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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 26 2022

FOR THE NINTH CIRCUIT

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

HAROLD L. WILBORN,

Plaintiff-Appellant,

v.

ALEJANDRO N. MAYORKAS,

Defendant-Appellee.

No. 21-56391

D.C. No. 3:20-cv-01981-LAB-BGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted August 17, 2022**

Before: S.R. THOMAS, PAEZ, and LEE, Circuit Judges.

Harold L. Wilborn appeals pro se from the district court's judgment dismissing his employment action alleging various constitutional and Title VII violations. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (dismissal

* 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 1a

under Fed. R. Civ. P. 12(b)(6)); *Sommato v. United States*, 255 F.3d 704, 707 (9th Cir. 2001) (subject matter jurisdiction). We affirm.

The district court properly dismissed Wilborn's constitutional claims as barred by sovereign immunity and because the Civil Service Reform Act precludes him from "seeking injunctive relief for his asserted constitutional injury just as it precludes him from bringing a *Bivens* action for damages." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (stating that the United States is immune from suit unless it has expressly waived its sovereign immunity, and "sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants").

The district court properly dismissed Wilborn's Title VII retaliation claim because Wilborn failed to allege facts sufficient to show there was a causal relationship between any protected activity and a materially adverse employment action. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 642, 646 (9th Cir. 2003) (setting forth elements of Title VII retaliation claim and explaining what constitutes an adverse employment action).

The district court did not abuse its discretion by denying Wilborn's request for leave to file a sur-reply opposing defendant's motion to dismiss because Wilborn did not raise any new evidence or new arguments. *See Preminger v. Peake*, 552 F.3d 757, 769 n.11 (9th Cir. 2008) (standard of review for a district

court's decisions concerning its management of litigation).

We reject as unsupported by the record Wilborn's contentions that the district court was biased against him and that he was denied due process.

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

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 18 2022

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

HAROLD L. WILBORN,

Plaintiff - Appellant,

v.

ALEJANDRO N. MAYORKAS,

Defendant - Appellee.

No. 21-56391

D.C. No. 3:20-cv-01981-LAB-BGS
U.S. District Court for Southern
California, San Diego

MANDATE

The judgment of this Court, entered August 26, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HAROLD L. WILBORN

Plaintiff,

v.

ALEJANDRO MAYORKAS

Defendant.

Case No.: 20cv1981-LAB (BGS)

ORDER:

**(1) DENYING EX-PARTE MOTION
TO FILE SUR-REPLY [DKT. 49];
AND**

**(2) GRANTING MOTION TO
DISMISS PLAINTIFF'S AMENDED
COMPLAINT [Dkt. 42]**

Plaintiff Harold L. Wilborn, proceeding *pro se*, is a former employee of the U.S. Custom and Border Patrol law enforcement agency ("CBP"). He brings this suit against the Secretary of the Department of Homeland Security, Defendant Alejandro Mayorkas ("Defendant" or "Secretary Mayorkas"), for alleged violations of the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution and for alleged violations of Title VII of the Civil Rights Act of 1964 ("Title VII"). Wilborn claims that during his tenure with CBP, he was subjected to denials of due process, social discrimination, hostile work environment, retaliation, and constructive discharge.

APPENDIX 5a

20cv1981

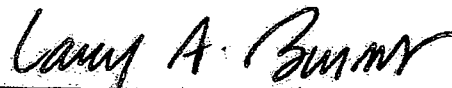
1 **IV. CONCLUSION**

2 Plaintiff's request to file a sur-reply is **DENIED** and Defendant's Motion to
3 Dismiss is **GRANTED**. The Court recognizes that in civil rights cases, *pro se*
4 plaintiffs should be afforded an opportunity to amend a complaint before the
5 complaint is dismissed in its entirety, unless "it is absolutely clear that the
6 deficiencies of the complaint could not be cured by amendment." *Rodriguez v.*
7 *Chandler*, 86 F.3d 1163 (9th Cir. 1996) (citing *Noll v. Carlson*, 809 F.2d 1446, 1448
8 (9th Cir. 1987)). In this case, the Court previously provided Wilborn an opportunity
9 to amend these pleadings and correct the deficiencies identified by Defendant in
10 its motion to dismiss the original Complaint, but to no avail. The current amended
11 complaint still fails to state viable causes of action against Defendant and includes
12 only vague, conclusory, and confusingly-pled statements of Defendant's alleged
13 wrongdoing. Because Wilborn has previously amended his complaint but has yet
14 again failed to state any viable claims against Defendant, Wilborn's claims are
15 **DISMISSED WITH PREJUDICE** and without leave to amend.

