Brooks v. Agate Resources

2019 | Cited 0 times | D. Oregon | March 25, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON MICHAEL T. BROOKS, Plaintiff, Civ. No. 6:15-cv-00983-MK

v. FINDINGS AND RECOMMENDATIONS

AGATE RESOURCES, INC., dba Trillium Community Health Plan Defendant. _____ KASUBHAI, Judge: Civil Procedure 12(b)(6) and 12(c) for failure to state a claim or judgment on the pleadings in its

Amended Complaint with prejudice because Plaintiff

fails to state a claim satisfying the requirements of Federal Rule of Civil Procedure 8.

BACKGROUND

Since the termination of his employment on September 27, 2013, Plaintiff has filed multiple lawsuits against his former employer, claiming that Defendant violated numerous state and federal statutes. Mot. Dismiss 1-2, ECF No. 137. To date, Plaintiff has filed several actions in federal court, with the United States Department of Labor , the Equal Employment Opportunity Commission and the Oregon Bureau of Labor and Industries . Id. ion claims to discrimination claims, to claims alleging securities fraud and violations under Sarbanes-Oxley and HIPAA. Id. Since filing the present case on June 4, 2015, Plaintiff has received the assistance of five attorneys, who represented him through the majority of this litigation. Id. Plaintiff now proceeds pro se. Id.

STANDARD OF REVIEW

but early enough not to delay trial

brought under the two rules are evaluated according to virtually the same legal standard. McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988); United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011); ger Corp., No. 15-cv-02726-MEJ, 2016 WL 4538367, at *2 (N.D. Cal. Aug. 31, 2016) (citing Dahlia v. Rodriguez, 735 F.3d 1060, 1076 (9th Cir. 2013), in describing standards applicable to motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c)). Thus, the Court should dismiss each claim that does not contain enough facts to state a Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must accept as true allegations in the complaint, unless contradicted by a document that , 502 F.3d 1141, 1143 (9th Cir. 2007). And while the Court must construe all inferences in the light most favorable to the nonmoving party, Godwin v. Rogue Valley Youth Corr. Facility, No. 1:12-cv- 00478- to reject, as implausible, allegations that are too speculative to warrant further factual

deveDahlia, 735 F.3d at 1076. Further, the Court need not accept conclusory allegations, unreasonable inferences, or legal conclusions set out in the form of factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Cafasso, 637 F.3d at 1054; Chavez v. United States Twombly, 550 U.S. at 555)); Moss v. U.S.

Secret Serv., more than a formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption

tted; first ellipsis and second brackets in original) (quoting Iqbal, Chavez, 683 F.3d at

1108 (citing Iqbal pleads factual content that allows the court to draw the reasonable inference that the defendant is

g whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial Id. at 1108-09 (citation omitted; ellipsis in original) (quoting Iqbal, 556 U.S. at 679). The point of this critical gatekeeping function is to ensure that claims are Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Finally, in ruling on motions under Rules 12(b)(6) and 12(c), a court may consider materials outside of the complaint if the plaintiff refers extensively to it in the complaint, if it is integral to the plainti See Godwin, 2013 WL 3712413, at *2; see also Req. Judicial Notice and cases cited therein.

DISCUSSION

As a threshold matter, this Court Judicial Notice (ECF No. 138). This Findings and Recommendation refers to exhibits provided

therein throughout the analysis of this case.

A. First Claim for Relief: Discrimination Claims Fail Because the Court Lacks Subject Matter Jurisdiction, and Plaintiff Fails to State a Claim for which Relief Can Be Granted. 1. Plaintiff Failed to Timely File an Administrative Charge Regarding His Race, National origin, or Religious Discrimination Claims. In Count One of his Amended Complaint, Plaintiff alleges that Defendant discriminated against him on the basis of race or national origin, violating Title VII, 42 U.S.C. § 2000e-2. Am. -16, ECF No. 135. Count Two alleges religious discrimination, although Plaintiff does

not identify the statutory basis for this count, and neither count identifies which subsection of Section 2000e-2 applies here. Id. -20. alysis and treats both counts as assertions of violations of Section 2000e-2(a)(1). See Mot. Dismiss n. 11, ECF No. 37. s the first time Plaintiff alleges racial, ethnic, or religious discrimination. Prior to commencing a lawsuit asserting a Title VII claim, a plaintiff must exhaust his administrative remedies by filing a charge with the EEOC after the alleged unlawfu -5(e)(1). A plaintiff

must initiate an action in federal court within 90 days after the EEOC issues a notice of right to sue. Id. § 2000e- McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). McDonnell Douglas stands for the proposition that a

