NO.

IN THE

SUPREME COURT of the United States

Rhonda Nanette Polite (Petitioner)

v.

KILOLO KIJAZAZI, Acting Commissioner

Of Social Security

Respondent

"John"

Respondent

On Petition for Writ of Certiorari

To The UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Rhonda Polite
2281 West Williams Street
Long Beach, CA 90810
714-331-1735

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

LIST OF APPENDICES

Questions to be presented to the Supreme Court as to the COA

1. Should the Court of Appeals have affirmed the District Court's decision in its entirety?

2. Should my Opening Brief have been reviewed; for my appeal isn't frivolous?

3. Isn't the COA to review in favor of the Plaintiff?

Questions to the Supreme Court as to the District Court

1. Was it practical for the DC to dismiss my SAC in its entirety?

2. After reviewing my FAC, was it practical for the DC to order plaintiff to prove "employment relationship" between plaintiff and defendant?

3. Was the EEOC correct in its decision?

LIST OF PARTIES

(X) All parties appear in the caption of the case on the cover page.

TABLE OF AUTHORITIES

FEDERAL CASES

Federal Statutes

Federal Rules

OPINIONS BELOW

UNITED STATES COURT OF APPEALS — September 23, 2021
FOR THE 9TH CIRCUIT
NOT PUBLISHED

JUDGEMENT OF UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NOT PUBLISHED — May 22, 2020

UNITED STATES DISTRICT COURT — April 29, 2020
CENTRAL DISTRICT OF CALIFORNIA
NOT PUBLISHED

UNITED STATES DISTRICT COURT — February 3, 2020
CENTRAL DISTRICT OF CALIFORNIA
NOT PUBLISHED

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RHONDA NANETTE POLITE, Plaintiff-Appellant, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, Defendant-Appellee, and JOHN, Defendant.	No. 20-55621 D.C. No. 8:19-cv-01518-JLS-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted September 14, 2021**

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

Rhonda Nanette Polite appeals pro se from the district court's judgment

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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).

dismissing her action alleging a violation of Title VII and state law. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011). We may affirm on any basis supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004). We affirm.

Dismissal of Polite's Title VII claim was correct because Polite failed to allege facts sufficient to state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (a plaintiff fails to show she is entitled to relief if the complaint's factual allegations "do not permit the court to infer more than the mere possibility of misconduct"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (elements of a Title VII failure-to-hire employment discrimination claim).

The district court did not abuse its discretion by dismissing Polite's second amended complaint without leave to amend because amendment would have been futile. *See Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010) (setting forth standard of review and factors for determining whether to grant leave to amend); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008) ("[T]he 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 matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RHONDA POLITE,

Plaintiff,

v.

"JOHN;" NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY; OR ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY

Defendants.

No. SACV 19-01518 JLS(DFM)

JUDGMENT

Hon. Josephine L. Staton
United States District Judge

The Motion to Dismiss Plaintiff's Second Amended Complaint filed by Defendant Andrew Saul, Commissioner of Social Security, having come on for hearing, and the Court having considered the pleadings, evidence presented, and the Memorandum of Points and Authorities,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion be granted and judgment is hereby entered for Defendant.

Dated: May 22, 2020

HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: April 29, 2020
Title: Rhonda Polite v. John et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 45) AND (2) DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WITH PREJUDICE

Before the Court is a Motion to Dismiss Plaintiff Rhonda Polite's Second Amended Complaint ("SAC") filed by Defendant Andrew Saul, in his capacity as commissioner of the Social Security Administration. (Mot., Doc. 45.) Polite opposed and Defendant replied. (Opp., Doc. 49; Reply, Doc. 54.) The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing set for May 1, 2020, at 10:30 a.m., is VACATED. For the following reasons, the Court GRANTS Defendant's Motion to Dismiss.

The parties are familiar with the facts of this case and the Court recounted them, in detail, in its prior Order dismissing Polite's First Amended Complaint ("FAC") pursuant to Rules 8 and 12(b)(6). (Order Dismissing FAC, Doc. 37.) In brief, Polite asserts that she was discriminated against on the basis of race when she was denied a volunteer position with the Brea, California office of the Social Security Administration ("SSA"). (*Id.* at 2-4, 6.) Two principal reasons the Court dismissed Polite's FAC were that: (1) it sought redress under clams for negligence and intentional infliction of emotional distress ("IIED"), despite the fact that Title VII of the Civil Rights Act of 1964 provides "the exclusive judicial remedy for claims of discrimination in federal employment" (*id.* at 6

(quoting *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976)).), and (2) its allegations did not suggest that the volunteer position at issue in this dispute falls within in the ambit of Title VII (*id.* at 6-9). Despite the Court's clear directions in its prior Order explaining how Polite could remedy these deficiencies, her SAC fails to do so.[1] The Court addresses each in turn.

As the Court previously clarified, Supreme Court and Ninth Circuit precedent firmly establishes that "the *only* form that Polite's claims may take is for a violation of Title VII." (Order Dismissing FAC at 6, 10-11.) Accordingly, "to the extent [Polite's] common law claims are products of race, color, religion, sex, or national origin discrimination, they may not be brought separately under state tort …law." (*Id.* at 6 (quoting *Labtis v. Paulson*, No. C 07-3333 RS, 2008 WL 2705004, at *3 (N.D. Cal. July 9, 2008)).) For that reason, Polite's negligence and IIED claims were preempted and barred. (*Id.*) Polite has removed those claims from her SAC, and in their stead, brought claims for breach of contract and "illegal background check." (SAC at 12.) For the reasons the Court set forth in its prior Order, these non-Title VII claims too are barred.

Although the Court clearly stated that Polite must litigate her claim as one for racial discrimination under Title VII, she has removed all express mention of Title VII from the SAC. (*See generally* SAC.) Nevertheless, the Court construes her first claim, for "disparate treatment," as brought under Title VII. (*See id.* at 11-12.) The Court previously dismissed Polite's race discrimination claim in part because Polite failed to allege facts suggesting that the SSA volunteer position involved the sort of "employment relationship" sufficient to bring it within the scope of Title VII's protections. (Order Dismissing FAC at 6-9.) Most importantly, the FAC contained no allegations suggesting the existence, and incorporated documents specifically demonstrating the absence, of any

[1] In its February 3, 2020 Order, the Court also explained that the FAC was deficient because it failed to set forth a plausible theory of entitlement to relief for racial discrimination under Title VII. (Order Dismissing FAC at 9-10.) Because dismissal is warranted based on the Polite's failure to cure the two more fundamental inadequacies discussed herein, the Court does not reach this third issue.

compensation offered by the SSA in exchange for labor performed in the volunteer role. (*Id.* at 8-9.) The only revision evident in the SAC addressing this deficiency is Polite's allegation that she was led to believe that after completing a one-year volunteer term, "there was a possible chance that [she] could become a permanent employee." (*See* SAC ¶¶ 4-6.) Polite contends that this representation is clear from emails she exchanged with SSA staff (SAC Exs. 4, 6, Doc. 38 at 29-37, 42). (SAC ¶ 5, Opp. at 3.) Those emails categorically make no mention of a permanent position. (*See* SAC Exs. 4, 6.) And even if they did, the "possible chance" of a later permanent position has absolutely no bearing on whether *this* volunteer position involved an attendant "employment relationship," or "substantial benefits" offered as remuneration for labor, sufficient to bring the position within the umbrella of Title VII. *See Woodson v. State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 6568668, at *5 (E.D. Cal. Nov. 4, 2016); *Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 151-52 (9th Cir. 2010). For this reason, Polite again fails to allege a Title VII claim.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss in its entirety. The Court previously granted Polite leave to amend and notified her of the substantive problems with her claims. Nevertheless, she failed to remedy the primary deficiency identified by the Court, namely that the volunteer position does not come within the scope of an employment relationship governed by Title VII. Thus, the Court concludes that further amendment would be futile and DISMISSES WITH PREJUDICE Polite's action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261-63 (9th Cir. 1992), *as amended* (May 22, 1992) (explaining that dismissal of pro se litigant's complaint is proper after the district court "provide[s] the litigant with notice of the deficiencies in [her] complaint in order to ensure that the litigant uses the opportunity to amend effectively" and yet, the litigant fails to do so); *Bockari v. JPMorgan Chase & Co.*, 695 F. App'x 309, 310 (9th Cir. 2017). Defendant shall submit a proposed judgment **within fourteen (14) days of the date of this Order.**