16 The Clerk of Court is ordered to terminate this case.

17 **IT IS SO ORDERED.**

18 Dated: October 28, 2021

19 

20 Honorable Larry Alan Burns
21 United States District Judge
22
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ORIGINAL

1 Name: Harold L. Wilborn
2 Address: 15501 Harvard Avenue
3 Telephone Phone: (619) 402-7975
4 Email: harold.wilborn@sbcglobal.net
5
6
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 Harold L. Wilborn

12 Plaintiff(s),
13

14 v.

15 Chad F. Wolf
16 Acting Secretary

17 Department of Homeland Security
18 Agency

19 Defendant(s).
20

Case No.: **'20CV1981 LAB BGS**
(assigned at time of filing)

COMPLAINT

Employment Discrimination and Retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. **Failure to Comply** with the Uniform Services Employment and Reemployment Rights Act of 1994, (USERRA, Pub.L. 103-353, codified as amended at 38 U.S.C. 4301-4335), Plaintiffs leave being a "benefit" under USERRA and 5 U.S.C. Code § 7703. Judicial review on the merits.

All filing fees are requested to be determined under USERRA, NO court cost provision.

21 I. RELATED CASES

22 a. Do you have other Civil Case(s) in this or any other federal court?

23 ☐ Yes ☒ No

24 b. If yes, please list the case numbers here:

25 II. STATEMENT OF CLAIM *(Briefly state the facts of your case. Describe how*
26 *each defendant is involved, and tell what each defendant did to you that caused*
27 *you to file this suit against them. Include names of any other persons involved,*
28 *dates, and places.)*

APPENDIX 7a

ORIGINAL

1 Plaintiff Pro Se wishes to state as briefly as possible the facts showing that he is
2 entitled to the damages or other relief sought., as to how the defendant heading and
3 in charge of the United States Department of Homeland Security, DHS, Agency,
4 Chad F. Wolf, Acting Secretary of DHS, was involved and what the defendant did
5 that caused the Plaintiff harm or violated the Plaintiffs rights, including the dates
6 and places of that involvement or conduct.
7

8 The Plaintiff has shown that the Agency subjected him to a hostile workings
9 environment and discriminated against him on the bases of his protected
10 class and in reprisal; retaliating against him for his previous Equal Employment
11 Opportunity, EEOC, activity and complaints, while in the middle of the EEOC
12 process. These violations occurring between May 10, 2013 and
13

14 January 31st 2015, the Agency never deciding these matters on the merits.

15 On October 9, 2014, Complainant filed an EEO complaint alleging that the
16 Agency subjected him to a hostile work environment and discriminated against
17 him on the bases of race (African American), disability (disabled veteran), age
18 (64), and reprisal for prior protected EEO activity. Please see attached EEOC
19 Appellate Decision of 07/14/2020.

- 20 1. on October 3, 2014, the Agency issued Complainant a proposal to suspend
21 him from duty without pay for 10 calendar days; using previous EEOC cases
22 as justification. Final decision January 30, 2015. Please see attached.
- 23 2. on January 12, 2015, Supervisor requested that Complainant provide medical
24 verification in order to grant Complainant's request for sick leave a first time
25 of such a request after nearly 30 years of government service as a disabled
26 military veteran with the Agency.
- 27 3. effective January 31, 2015, the Agency forced Complainant to resign from
28 the Agency (constructive discharge)²

1 **III. RELIEF YOU REQUEST** (*State exactly what you want the court to do for you.*
2 *Do not use this space to state the facts of your claim.*)

3 Plaintiff Pro states briefly what damages or other relief he asks the court to
4 order not intending to make legal arguments. Included are the amounts of any
5 actual damages claimed for the acts alleged and any punitive or exemplary
6 damages claimed, the amounts, and the reasons Plaintiff claims he maybe
7 entitled to actual or punitive money damages.
8

9 A part of the claim of retaliation (the prima facie case) the Plaintiff states that
10 the employers conduct was materially adverse and may have well dissuaded a
11 reasonable military veteran worker from making or supporting a charge of
12 discrimination under USERRA's which prohibit discrimination against persons
13 because of their service in the uniformed services. Here the benefit of medical
14 leave, due to Plaintiff's veterans military disability, was denied.
15

16 Plaintiff, has a right or benefit provided under USERRA, to this leave, If any
17 other disabled veteran of DHS was granted this sick leave, to go to the Veterans
18 Administration hospital and his private physician; both of whom recommended
19 further sick leave, by reasonable demonstration, the Plaintiff has been
20 discriminated against and lost benefits under USERRA.
21

22 The Plaintiff asks the court for awards of \$450,000 in front and backpay,
23 \$175,000 in economic and non-economic damages, and punitive damages of
24 \$300,000 under relief as per Title VII.