Plaintiff relies on this proposition in his Response. 63-63, ECF No. 151. But it does not hold that a plaintiff may assert claims that were not raised at all before the EEOC. To the contrary, any theory of liability not presented to the EEOC is barred from a subsequent lawsuit. See, e.g., Wilder v. Ariz. Bd. of Regents 535, 537 (9th Cir. 2013)

discrimination claim because Cameron included no allegation of gender discrimination in her administrative charge before the Equal Employment Lowe v. City of Monrovia, 775 F.2d 998, 1003-04 (9th Cir. 1985))).

Plaintiff filed a complaint with the EEOC on January 21, 2014, after he filed a BOLI Complaint on January 13, 2014 operate under a work sharing agreement, which means that when you filed your charge with BOLI,

that same charge was automatically co- complaint duplicative. Compl. Ex. 1, ECF No. 1. Plaintiff was terminated from his job on

September 27, 2013. Although that time is within the 180 days required to file a BOLI/EEOC complaint, Defendant argues that Plaintiff failed to exhaust his administrative remedies on these claims because the charge he filed with the EEOC did not identify race, national origin, or religion as bases of the alleged discrimination. Mot. Dismiss 6-7, ECF No. 137. As a result, the EEOC did not investigate those charges, and this Court finds that Plaintiff is now barred from asserting those claims in this lawsuit. See Vasquez v. Cty. of L.A., 349 F.3d 634, 644-45 (9th Cir. 2003), as amended ude that Vasquez did not exhaust his administrative remedies regarding retaliation for filing the discrimination charge . . . [because he] checked the box on the

As stated above, when Plaintiff initiated this suit in federal court on June 4, 2015, he did not assert claims of discrimination based on race, national origin, or religion. Compl., ECF No. 1. Complaint that he originally filed, and he did not identify his race/color, national origin, or religion as a basis for the discrimination he alleges he suffered. Id. The Supplement that accompanied the Form Complaint also did not contain any facts suggesting that Plaintiff was discriminated against for any of these

reasons. Plaintiff alleges race, national origin, and religious discrimination claims for the first time in his Amended Complaint, filed May 12, 2018, nearly three years after his initial complaint. Thus, he did not timely assert discrimination claims within 90 days of his right to sue letter, even had he properly alleged racial, national origin, or religious discrimination claims with the EEOC. See Compl. Ex.3 at 23, ECF No. 1. Given that Plaintiff alleges no facts that plausibly state a claim for racial, national origin, or religious discrimination in the original complaint, these claims, to the extent they are alleged in the operative Amended Complaint, do not relate back to his original filing. Plaintiff attaches to the Amended Complaint the Notice of Charge of Discrimination that he filed with the EEOC, dated January 23, 2014. See Am. Compl. Ex. 3, ECF NO. 135. Although See id. There

section of the pleading) that suggest that such claims were made to or investigated by the EEOC.

Title VII race, national origin, and religious discrimination claims because Plaintiff failed to allege such discrimination to the EEOC and therefore cannot properly raise them here for the first time. Further, even if the claims were properly raised and evaluated by the EEOC, Plaintiff failed to file racial, national origin, or religious discrimination claims within the 90 days required by his right to sue letter. This claim should be dismissed with prejudice because amendment would be futile. 2. Plaintiff fails to allege facts supporting his Title VII Claims for Discrimination Based on Race and Religion. Even if this Court had jurisdiction, First Claim for Relief should be dismissed because he has not alleged any facts that support a plausible inference of discrimination based on race, national origin, or religion. 42 U.S.C. § 2000e- respect to his compensation, terms, conditions, or privileges of employment, because of such

Plaintiff must allege facts to plausibly show that Defendant acted against him specifically because

of his race or national origin and because of his religion. See id. Nothing Plaintiff alleges in the Amended Complaint creates a plausible inference that he suffered an adverse employment action because of his race or national origin or because of his religion. comments about his Native American heritage by coworkers, which comments were observed by

, ECF No. 135. to repeated questions and degrading comments relating to abortion, gay marriage, dancing, playing

Defendant Id. ¶ 18.)