Initials of Preparer: tg/mku

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: February 03, 2020
Title: Rhonda Polite v. John et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 16) AND (2) DENYING AS MOOT PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (Doc. 28)

Before the Court are two motions. First, Defendant Andrew Saul[1] filed a Motion to Dismiss the First Amended Complaint in this matter. (MTD, Doc. 16.) Plaintiff Rhonda Polite opposed and Saul replied. (Opp. Doc. 19; Reply, Doc. 27.) Without leave of Court, Polite filed a surreply to the Motion to Dismiss, to which Defendant filed an unauthorized response.[2] (Docs. 30, 32.)

Thereafter, Polite filed a Motion for Leave to File a Second Amended Complaint. (MLA, Doc. 28.) She attached thereto her proposed Second Amended Complaint.

Having taken the matter under submission and considered the parties' briefs and related papers on file in this case, the Court GRANTS Defendant's Motion to Dismiss and DENIES AS MOOT Plaintiff's Motion to File a Second Amended Complaint ("SAC").

[1] The Defendants named in the FAC are "John," and Nancy Berryhill, former Acting Commissioner of Social Security, or, Andrew Saul, current Commissioner of Social Security. (FAC, Doc. 6.) Andrew Saul was sworn in on June 17, 2019 and is the proper party in this action pursuant to Federal Rule of Civil Procedure 25(d). (MTD at 1 n.2.)

[2] The Court will consider neither the unauthorized surreply, nor the response thereto.

I. BACKGROUND[3]

The FAC filed in this action contains few factual allegations from which the Court can discern the full course of events giving rise to this dispute.

The Court is able to determine, from the FAC and its exhibits, that Polite was a participant in the Department of Veterans Affairs ("VA") Vocation Rehabilitation and Employment program. (*See* FAC Ex. 3, Doc. 6 at 40.) Through that program, the VA identified a volunteer position whereby Polite would work, for a period of one year, at the Social Security Administration ("SSA") facility located at 3230 East Imperial Highway, Suite 150, Brea, California 92821. (Veterans Volunteer Services Agreement at 1-2, Doc. 6 at 34-37.) The Veterans Volunteer Services Agreement connected with that position indicates that it was for "no remuneration (pay and/or benefits) from SSA," the "volunteer [would] be subject to [a] background investigation" prior to their start date, and "the volunteer shall not be considered an SSA or VA employee for any purpose or entitlement." (*Id.* at 2, 4.) It also notes that the "VA may provide a subsistence allowance to the volunteer if eligible in accordance with VA regulations."[4] (*Id.* at 2.) As part of the application process, Polite filled out paperwork including a "Declaration for Federal Employment."[5] (FAC ¶ 7; Declaration, FAC Ex. 2, Doc. 6 at 16-17.) On that Declaration, Polite indicated that she had not been convicted, imprisoned, on probation, or on parole in the preceding seven years. (Declaration at 2.)

On approximately February 10, 2018, Polite received a phone call from an

[3] The Court deems the well-pleaded factual allegations of the FAC true for the purposes of the Defendant's Motion to Dismiss.

[4] Polite was eligible to receive a subsistence benefit of $617.40 per month while she participated in the VA Vocation Rehabilitation and Employment program. (FAC Ex. 3.)

[5] The Declaration for Federal Employment is dated February 2, 2019, but in her FAC, Polite states that she mis-dated it, and it was actually completed on December 22, 2018. (FAC ¶ 7; FAC Ex. 2 at 2.)

individual who identified himself as "John."[6] (FAC ¶ 7.) He stated he was calling from the Richmond, California SSA office and was following up on the background check that was to be conducted before Polite began volunteering in the Brea office. (*Id.*) John asked Polite if she was "ever arrested." (*Id.*) Polite alleges that while "the declaration reads 7 years 'John' chose to go back 2 decades versus 7 years," and "his practices and acts led plaintiff to not being hired." (*Id.*) Further, she avers that John was aware of Polite's "race, gender, etc. before calling [her]" and his "blatant acts of racial discrimination caused Plaintiff many sleepless nights." (*Id.*)

On or about February 27, 2018, Polite was notified that she would not be offered the volunteer position. (EEOC Appeal at 1, FAC Ex. 4, Doc. 6 at 21.) On May 9, 2018, she filed a formal complaint with the SSA alleging that her non-selection for the position was the result of "discrimination on the basis of race (African-American)." (*Id.* at 1.) After the SSA dismissed the complaint, Polite appealed the decision to the Equal Employment Opportunity Commission ("EEOC").[7] (FAC ¶ ; EEOC Appeal.) The EEOC concurred with the reasoning of the SSA and affirmed the SSA's dismissal of Polite's complaint. (EEOC Appeal at 2.) The reasoning for that decision was as follows:

> Only in a narrow set of circumstances, usually where the volunteer is performing services for the agency as part of an education program and receives remuneration or where the volunteer service often leads to regular employment, has the Commission held that a volunteer is protected by Title VII. See Phillips v. Department of Veterans Affairs, EEOC Appeal No. 01893011 (Sept. 13, 1989) (citing Pollack v. Rice University, 28 FEP Cases 1273 (S.D. Texas 1982) (court found that because service for remuneration as incidental to scholastic program, plaintiff was a student and not an employee). In the instant case, because there was

[6] Polite only refers to "John" by his first name in the FAC. However, in a March 23, 2018 letter to the SSA, she refers to him as "John Joya" and "John Goya." (FAC Ex. 7, Doc. 6 at 46-49.)
[7] Polite states in the FAC that she submitted her appeal on May 15, 2018. (FAC ¶ 8.) However, the document is dated July 15, 2018. (Appeal Form, Doc. FAC Ex. 3, Doc. 6 at 19.)

> no remuneration for the volunteer position in question, and it was not tied to an educational program or might lead [sic] to employment with the Agency, we find that Complainant's claim is not within the scope of our regulations. See 29 C.F.R. § 1614.103(c)(1).

(*Id.* at 2.) Polite subsequently filed a request for reconsideration of that November 23, 2018 appellate decision, which the EEOC denied on May 17, 2019. (Reconsideration Request, FAC Ex. 5, Doc. 6 at 26-28; Reconsideration Denial, Fac. Ex. 6, Doc. 6 at 42-43.) Included in that denial was notice of Polite's right to file a civil action. (Reconsideration Denial at 2.)

Polite filed the instant lawsuit on August 6, 2019. (Compl., Doc. 1.) In the FAC, Polite asserts "John's" conduct and SSA's hiring practices were violative of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C § 2000e *et. seq.* (FAC at 1.) She brings claims for (1) negligence and (2) intentional infliction of emotional distress ("IIED"). (*Id.* ¶¶ 11-12.)

II. LEGAL STANDARD

"Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for 'failure to state a claim upon which relief can be granted.' Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174, 1180 (C.D. Cal. 2019) (citation omitted) (quoting Fed R. Civ. P. 12(b)(6)). In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts must also draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual

allegation.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A plaintiff must not merely allege conduct that is conceivable. When "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 (internal quotation marks omitted).