25 This to include damages for the Agency's wrongful use of previous EEOC
26 case(s), this in proposing to suspend the Plaintiff for 10 calendar days on
27 October 03, 2014, leading to his forced retirement on January 31, 2015.

28 Other relief requested as the court finds lawful.

1 **IV. DEMAND FOR JURY TRIAL** (*Would you like a trial by jury on all claims*
2 *pursuant to FRCP, Rule 38?*)

3 ☐ Yes ☒ No

4
5 I declare under penalty of perjury that the foregoing is true and correct.

6 October 06, 2020

7 Date

Harold L. Wilborn
Signature

8 Harold L. Wilborn

9 Printed Name

1 Harold L. Wilborn
15501 Harvard Avenue
2 Cleveland, Ohio 44128-2041
Phone: 1.619.402.7975
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4
5 Harold L. Wilborn IN PRO PER

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7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 HAROLD L. WILBORN

12 PLAINTIFF

13 vs.

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16 ALEJANDRO MAYORKAS
17 UNITED STATES SECRETARY OF
18 HOMELAND SECURITY, (CUSTOMS
19 AND BORDER PROTECTION,
20 BORDER PATROL)

21 DEFENDANT
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CASE NO.: '20-cv-01981-LAB-BGS'

AMENDED COMPLAINT
(Title Ordered by the Court)
No Other Documents Attached

Judge's Order and motion sua sponte
February 22, 2021 (Dkt 18, 19, 20)

Judge: Hon. Larry Alan Burns
Dept: CTRM 14 A
Time: Unassigned
Date: Unassigned

AMENDED COMPLAINT

20-cv-01981-LAB(BGS)

APPENDIX 11a

1 written up for "lack of candor" nor proposed ten (10) day suspension as the Plaintiff
2 was given such a proposal., discriminating.
3

4 90. On January 30, 2015 Deputy Assistant Chief Patrol Agent Rodney Scott
5 presented the Plaintiff with a suspension letter based on the following, "... I
6 considered your explanation that this was unintentional. I also considered your
7 employment with the Federal government (not including 8 years military service,)
8 since August of 28, 1986. I also considered your five days suspension effective in
9 2010 for unprofessional conduct. . ." The EEOC complaint filed on April 22, 2010,
10 finalized August 20, 2013 for reprisal of prior protected activity was once again at
11 least four (4) times, again discriminating based on reprisal for prior protected EEO
12 activity. *Third time Agency used Plaintiffs five (5) day suspension unlawfully.*
13
14
15
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19 91. Immediately following this January 30, 2015, proposal was to come a
20 termination, proposal, as stated by Plaintiff past Department Head that he was
21 informed of such an action. This constituted a proposal of disciplinary action and a
22 termination proposal.
23

24 **PRAYER FOR RELIEF**
25

26 .For the forgoing reasons Plaintiff request that the Court grant leave to
27 amend his Original Complaint with this "Amended Complaint," pleading, and
28 other relief sought.

1 Where for the Plaintiff prays the court to grant the request for leave to amend his
2 complaint herein made for the foregoing reasons, as justice, fairness, equity, law
3 requires., Rule 1.
4

5 Additionally, the amount in controversy in the above referenced case, as
6 evidenced, is in excess of \$75,000. The Plaintiff made charges, testified, assisted, or
7 participated in EEOC enforcement proceedings and was retaliated against by the
8 Agency for doing so, again violating Title VII., Plaintiff praying \$300,000 for each
9 intentional unlawful discrimination., retaliation, each four(4) times the law violated.
10
11

12 Damages Prayed for: Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a,
13 compensatory and punitive damages are available for a range of violations under Title
14 VII, including retaliation, the same under Constructive Discharge back pay, and
15 Disparate Treatment. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73
16 L.Ed.2d 396 (1982)). Bivens actions motioned for damages. Marbury v. Madison, 1
17 Cranch 137, 2 L.Ed. 60 (1803),
18
19

20 Finding that has not met its proof burden, the court is asked awarded the
21 Plaintiff in the least, compatible to 'Nassar' damages, \$438,167.66 in backpay and
22 \$3,187,500 in compensatory damages. Id *Nassar* 367.
23

24 Date: March 15, 2021

Respectfully Submitted,

25
26 By: Harold L. Wilborn
27 Harold L. Wilborn
28