Plaintiff does not explain what statements were made, when they were made, who made the statements, or any facts as to how any such remarks related to the termination of his employment or otherwise adversely affected the terms and conditions of his employment. His allegations and in his termination cannot form the basis of a valid complaint under Iqbal. See 556 U.S. at 678

(holding that complaints that consists of mere conclusory allegations or merely recites statutory

language or elements of claims are insufficient); Naharaja v. Wray, No. 3:13-CV-01261-HZ, 2015 T]he court need not accept conclusory allegations as motion for relief from judgment denied, No. 3:13-CV-01261-HZ, 2015 WL 5970346 (D. Or. Oct. 12, 2015), , No. 15-35624 (9th Cir. June 10, 2016). tly allege that he was subject to a hostile work environment to state a claim. For harassment to be actionable under employment discrimination working conditions. Manatt v. Bank of Am., NA, 339 F.3d 792, 798 (9th Cir. 2003) (citation

isolated incidents (unless extremely serious) will not amount to discriminatory changes in the

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted); Manatt rise to a plausible inference that Plaintiff was subjected to any severe or pervasive conduct. The

First Claim for Relief (Counts One and Two) should be dismissed with prejudice its entirety. B. Second Claim for Relief: Plaintiff Fails to Allege Sufficient Facts to Support a Claim for Age Discrimination under the ADEA or Oregon Revised Statute 659A.030. Second Claim asserts two counts of age discrimination one based on an alleged violation of the ADEA, 29 U.S.C. § 623 (Count One), and one for an alleged violation of Oregon State law, ORS 659A.030 (Count Two). Plaintiff fails to state a claim on both counts. To establish a disparate- - Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). To make out a

prima facie (1) at least forty years old, (2) performing his job satisfactorily, (3) discharged, and (4) either

replaced by substantially younger employees with equal or inferior qualifications or discharged Diaz v. Eagle , 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000)); see also Barrett v. Kaiser Found. Health Plan of the Nw., No. 3:14-cv-02016-SI, 2015 WL 1491037, at *3 (D. Or. Apr. 1, 2015) (dismissing ADEA claim for failure to sufficiently state a claim). a prima facie case of age discrimination is identical to that under federal law, except that for claims is 18, rather than 40. Henderson v. Jantzen, Inc., 79 Or. App. 654, 657, 719 P.2d 1322, 1324 (1986); Dennis v. Airport Chevrolet, Inc., No. 1:13-cv-00008-CL, 2014 WL 715458, at *6 (D. Or. Feb. 24, 2014). Plaintiff does not allege facts sufficient to state an age discrimination claim under either action taken against him, either as to the terms and conditions of his employment or his

termination. Instead, he states only . Am. Compl. ¶ 23, ECF No. 135. This is insufficient under the applicable statutes. See Gross, 557 U.S. at 180; Henderson, 79 Or. App. 654; Ogden v. Bureau of Labor, 68 Or. App. 235, 243, 682 P.2d 802, 809 (1984), , 299 Or. 98 (1985); Rogers v. Or. Trail Elec. Consumers Coop., Inc., No. 3:10-CV-1337-AC, 2012 WL 1635127, at *11 (D. Or. May 8, 2012). Second, the Amended Complaint is devoid of factual allegations that could support an age discrimination claim. The only age-related allegations in the Amended Complaint are that Plaintiff []s Plaintiff makes no allegations as to when these comments were made, how often they were made, or who made them. Am. Compl. ¶ 22, ECF No. 135. These See

Faragher, 524 U.S. at 788. Further, Plaintiff does not allege that he was performing his job satisfactorily or any other facts giving rise to a plausible inference that any adverse employment -defendant-unlawfully- harmed- 8. Iqbal, 556 U.S. at 678. For these reasons, the Second Claim for Relief fails and should be dismissed with prejudice. C. Third Claim for Relief: Plaintiff Fails to State a Claim for Disability Discrimination. 42 U.S.C. § 12101, et seq. First, he claims that Defendant failed to provide reasonable

accommodations in his employment in violation of 42 U.S.C. § 12112(b)(5)(A). Am. Compl. ¶¶ 28-35, ECF NO. 135. Second, he claims that Defendant unlawfully requested disability-related medical information in violation of 42 U.S.C. § 12112(d)(4)(A). Id. ¶¶ 39-44. Plaintiff also references Oregon state law as the basis for a third disability claim. 1