Finally, the Court may not dismiss a complaint without leave to amend unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (internal quotation marks and citations omitted); *see also Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (district court should grant leave to amend "unless it determines that the pleading could not possibly be cured by the allegation of other facts") (internal quotation marks and citations omitted).

III. DISCUSSION

As explained below, Polite's FAC is defective for three principal reasons: (1) Polite's claims are preempted by Title VII; (2) the volunteer position at issue does not fall within the ambit of Title VII; and (3) a failure to comply with pleading standards. The Court addresses each of those issues in turn before a brief discussion of Polite's proposed SAC, which fails to remedy the FAC's deficiencies.

A. Title VII Preemption

The cognizable theory of Polite's FAC is that, in denying her the volunteer position, Defendant discriminated against Polite based on her race in violation of Title VII. (*See generally* FAC; FAC Exs.) She claims that these same facts give rise to claims for negligence and IIED.

In *Brown v. General Services Administration*, the Supreme Court conducted a detailed analysis of the Title VII framework, and the congressional intent behind it, ultimately and decisively concluding that Title VII "as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. 820, 835 (1976). The Supreme Court's analysis in *Brown* focused on the import of Title VII's "precisely drawn, detailed statut[ory]" scheme and the fact that it's efficacy would be undermined if recovery were permitted under more "general" and "facially applicable" statutory and tort causes of action. *Id.* at 834; *see Holly v. Jewell*, 196 F. Supp. 3d 1079, 1083-85 (N.D. Cal. 2016). In *White v. General Services Administration*, the Ninth Circuit interpreted *Brown*, reiterating that Title VII precludes all other remedies for unconstitutional "discrimination based on race, sex, religion or national origin" and noting that *Brown* drew no distinctions between "a suit against the government or its individual employees." 652 F.2d 913, 916-17 (9th Cir. 1981). Thus, an application of *Brown* and *White* requires the conclusion that "to the extent [Polite's] common law claims are products of race, color, religion, sex, or national origin discrimination, they may not be brought separately under state tort … law." *Labtis v. Paulson*, No. C 07-3333 RS, 2008 WL 2705004, at *3 (N.D. Cal. July 9, 2008); *Holly*, 196 F. Supp. 3d at 1083-85 (reaching the same conclusion and dismissing plaintiff's claim with prejudice "to the extent that it challenge[d] conduct [covered] by Title VII").

Accordingly, the Court concludes that Polite's claims for negligence and intentional infliction of emotional distress are barred.

B. Applicability of Title VII to Volunteer Position

Title VII provides, in part, that "[i]t shall be an unlawful employment practice for

an employer--"

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). However, Title VII's protections do not attach absent "some connection with an employment relationship." *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). To determine whether the requisite connection is present, the Court must engage in a "fact-specific inquiry which 'depends on the economic realities of the situation.'" *Id.* In analyzing whether individuals qualify as employees under federal statutory frameworks, the Ninth Circuit has considered the nature of the job, manner of supervision, and various other "incidents of the [work] relationship." *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008). However, the Ninth Circuit's analysis of employment relationships under Title VII suggests the significance of compensation provided in consideration for labor. *See Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 152 (9th Cir. 2010). While "the fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an 'employee' for purposes of federal statutes," the presence of "substantial benefits not merely incidental to the activity performed" is important. *Id.* (collecting circuit cases where the applicability of Title VII to volunteer workers depended on the receipt of benefits including retirement pensions, life insurance, death benefits, disability insurance, limited medical benefits, scholarships for dependents upon death in the line of duty, tax exemptions, and the accrual of annual or sick leave).

Here, the Veterans Volunteer Services Agreement includes three critical statements under the heading "TERMS AND CONDITIONS." They are:

(1) The Volunteer shall receive no remuneration (pay and/or benefits) from SSA for services rendered under this Agreement;
(2) The volunteer shall not be considered an SSA or VA employee for any purpose or entitlement, except in some limited circumstances the volunteer may be eligible for certain compensation for injuries according to 5 U.S.C. § 8101 *et seq.*; and
(3) VA may provide a subsistence allowance to the volunteer if eligible in accordance with VA regulations.

(Veterans Volunteer Services Agreement at 2.) The only compensation referenced by Polite in connection with her desired volunteer position is the subsistence allowance benefit of $617.40, for which she qualified as a participant in the VA Rehabilitation & Employment Program. (FAC ¶ 13; FAC Ex. 3, Doc. 6 at 39.) However, as is clear from the above-quoted language, the volunteer position involved "no remuneration (pay and/or benefits)" and Polite was explicitly placed on notice that she would "not be considered an SSA or VA employee for any purpose or entitlement." Her VA subsistence allowance benefit is contemplated by the Agreement, which demonstrates that the benefit's payment is permitted but does not constitute compensation provided by SSA in exchange for Polite's volunteer labor. The letter provided by Polite to substantiate the existence of the subsistence benefit further demonstrates the lack of connection between the benefit and the SSA position. That letter, from Rehabilitation Counselor Gary Rusth, makes clear that the subsistence allowance benefit is provided in connection with the VA Rehabilitation & Employment Program generally and would be also paid while Polite attended school. (*See* FAC Ex. 3, Doc. 6 at 39.) It includes no indication that the benefit payment is specifically tied to, or serves as remuneration for, labor. (*See id.*) In any case, in the absence of some more "substantial benefit," even this stipend falls short of

the type of remuneration previously held sufficient to convert a volunteer into an employee for the purposes of Title VII. *Cf. Woodson v. State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 6568668, at *4-*5 (E.D. Cal. Nov. 4, 2016) (dismissing with prejudice plaintiffs' claim under Title VII where they participated in a program with regulations specifically declaring them to be a volunteer and where compensation thereunder was limited to a stipend and other limited, incidental benefits "expressly contemplate[d]" by "the statutory framework upon which the Program [was] based").

Based on the factual allegations of the FAC, including the incorporated exhibits, the Court concludes that the protections of Title VII do not extend to applicants for the SSA volunteer position at issue.

C. Failure to State a Claim or Comply with Pleading Standards

"The complainant in a Title VII case must ... [establish] a prima facie case of racial discrimination ... by showing (i) that [she] belongs to a racial minority; (ii) that [she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek [applications] from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The sole element of the prima facie case that Polite has affirmatively pleaded is her status as a member of a racial minority. (FAC ¶ 5.) The FAC is devoid of any allegation that she (1) applied to and was qualified for the volunteer position at issue, (2) was rejected despite her adequate qualifications for the position, and (3) that SSA continued to seek applications from person's with equivalent qualifications following her rejection. (*See generally* FAC.) Accordingly, the FAC, as presently alleged, does not set forth a claim for racial discrimination under Title VII.

Finally, under Federal Rule of Civil Procedure 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief," and

"[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). "[T]he 'short and plain statement' must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005). Violation of Rule 8 is a "basis for dismissal independent of Rule 12(b)(6)." *McHenry*, 84 F.3d at 1179. "Prolix, confusing complaints . . . impose unfair burdens on litigants and judges." *Id.*

Taken together, Rules 8 and 12(b)(6) require that in a pleading, a Plaintiff employ concise allegations to set forth "a claim that is plausible on its face," and not merely conduct "consistent with a defendant's liability." First, the theory of the FAC is muddled and includes irrelevant information about Polite's upbringing and work history. (*See* FAC ¶¶ 5-6.) Moreover, the FAC does not explain how any of the conduct alleged amounted to racial discrimination. It simply states that an individual named "John" asked a question on criminal history, which Polite asserts was overly broad and resulted in her non-selection for the volunteer opportunity. (FAC ¶¶ 7-12.) The only allegation suggesting a nexus between Polite's interaction with "John" and her race is the conclusory assertion that "Defendant John knew of my race, gender, etc. before calling me." (*Id.* ¶ 7.) Such barebones allegations fall on the wrong side of the line demarcating "possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678.

D. Polite's Proposed Second Amended Complaint

On January 28, Polite filed her Motion for Leave to File Second Amended Complaint and provided alongside it, her proposed SAC. (MLA, Doc. 28.) While the SAC removes many of the irrelevant allegations contained in the FAC, it fails to remedy any of the other deficiencies identified herein. (*See* SAC, Doc. 31 at 21-30.) The most notable change between the FAC and the SAC is Polite's assertion that while the Court has subject-matter jurisdiction over this matter under Title VII, she now purports to bring her claims under 42 U.S.C. 1983 for civil rights violations. (SAC at 1, 8.) As explained

above, the *only* form that Polite's claims may take is for a violation of Title VII. *See Santos v. Potter*, No. C06-2948 VRW, 2007 WL 926493, at *2 (N.D. Cal. Mar. 26, 2007) ("Moreover, in view of the comprehensive remedial scheme for employment discrimination provided by Title VII and the ADEA, the court doubts whether separate remedies are even available under Bivens[.]") (noting that in *Bush v. Lucas*, 462 U.S. 367, 390, (1983), the Supreme Court held "*Bivens* remedies unavailable where Congress has established a comprehensive remedial scheme"). Additionally, the SAC still fails to demonstrate that the SSA volunteer position falls within the ambit of Title VII or allege each element of a prima facie Title VII claim for racial discrimination. (*See generally* SAC.)

Therefore, the SAC largely fails to resolve the inadequacies present in the FAC.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is GRANTED. Plaintiff's Motion for Leave to File Second Amended Complaint is DENIED AS MOOT. While amendment may be futile, Plaintiff is nonetheless granted leave to file a Second Amended Complaint no later than **twenty-one (21) days** after the date of this Order. Failure to timely file a Second Amended Complaint in full conformity with this Order[8] may result in the dismissal of this action without leave to amend. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642–43 (9th Cir. 2002), *cert. denied*, 538 U.S. 909 (2003) (court may dismiss action for failure to follow court order).

[8] To summarize, in her SAC, Polite should attempt to (1) set forth her claim as a violation of Title VII, (2) explain why the work conditions and compensation associated with the SSA position place it under the coverage of Title VII, and (3) allege every element of a prima facie claim for racial disclination under Title VII, supported by a plausible theory of discriminatory conduct.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: February 03, 2020
Title: Rhonda Polite v. John et al.

Plaintiff is advised that she may wish to contact the Federal *Pro Se* Clinic, which provides free legal assistance to *pro se* litigants. The clinic is located in the Ronald Reagan Federal Building and United States Courthouse and can be reached at (714) 541-1010 (x222).

Initials of Preparer: tg

JURISDICTION

This Honorable Court has jurisdiction of this case based on 28 USC 1251 (b) (2) The United States Supreme Court shall have original but not exclusive jurisdiction of all controversies between the United States and a State. The Ninth Circuit COA entered its opinion on September 23, 2021. Plaintiff timely filed her writ on December 13, 2021; however, it was returned due to discrepancies, and received by Plaintiff on December 16, 2021. Court Clerk of the Supreme Court granted Plaintiff (within) 60 days to make corrections to her writ of certiorari.

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution protects the right to freedom of religion and freedom of expression from government interference. It prohibits any laws that establish a national religion, impede the free exercise of religion, abridge the freedom of speech, infringe upon the freedom of the press, interfere with the right to peaceably assemble, or prohibit citizens from petitioning for a governmental redress of grievances. It was adopted into the Bill of Rights in 1791. The Supreme Court interprets the extent of the protection afforded to these rights. The First Amendment has been interpreted by the Court as applying to the entire federal government even though it is only expressly applicable to Congress. Furthermore, the Court has interpreted the Due Process Clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments.

My first amendment rights were violated by "John" for he didn't allow me to speak from time to time throughout the 1.5-hour conversation.

STATEMENT OF THE CASE

This case involves the discriminatory acts of "John" toward Plaintiff Rhonda N. Polite. "John" works as a Human Resources agent for the Social Security Administration, located in the city of Richmond, California. Rhonda Polite is a disabled veteran seeking for work. It is clear in my meritorious Second Amended Complaint (Appendix D) that defendants were properly put on notice as to who, what, where and why Plaintiff suffered. The Court of Appeals for the Ninth Circuit, San Francisco, California issued an opinion affirming the District Court's order granting Defendant's Motion To Dismiss Plaintiff's Second Amended Complaint with Prejudice (Appendix A).

THE NINTH CIRCUIT COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S ORDER; GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING BPLAINTIFF'S SECOND AMENDED COMPLAINT WITH PREJUDICE.

Plaintiff filed her first amended complaint on August 18, 2019. The District Court issued an order giving plaintiff instructions how to amend her complaint. Plaintiff followed the Court's instructions to the best of her ability (Appendix D). Plaintiff filed her Second

Amended Complaint on February 24, 2020 (Appendix E). Plaintiff filed for an appeal on June 15, 2020, and on September 23, 2021 the Court of Appeals issued its order; affirming Motion for Summary Affirmance. (Appendix A)

Court of Appeals abused its discretion in that it overlooked the fact that Plaintiff presented evidence to support her claim. In doing so, moreover the McDonnell Douglas framework does not apply where for example; a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines Inc., v.Thurston 469 U.S. 110, 121.* Plaintiff feels that giving her a "second bite of the apple" is proper at this early stage of the case. See *Najera v. Green. A* case in which Plaintiff was granted leave to amend his Third Amended Complaint. "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'…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." Second, determining whether a complaint states a plausible claim is context-specific, requiring the

reviewing court to draw on its experience and common sense. *Id.*, at 556. See *Ashcroft v. Iqbal 556 U.S. 662 (2009)*

I. PLAINTIFF FEELS THE COURT OF APPEALS SHOULD HAVE REVIEWED HER OPENING BRIEF

The COA mentions a case that's not relevant and is incongruous with plaintiff's Opening Brief See *Padgett v Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009)*. Summarily speaking, it's a case in which the jury had already made its decision before the plaintiff submitted his appeal; as a result, the appeal was frivolous. Plaintiff Polite's appeal is not frivolous. Had the COA read through my Opening Brief, I don't feel the COA would have ruled in favor of Defendants.

II. SHOULD THE COA HAVE AFFIRMED THE DISTRICT COURT'S DECISION IN ITS ENTIRETY?

To begin, I don't feel I should have to amend my complaint for it is in strict compliance to Federal Rule 8 which states:

A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. See *Conley v. Gibson, 355 U.S. 41 (1957).*

III. ISN'T THE COA TO REVIEW IN FAVOR OF THE PLAINTIFF?

Not sure what the COA was looking for circumstantial evidence or direct evidence. Nevertheless, Plaintiff presented a burden of circumstantial proof within her SAC; that she not only was discriminated against based on her race, but that there was an implied contract. That is, Plaintiff would obtain a permanent position after a year of volunteering; which coincides with the EEO Commission's statement. Plaintiff made out her prima facie case with a burden of circumstantial proof attached to her SAC. See *Gross v. FBL Financial Service Inc.* In Gross, the petitioner argued that interpreting the ADEA to require direct evidence of

discrimination is contrary to conventional rules of civil litigation which do not impose elevated evidentiary standards without statutory instruction.

I. AFTER REVIEWING MY FAC, WAS IT PRACTICAL FOR THE DC TO ORDER PLAINTIFF TO PROVE "EMPLOYMENT RELATIONSHIP" BETWEEN PLAINTIFF AND DEFENDANT?