For the reasons below,

1 The Amended Complaint lists Count Two of Claim Three as a claim under ORS 659A.118, but that section merely Plaintiff has failed to state a claim for relief in all three instances, and his disability-discrimination claims should be dismissed with prejudice. 1. Count One: Plaintiff Fails to Allege Sufficient Facts to Support His Claim for Denial of Reasonable Accommodations. The ADA prohibits certain employers from discriminating against employees on the basis of disability:

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). The statute prohibits physical or mental limitations of an otherwise qualified individual with a disability who is an

applicant or employee, unless such covered entity can demonstrate that the accommodation would Id. § 12112(b)(5)(A). To state a claim under the ADA that an employer has failed to accommodate a disability, e meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and Allen v. Pac. Bell, 348 F.3d 1113, 1114 (9th Cir. 2003) (citing Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th

First, Plaintiff fails to allege facts supporting the contention that he is disabled. The ADA failure to accommodate is ORS 659A.112. The Court assumes that Plaintiff intended to reference this statute. ORS

659A.118 does not provide a right of action. are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping,

walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, 42 U.S.C. , ECF No. 135. However, Plaintiff never alleges what those

impairments are. Likewise, although he recites the statutory language that his unspecified explain how he is so limited.

It is not enough for Plaintiff to simply recite the elements of a claim using the words of a statute; he must allege how the facts of his case satisfy those elements. Twombly, 550 U.S. at 555. Because Plaintiff provides no facts whatsoever to support the allegation that he is (or was) disabled, his ADA claim should fail. See Lacayo v. Donahoe, No. 14-CV-04077-JSC, 2015 WL 993448, at McKenna v.

Permanente Med. Grp., Inc., 894 F. Supp. 2d 1258, 1278 (E.D. Cal. 2012))).

who ar Allen, 348 F.3d at 1114; 42 U.S.C. § 12111(8). Again, Plaintiff recites the appropriate statutory language but provides no supporting facts. Other than alleging that he w became disabled, or how his disability impacted his ability to perform his job. Am. Compl. ¶ 9, ECF No. 135. In fact, Plaintiff alleges tha h]e is able to perform the essential functions of his position with reasonable accommodation conclusory allegations, and allegations contravening that he is a individual are insufficient to state a claim for relief. See, e.g., King v. C&K Mkt., Inc., No. 2:16-CV-00559-TLN-CMK, 2018 WL 934551, at *4 (E.D. Cal. Feb. 15, 2018) (dismissing ADA claim demonstrate her ability to perform the essential functions of her job with or without a reasonable accommodation, or even what the essential Ting v. Adams & Assocs., Inc., No. 2:16-CV-01309-TLN-KJN, 2017 WL 4422508, at *6 (E.D. not allege facts showing how she was limited by her condition or able to perform the essential job

Third, Plaintiff does not allege sufficient facts to support that he suffered an adverse employment action because of his purported disability. Plaintiff generally alleges that he failed and refused to provide such engage in a good faith interactive process with plaintiff to identify feasible and appropriate

-32, ECF No. 135. Though he generally lists some accommodations he claims to have requested, he alleges no facts supporting the process by which he requested accommodations or how Defendant responded. He fails to allege when, how, and to whom the requests were made, and he does not state whether Defendant responded at all and, if it did, why his requests were allegedly rejected. See Wozab v. Flextronics Am., LLC, No. 2:11-CV- 1612-LDG-GWF, 2012 WL 4498232, at *4 (D. Nev. Sept. 28, 2012) (dismissing ADA claim for een reasonable, to whom the purported requests were made, and why the accommodations were necessary for plaintiff to Defendant of his disability, instead simply stating Id. at

a claim under the ADA. 2

By admitting he was able to perform his job without accommodation, Plaintiff can not prove he was a qualified individual under the ADA. This claim should be dismissed with prejudice because amendment would be futile. 2. Count Two:

which provides as follows:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 3 Plaintiff alleges that Defendant violated this section by demanding that he provide medical

Compl. ¶¶ 41-42, ECF No. 135 use he admits that he had requested time off as a reasonable accommodation of his disability, and Defendant had the right