As spoken earlier, Plaintiff followed the DC's orders to the best of her ability; however, the DC included in its instructions-Plaintiff needed to show an "employment relationship" between plaintiff and defendant. I contend in that I was an applicant/volunteer. See *936 F.2d 870-Christopher v Stouder Memorial Hospital.*

Further, we have repeatedly said that "Title VII of the Civil Rights Act should not be construed narrowly." Tipler v. E.I. du Pont de Nemours and Co., 443 F.2d 125, 131 (6th Cir.1971). In this spirit, several courts have held that Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." *Doe v. St. Joseph's Hosp., 788 F.2d 411, 422-25 (7th Cir.1986)*

II. WAS IT PRACTICAL FOR THE DC TO DISMISS MY SAC IN ITS ENTIRETY?

DC abused its discretion in that my entire SAC was dismissed with prejudice without leave to amend. DC says that Breach of contract and illegal background check are barred. However, 28 USC 1491 (b) states:

(1)

Both the Unites [2] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

Plaintiff and interviewers entered into an implied contract, based on our actions. As proven in my SAC-emails- and such are proof within themselves that an implied contract existed.

As for illegal background check, I did the research and found a case that refers to FRCA and background checks. *See Walker v. Fred Meyer, Inc. 18-35592 (9th Cir. 2020)* Defendant "John" failed to provide plaintiff any pre-adverse action notice, that the FCRA requires an employer to provide a pre-adverse action notice far enough in advance before taking adverse action to give the applicant a "real" opportunity to

respond and "meaningfully contest or explain the contents of the report" so that the applicant may attempt to "change the employer's mind"); *U.S. Fed. Trade Comm'n Advisory Opinion to Lewis, 1998 WL 34323760 at *1 (June 11, 1998).*

Plaintiff Polite was never given the report by prospective employer "John". Instead he called me and harassed me about a recalled bench warrant and much more. "But for" the fact I am African-American he discriminated against me. He knew what color I was before the initial call. See *McDonnell Douglas v. Green 411 U.S. 792.* The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

As mentioned in my Opening Brief an affidavit doesn't suffice.

In its Motion to Dismiss, defendants mention "immunity". I contend in that neither defendant is immune. See Harlowe v Fitzgerald pp.457 U.S. 815-819, the court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pp. 457 U.S. 815-819. See also *Monell vs. Soc Srvcs 436 U.S. 658 (1978)* Defendants were in violation of my First Amendment rights; in that "John" didn't allow me to speak/interrupted my speech throughout the 1.5-hour conversation.

The DC noted in her order with instructions, that Plaintiff would receive a monthly stipend of about $617.40. DC disagreed with that, too. However, in *Brown v. City of North Chicago, 2006* Michael's earnings were of not less than minimum wage. For he was on the Earnfare Program and was only earning food stamp benefits.

III. WAS THE EEOC CORRECT IN ITS DECISION, AND IF SO, PLAINTIFF FEELS SHE MET THE CRITERIA

> "Only in a narrow set of circumstances, usually where the volunteer is performing services for the agency as part of an education program and receives remuneration or where the volunteer service often leads to regular employment, has the Commission held that a volunteer is protected by Title VII."....

Plaintiff mentions in her SAC, that the volunteer position would have led to permanent employment with benefits.

Title VII of the Civil Rights Act of 1964 is a **federal law that protects employees against discrimination based on certain specified characteristics: race, color, national origin, sex, and religion**. Under Title VII, an employer may not discriminate with regard to any term, condition, or privilege of employment. See Carnella Times 1:18-cv-02993. Case in which African Americans and Latinos were weeded out from employment based on their race.

REASONS FOR GRANTING THE PETITION

1. This Honorable Court should grant Plaintiff's writ in doing so, it would prevent other pro se litigants in the State of California from dealing with employers that do unauthorized background checks on applicants/employees. It would inform employers in the State of California to abide by the Fair Credit Reporting Agency guidelines:

In Walker v Fred Meyer Inc. 18-35592 9th Circuit 2020

The 9th Circuit panel affirmed in part and reversed in part the district court's dismissal of an action under the Fair Credit Reporting Act, which requires employers who obtain a consumer report on a job applicant to first provide the applicant with a "clear and conspicuous disclosure" that the employer may obtain such a report, and to provide this disclosure "in a document that consists solely of the disclosure."

In Doe v. St. Joseph's Hosp, 788 F2d 411 , 422-25. The 7th District Court of the State of Indiana stated: We must take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiffs. Ellsworth v. City of Racine, (7th Cir.1985); Powe v. City of Chicago, 664 F.2d 639, 642
(7th Cir. 1981). A complaint should be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff is unable to prove any set of facts that would entitle the plaintiff to relief. Ellsworth, 774 F.2d at 184; Benson v. Cady, 761

F.2d 335, 338 (7th Cir. 1985). A plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. Ellsworth, 774 F.2d at 184; Benson, 761 F.2d at 338.

2. This Honorable Court should grant certiorari in that the 7th Circuit Court Appeals of Indiana states it is to rule in favor of the plaintiffs. 9th Circuit Court of Appeals is erroneous and not coinciding with 7th Circuit COA Indiana. Plaintiff has reason to believe the 9th Circuit COA California didn't review my pleadings; not to mention my second amended complaint.

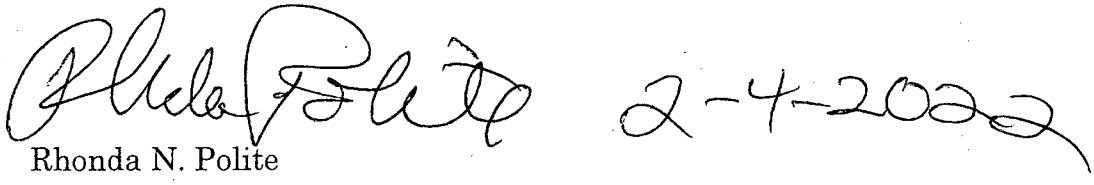
3.

4. Lastly, The United States Supreme Court has recognized in McDonnell Douglas v. Green 411 U.S.792 (1973) that racial discrimination did exist Afterall there were whites that were participants in illegal activities; however, the "whites" were either retained their employment or there were new "white" hires.

CONCLUSION

The bottom line is that Plaintiff submitted her prima facie case and it was ignored not only by the COA but the District Court also.

Respectfully Submitted,



Rhonda N. Polite

LIST OF APPENDICES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RHONDA NANETTE POLITE, Plaintiff-Appellant, v. KILOLO KIJAKAZI, Acting Commissioner of Social Security, Defendant-Appellee, and JOHN, Defendant.	No. 20-55621 D.C. No. 8:19-cv-01518-JLS-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted September 14, 2021**

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

Rhonda Nanette Polite appeals pro se from the district court's judgment

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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).

Appendix A

dismissing her action alleging a violation of Title VII and state law. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011). We may affirm on any basis supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9th Cir. 2004). We affirm.

Dismissal of Polite's Title VII claim was correct because Polite failed to allege facts sufficient to state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (a plaintiff fails to show she is entitled to relief if the complaint's factual allegations "do not permit the court to infer more than the mere possibility of misconduct"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (elements of a Title VII failure-to-hire employment discrimination claim).

The district court did not abuse its discretion by dismissing Polite's second amended complaint without leave to amend because amendment would have been futile. *See Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010) (setting forth standard of review and factors for determining whether to grant leave to amend); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008) ("[T]he 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 matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RHONDA POLITE,

Plaintiff,

v.

"JOHN;" NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY; OR ANDREW SAUL, COMMISSIONER OF SOCIAL SECURITY

Defendants.

No. SACV 19-01518 JLS(DFM)

JUDGMENT

Hon. Josephine L. Staton
United States District Judge

Appendix B

The Motion to Dismiss Plaintiff's Second Amended Complaint filed by Defendant Andrew Saul, Commissioner of Social Security, having come on for hearing, and the Court having considered the pleadings, evidence presented, and the Memorandum of Points and Authorities,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion be granted and judgment is hereby entered for Defendant.

Dated: May 22, 2020

HONORABLE JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: April 29, 2020
Title: Rhonda Polite v. John et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 45) AND (2) DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WITH PREJUDICE

Before the Court is a Motion to Dismiss Plaintiff Rhonda Polite's Second Amended Complaint ("SAC") filed by Defendant Andrew Saul, in his capacity as commissioner of the Social Security Administration. (Mot., Doc. 45.) Polite opposed and Defendant replied. (Opp., Doc. 49; Reply, Doc. 54.) The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing set for May 1, 2020, at 10:30 a.m., is VACATED. For the following reasons, the Court GRANTS Defendant's Motion to Dismiss.

The parties are familiar with the facts of this case and the Court recounted them, in detail, in its prior Order dismissing Polite's First Amended Complaint ("FAC") pursuant to Rules 8 and 12(b)(6). (Order Dismissing FAC, Doc. 37.) In brief, Polite asserts that she was discriminated against on the basis of race when she was denied a volunteer position with the Brea, California office of the Social Security Administration ("SSA"). (*Id.* at 2-4, 6.) Two principal reasons the Court dismissed Polite's FAC were that: (1) it sought redress under clams for negligence and intentional infliction of emotional distress ("IIED"), despite the fact that Title VII of the Civil Rights Act of 1964 provides "the exclusive judicial remedy for claims of discrimination in federal employment" (*id.* at 6

Appendix C

(quoting *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976)).), and (2) its allegations did not suggest that the volunteer position at issue in this dispute falls within in the ambit of Title VII (*id.* at 6-9). Despite the Court's clear directions in its prior Order explaining how Polite could remedy these deficiencies, her SAC fails to do so.[1] The Court addresses each in turn.

As the Court previously clarified, Supreme Court and Ninth Circuit precedent firmly establishes that "the *only* form that Polite's claims may take is for a violation of Title VII." (Order Dismissing FAC at 6, 10-11.) Accordingly, "to the extent [Polite's] common law claims are products of race, color, religion, sex, or national origin discrimination, they may not be brought separately under state tort ...law." (*Id.* at 6 (quoting *Labtis v. Paulson*, No. C 07-3333 RS, 2008 WL 2705004, at *3 (N.D. Cal. July 9, 2008)).) For that reason, Polite's negligence and IIED claims were preempted and barred. (*Id.*) Polite has removed those claims from her SAC, and in their stead, brought claims for breach of contract and "illegal background check." (SAC at 12.) For the reasons the Court set forth in its prior Order, these non-Title VII claims too are barred.

Although the Court clearly stated that Polite must litigate her claim as one for racial discrimination under Title VII, she has removed all express mention of Title VII from the SAC. (*See generally* SAC.) Nevertheless, the Court construes her first claim, for "disparate treatment," as brought under Title VII. (*See id.* at 11-12.) The Court previously dismissed Polite's race discrimination claim in part because Polite failed to allege facts suggesting that the SSA volunteer position involved the sort of "employment relationship" sufficient to bring it within the scope of Title VII's protections. (Order Dismissing FAC at 6-9.) Most importantly, the FAC contained no allegations suggesting the existence, and incorporated documents specifically demonstrating the absence, of any

[1] In its February 3, 2020 Order, the Court also explained that the FAC was deficient because it failed to set forth a plausible theory of entitlement to relief for racial discrimination under Title VII. (Order Dismissing FAC at 9-10.) Because dismissal is warranted based on the Polite's failure to cure the two more fundamental inadequacies discussed herein, the Court does not reach this third issue.

compensation offered by the SSA in exchange for labor performed in the volunteer role. (*Id.* at 8-9.) The only revision evident in the SAC addressing this deficiency is Polite's allegation that she was led to believe that after completing a one-year volunteer term, "there was a possible chance that [she] could become a permanent employee." (*See* SAC ¶¶ 4-6.) Polite contends that this representation is clear from emails she exchanged with SSA staff (SAC Exs. 4, 6, Doc. 38 at 29-37, 42). (SAC ¶ 5, Opp. at 3.) Those emails categorically make no mention of a permanent position. (*See* SAC Exs. 4, 6.) And even if they did, the "possible chance" of a later permanent position has absolutely no bearing on whether *this* volunteer position involved an attendant "employment relationship," or "substantial benefits" offered as remuneration for labor, sufficient to bring the position within the umbrella of Title VII. *See Woodson v. State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 6568668, at *5 (E.D. Cal. Nov. 4, 2016); *Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 151-52 (9th Cir. 2010). For this reason, Polite again fails to allege a Title VII claim.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss in its entirety. The Court previously granted Polite leave to amend and notified her of the substantive problems with her claims. Nevertheless, she failed to remedy the primary deficiency identified by the Court, namely that the volunteer position does not come within the scope of an employment relationship governed by Title VII. Thus, the Court concludes that further amendment would be futile and DISMISSES WITH PREJUDICE Polite's action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261-63 (9th Cir. 1992), *as amended* (May 22, 1992) (explaining that dismissal of pro se litigant's complaint is proper after the district court "provide[s] the litigant with notice of the deficiencies in [her] complaint in order to ensure that the litigant uses the opportunity to amend effectively" and yet, the litigant fails to do so); *Bockari v. JPMorgan Chase & Co.*, 695 F. App'x 309, 310 (9th Cir. 2017). Defendant shall submit a proposed judgment **within fourteen (14) days of the date of this Order.**

Initials of Preparer: tg/mku

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: February 03, 2020
Title: Rhonda Polite v. John et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING DEFENDANT'S MOTION TO DISMISS (Doc. 16) AND (2) DENYING AS MOOT PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (Doc. 28)

Before the Court are two motions. First, Defendant Andrew Saul[1] filed a Motion to Dismiss the First Amended Complaint in this matter. (MTD, Doc. 16.) Plaintiff Rhonda Polite opposed and Saul replied. (Opp. Doc. 19; Reply, Doc. 27.) Without leave of Court, Polite filed a surreply to the Motion to Dismiss, to which Defendant filed an unauthorized response.[2] (Docs. 30, 32.)

Thereafter, Polite filed a Motion for Leave to File a Second Amended Complaint. (MLA, Doc. 28.) She attached thereto her proposed Second Amended Complaint.

Having taken the matter under submission and considered the parties' briefs and related papers on file in this case, the Court GRANTS Defendant's Motion to Dismiss and DENIES AS MOOT Plaintiff's Motion to File a Second Amended Complaint ("SAC").

[1] The Defendants named in the FAC are "John," and Nancy Berryhill, former Acting Commissioner of Social Security, or, Andrew Saul, current Commissioner of Social Security. (FAC, Doc. 6.) Andrew Saul was sworn in on June 17, 2019 and is the proper party in this action pursuant to Federal Rule of Civil Procedure 25(d). (MTD at 1 n.2.)

[2] The Court will consider neither the unauthorized surreply, nor the response thereto.

Appendix D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: February 03, 2020
Title: Rhonda Polite v. John et al.

I. BACKGROUND[3]

The FAC filed in this action contains few factual allegations from which the Court can discern the full course of events giving rise to this dispute.

The Court is able to determine, from the FAC and its exhibits, that Polite was a participant in the Department of Veterans Affairs ("VA") Vocation Rehabilitation and Employment program. (*See* FAC Ex. 3, Doc. 6 at 40.) Through that program, the VA identified a volunteer position whereby Polite would work, for a period of one year, at the Social Security Administration ("SSA") facility located at 3230 East Imperial Highway, Suite 150, Brea, California 92821. (Veterans Volunteer Services Agreement at 1-2, Doc. 6 at 34-37.) The Veterans Volunteer Services Agreement connected with that position indicates that it was for "no remuneration (pay and/or benefits) from SSA," the "volunteer [would] be subject to [a] background investigation" prior to their start date, and "the volunteer shall not be considered an SSA or VA employee for any purpose or entitlement." (*Id.* at 2, 4.) It also notes that the "VA may provide a subsistence allowance to the volunteer if eligible in accordance with VA regulations."[4] (*Id.* at 2.) As part of the application process, Polite filled out paperwork including a "Declaration for Federal Employment."[5] (FAC ¶ 7; Declaration, FAC Ex. 2, Doc. 6 at 16-17.) On that Declaration, Polite indicated that she had not been convicted, imprisoned, on probation, or on parole in the preceding seven years. (Declaration at 2.)

On approximately February 10, 2018, Polite received a phone call from an

[3] The Court deems the well-pleaded factual allegations of the FAC true for the purposes of the Defendant's Motion to Dismiss.

[4] Polite was eligible to receive a subsistence benefit of $617.40 per month while she participated in the VA Vocation Rehabilitation and Employment program. (FAC Ex. 3.)

[5] The Declaration for Federal Employment is dated February 2, 2019, but in her FAC, Polite states that she mis-dated it, and it was actually completed on December 22, 2018. (FAC ¶ 7; FAC Ex. 2 at 2.)

individual who identified himself as "John."[6] (FAC ¶ 7.) He stated he was calling from the Richmond, California SSA office and was following up on the background check that was to be conducted before Polite began volunteering in the Brea office. (*Id.*) John asked Polite if she was "ever arrested." (*Id.*) Polite alleges that while "the declaration reads 7 years 'John' chose to go back 2 decades versus 7 years," and "his practices and acts led plaintiff to not being hired." (*Id.*) Further, she avers that John was aware of Polite's "race, gender, etc. before calling [her]" and his "blatant acts of racial discrimination caused Plaintiff many sleepless nights." (*Id.*)

On or about February 27, 2018, Polite was notified that she would not be offered the volunteer position. (EEOC Appeal at 1, FAC Ex. 4, Doc. 6 at 21.) On May 9, 2018, she filed a formal complaint with the SSA alleging that her non-selection for the position was the result of "discrimination on the basis of race (African-American)." (*Id.* at 1.) After the SSA dismissed the complaint, Polite appealed the decision to the Equal Employment Opportunity Commission ("EEOC").[7] (FAC ¶ ; EEOC Appeal.) The EEOC concurred with the reasoning of the SSA and affirmed the SSA's dismissal of Polite's complaint. (EEOC Appeal at 2.) The reasoning for that decision was as follows:

> Only in a narrow set of circumstances, usually where the volunteer is performing services for the agency as part of an education program and receives remuneration or where the volunteer service often leads to regular employment, has the Commission held that a volunteer is protected by Title VII. See Phillips v. Department of Veterans Affairs, EEOC Appeal No. 01893011 (Sept. 13, 1989) (citing Pollack v. Rice University, 28 FEP Cases 1273 (S.D. Texas 1982) (court found that because service for remuneration as incidental to scholastic program, plaintiff was a student and not an employee). In the instant case, because there was

[6] Polite only refers to "John" by his first name in the FAC. However, in a March 23, 2018 letter to the SSA, she refers to him as "John Joya" and "John Goya." (FAC Ex. 7, Doc. 6 at 46-49.)
[7] Polite states in the FAC that she submitted her appeal on May 15, 2018. (FAC ¶ 8.) However, the document is dated July 15, 2018. (Appeal Form, Doc. FAC Ex. 3, Doc. 6 at 19.)

> no remuneration for the volunteer position in question, and it was not tied to an educational program or might lead [sic] to employment with the Agency, we find that Complainant's claim is not within the scope of our regulations. See 29 C.F.R. § 1614.103(c)(1).

(*Id.* at 2.) Polite subsequently filed a request for reconsideration of that November 23, 2018 appellate decision, which the EEOC denied on May 17, 2019. (Reconsideration Request, FAC Ex. 5, Doc. 6 at 26-28; Reconsideration Denial, Fac. Ex. 6, Doc. 6 at 42-43.) Included in that denial was notice of Polite's right to file a civil action. (Reconsideration Denial at 2.)

Polite filed the instant lawsuit on August 6, 2019. (Compl., Doc. 1.) In the FAC, Polite asserts "John's" conduct and SSA's hiring practices were violative of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C § 2000e *et. seq.* (FAC at 1.) She brings claims for (1) negligence and (2) intentional infliction of emotional distress ("IIED"). (*Id.* ¶¶ 11-12.)

II. LEGAL STANDARD

"Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for 'failure to state a claim upon which relief can be granted.' Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174, 1180 (C.D. Cal. 2019) (citation omitted) (quoting Fed R. Civ. P. 12(b)(6)). In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all "well-pleaded factual allegations" in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts must also draw all reasonable inferences in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Yet, "courts 'are not bound to accept as true a legal conclusion couched as a factual

allegation.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A plaintiff must not merely allege conduct that is conceivable. When "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 (internal quotation marks omitted).

Finally, the Court may not dismiss a complaint without leave to amend unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (internal quotation marks and citations omitted); *see also Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (district court should grant leave to amend "unless it determines that the pleading could not possibly be cured by the allegation of other facts") (internal quotation marks and citations omitted).

III. DISCUSSION

As explained below, Polite's FAC is defective for three principal reasons: (1) Polite's claims are preempted by Title VII; (2) the volunteer position at issue does not fall within the ambit of Title VII; and (3) a failure to comply with pleading standards. The Court addresses each of those issues in turn before a brief discussion of Polite's proposed SAC, which fails to remedy the FAC's deficiencies.

A. Title VII Preemption

The cognizable theory of Polite's FAC is that, in denying her the volunteer position, Defendant discriminated against Polite based on her race in violation of Title VII. (*See generally* FAC; FAC Exs.) She claims that these same facts give rise to claims for negligence and IIED.

In *Brown v. General Services Administration*, the Supreme Court conducted a detailed analysis of the Title VII framework, and the congressional intent behind it, ultimately and decisively concluding that Title VII "as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. 820, 835 (1976). The Supreme Court's analysis in *Brown* focused on the import of Title VII's "precisely drawn, detailed statut[ory]" scheme and the fact that it's efficacy would be undermined if recovery were permitted under more "general" and "facially applicable" statutory and tort causes of action. *Id.* at 834; *see Holly v. Jewell*, 196 F. Supp. 3d 1079, 1083-85 (N.D. Cal. 2016). In *White v. General Services Administration*, the Ninth Circuit interpreted *Brown*, reiterating that Title VII precludes all other remedies for unconstitutional "discrimination based on race, sex, religion or national origin" and noting that *Brown* drew no distinctions between "a suit against the government or its individual employees." 652 F.2d 913, 916-17 (9th Cir. 1981). Thus, an application of *Brown* and *White* requires the conclusion that "to the extent [Polite's] common law claims are products of race, color, religion, sex, or national origin discrimination, they may not be brought separately under state tort … law." *Labtis v. Paulson*, No. C 07-3333 RS, 2008 WL 2705004, at *3 (N.D. Cal. July 9, 2008); *Holly*, 196 F. Supp. 3d at 1083-85 (reaching the same conclusion and dismissing plaintiff's claim with prejudice "to the extent that it challenge[d] conduct [covered] by Title VII").

Accordingly, the Court concludes that Polite's claims for negligence and intentional infliction of emotional distress are barred.

B. Applicability of Title VII to Volunteer Position

Title VII provides, in part, that "[i]t shall be an unlawful employment practice for

an employer--"

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). However, Title VII's protections do not attach absent "some connection with an employment relationship." *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). To determine whether the requisite connection is present, the Court must engage in a "fact-specific inquiry which 'depends on the economic realities of the situation.'" *Id.* In analyzing whether individuals qualify as employees under federal statutory frameworks, the Ninth Circuit has considered the nature of the job, manner of supervision, and various other "incidents of the [work] relationship." *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008). However, the Ninth Circuit's analysis of employment relationships under Title VII suggests the significance of compensation provided in consideration for labor. *See Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 152 (9th Cir. 2010). While "the fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an 'employee' for purposes of federal statutes," the presence of "substantial benefits not merely incidental to the activity performed" is important. *Id.* (collecting circuit cases where the applicability of Title VII to volunteer workers depended on the receipt of benefits including retirement pensions, life insurance, death benefits, disability insurance, limited medical benefits, scholarships for dependents upon death in the line of duty, tax exemptions, and the accrual of annual or sick leave).

Here, the Veterans Volunteer Services Agreement includes three critical statements under the heading "TERMS AND CONDITIONS." They are:

(1) The Volunteer shall receive no remuneration (pay and/or benefits) from SSA for services rendered under this Agreement;
(2) The volunteer shall not be considered an SSA or VA employee for any purpose or entitlement, except in some limited circumstances the volunteer may be eligible for certain compensation for injuries according to 5 U.S.C. § 8101 *et seq.*; and
(3) VA may provide a subsistence allowance to the volunteer if eligible in accordance with VA regulations.

(Veterans Volunteer Services Agreement at 2.) The only compensation referenced by Polite in connection with her desired volunteer position is the subsistence allowance benefit of $617.40, for which she qualified as a participant in the VA Rehabilitation & Employment Program. (FAC ¶ 13; FAC Ex. 3, Doc. 6 at 39.) However, as is clear from the above-quoted language, the volunteer position involved "no remuneration (pay and/or benefits)" and Polite was explicitly placed on notice that she would "not be considered an SSA or VA employee for any purpose or entitlement." Her VA subsistence allowance benefit is contemplated by the Agreement, which demonstrates that the benefit's payment is permitted but does not constitute compensation provided by SSA in exchange for Polite's volunteer labor. The letter provided by Polite to substantiate the existence of the subsistence benefit further demonstrates the lack of connection between the benefit and the SSA position. That letter, from Rehabilitation Counselor Gary Rusth, makes clear that the subsistence allowance benefit is provided in connection with the VA Rehabilitation & Employment Program generally and would be also paid while Polite attended school. (*See* FAC Ex. 3, Doc. 6 at 39.) It includes no indication that the benefit payment is specifically tied to, or serves as remuneration for, labor. (*See id.*) In any case, in the absence of some more "substantial benefit," even this stipend falls short of

the type of remuneration previously held sufficient to convert a volunteer into an employee for the purposes of Title VII. *Cf. Woodson v. State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 6568668, at *4-*5 (E.D. Cal. Nov. 4, 2016) (dismissing with prejudice plaintiffs' claim under Title VII where they participated in a program with regulations specifically declaring them to be a volunteer and where compensation thereunder was limited to a stipend and other limited, incidental benefits "expressly contemplate[d]" by "the statutory framework upon which the Program [was] based").

Based on the factual allegations of the FAC, including the incorporated exhibits, the Court concludes that the protections of Title VII do not extend to applicants for the SSA volunteer position at issue.

C. Failure to State a Claim or Comply with Pleading Standards

"The complainant in a Title VII case must ... [establish] a prima facie case of racial discrimination ... by showing (i) that [she] belongs to a racial minority; (ii) that [she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek [applications] from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The sole element of the prima facie case that Polite has affirmatively pleaded is her status as a member of a racial minority. (FAC ¶ 5.) The FAC is devoid of any allegation that she (1) applied to and was qualified for the volunteer position at issue, (2) was rejected despite her adequate qualifications for the position, and (3) that SSA continued to seek applications from person's with equivalent qualifications following her rejection. (*See generally* FAC.) Accordingly, the FAC, as presently alleged, does not set forth a claim for racial discrimination under Title VII.

Finally, under Federal Rule of Civil Procedure 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief," and

"[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). "[T]he 'short and plain statement' must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005). Violation of Rule 8 is a "basis for dismissal independent of Rule 12(b)(6)." *McHenry*, 84 F.3d at 1179. "Prolix, confusing complaints . . . impose unfair burdens on litigants and judges." *Id.*

Taken together, Rules 8 and 12(b)(6) require that in a pleading, a Plaintiff employ concise allegations to set forth "a claim that is plausible on its face," and not merely conduct "consistent with a defendant's liability." First, the theory of the FAC is muddled and includes irrelevant information about Polite's upbringing and work history. (*See* FAC ¶¶ 5-6.) Moreover, the FAC does not explain how any of the conduct alleged amounted to racial discrimination. It simply states that an individual named "John" asked a question on criminal history, which Polite asserts was overly broad and resulted in her non-selection for the volunteer opportunity. (FAC ¶¶ 7-12.) The only allegation suggesting a nexus between Polite's interaction with "John" and her race is the conclusory assertion that "Defendant John knew of my race, gender, etc. before calling me." (*Id.* ¶ 7.) Such barebones allegations fall on the wrong side of the line demarcating "possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678.

D. Polite's Proposed Second Amended Complaint

On January 28, Polite filed her Motion for Leave to File Second Amended Complaint and provided alongside it, her proposed SAC. (MLA, Doc. 28.) While the SAC removes many of the irrelevant allegations contained in the FAC, it fails to remedy any of the other deficiencies identified herein. (*See* SAC, Doc. 31 at 21-30.) The most notable change between the FAC and the SAC is Polite's assertion that while the Court has subject-matter jurisdiction over this matter under Title VII, she now purports to bring her claims under 42 U.S.C. 1983 for civil rights violations. (SAC at 1, 8.) As explained

above, the *only* form that Polite's claims may take is for a violation of Title VII. *See Santos v. Potter*, No. C06-2948 VRW, 2007 WL 926493, at *2 (N.D. Cal. Mar. 26, 2007) ("Moreover, in view of the comprehensive remedial scheme for employment discrimination provided by Title VII and the ADEA, the court doubts whether separate remedies are even available under Bivens[.]") (noting that in *Bush v. Lucas*, 462 U.S. 367, 390, (1983), the Supreme Court held "*Bivens* remedies unavailable where Congress has established a comprehensive remedial scheme"). Additionally, the SAC still fails to demonstrate that the SSA volunteer position falls within the ambit of Title VII or allege each element of a prima facie Title VII claim for racial discrimination. (*See generally* SAC.)

Therefore, the SAC largely fails to resolve the inadequacies present in the FAC.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is GRANTED. Plaintiff's Motion for Leave to File Second Amended Complaint is DENIED AS MOOT. While amendment may be futile, Plaintiff is nonetheless granted leave to file a Second Amended Complaint no later than **twenty-one (21) days** after the date of this Order. Failure to timely file a Second Amended Complaint in full conformity with this Order[8] may result in the dismissal of this action without leave to amend. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642–43 (9th Cir. 2002), *cert. denied*, 538 U.S. 909 (2003) (court may dismiss action for failure to follow court order).

[8] To summarize, in her SAC, Polite should attempt to (1) set forth her claim as a violation of Title VII, (2) explain why the work conditions and compensation associated with the SSA position place it under the coverage of Title VII, and (3) allege every element of a prima facie claim for racial disclination under Title VII, supported by a plausible theory of discriminatory conduct.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:19-cv-01518-JLS-DFM Date: February 03, 2020
Title: Rhonda Polite v. John et al.

Plaintiff is advised that she may wish to contact the Federal *Pro Se* Clinic, which provides free legal assistance to *pro se* litigants. The clinic is located in the Ronald Reagan Federal Building and United States Courthouse and can be reached at (714) 541-1010 (x222).

Initials of Preparer: tg

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