2 -barred to the extent it is based on any alleged acts that occurred before March 19, 2013. A plaintiff must file a timely charge of discrimination with the EEOC as a prerequisite to bringing an ADA claim. 42 U.S.C. § 12117(a). Further, 42 U.S.C. § 2000e-5(e)(1) requires a complainant to file a charge with the EEOC proceedings with a state or local agency, in which case the EEOC charge must be filed within 300 days. See also Clink v. Or. Health & Sci. Univ., 9 F. Supp. 3d 1162, 1164-65 (D. Or. 2014). Plaintiff filed a complaint with BOLI on January 13, 2014. (See Dkt. 1-3 at 24.) Therefore, any acts occurring before March 19, 2013 are nonactionable. 3 Plaintiff alleges a violation of ORS 659A.136, which incorporates the same language as 42 U.S.C. § 12112(d)(4)(A) and is interpreted consistently with that statute. See ORS 659A.139; Heiple v. Henderson, 229 Or. App. 693, 700, 215 P.3d 891 (2009). Plaintif -law claim therefore rises and falls with his ADA claim. to request verification of and updates to an alleged disability that was impacting his ability to perform his job. Plaintiff does not alleges the nature of his purported disability, but does allege that he isabilities on several occasions, including . . . Id. ¶ 31. He alleges that, in response to the request for

updates on his medical conditions to his weekly status reports and periodically stopped by [his] cubical [to] demand a verbal accounting of his treat Id. ¶¶ 41-42. The EEOC the agency tasked with implementing the ADA has unequivocally stated - under the ADA when the employer has reason to believe that a health condition could affect job

performance:

Generally, a disability-related inquiry or medical examination of an employee may be - reasonable belief, perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 2000 WL 33407181, at *6 (2000) (footnotes see also Doby v. Sisters of St. Mary of Or. Ministries Corp., No. 3:13-CV-0977-ST, 2014 WL 3943713, at *7 (D. Or. Aug. 11, 2014). By his own admission, Plaintiff had already informed his supervisors and coworkers that his medical condition was impacting his ability to perform his job duties. Am. Compl. ¶¶ 29, 40- 41, ECF No. 135. In that circumstance, Defendant is entitled to request additional information about the nature and severity of his condition

because those requests are job-related and consistent with business necessity. Defendant information from Plaintiff also would be justified -related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and

The employer is entitled to know that an employee has a covered disability that requires a reasonable accommodation. Thus, when the disability or the need for the accommodation is not known or obvious, it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation. Id. at *9 (footnote and emphasis omitted). Here, Plaintiff admits that Defendant response to his request for time off as a reasonable accommodation of his disability. Am. Compl.

¶¶ 31, 41, ECF No. 135. Defendant would have been well within its rights to request further information abou -related wo be dismissed with prejudice.

3. Count Three: Plaintiff Fails to State a Claim Under Oregon Revised Statute 659A.112. Plaintiff also asserts a state-law disability discrimination claim under Oregon Revised Statute 659A.112. Am. Compl. ¶¶ 36-38, ECF No. 135. This claim fails for the same reasons as

Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1087 (9th Cir. 2001) (citing Henderson, 79 Or. App. at 656); see also ORS 659A.139(1) consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as omitted)). state a claim, it recommends that this Oregon state claim also be dismissed on the same grounds.

It should be dismissed with prejudice because amendment would be futile. D. Fourth Claim for Relief: Plaintiff Fails to State a Claim for Denial of Medical Leave. Plaintiff alleges two claims of denial of medical leave, the first under the federal Family and Medical Leave Act, 29 U.S.C. § 2601 (Count One), and the second under the Oregon Family 45-57. For the following reasons, both of with prejudice. 1. Count 1: Plaintiff Fails to State a Claim Under the Family and Medical Leave Act. employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position e statute prohibits (1) interference with an

her pursuit of any charge or proceeding under the statute. 29 U.S.C. § 2615. Courts have referred to claims under discussed below, fails to allege sufficient facts in support. 4

4 opposing Xin Liu v. Amway Corp., 347 F.3d 1125, 1136 (9th Cir. 2003). Plaintiff has not alleged an FMLA retaliation claim. His FMLA allegations relate to his efforts to exercise his rights, not to any efforts to oppose purportedly wrongful behavior FMLA p Id. §

Sanders v. City of Newport, 657 F.3d 772, 777-78 (9th Cir. 2011) (quoting

Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001)). To sufficiently plead an FMLA interference claim, a plaintiff must allege that:

the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled. Id. at 778 (quoting Burnett v. LFW Inc., Complaint fails to sufficiently plead these elements.

First, Plaintiff fails to allege that he was entitled to FMLA leave. The statute provides that

employee unable to perform the functions of the position of -the-job and off work,

, ECF No. 135. Plaintiff

surgery was purportedly required. Without supporting facts, this allegation is merely a recitation of one element of an FMLA claim and is insufficient to state a claim for relief. Plai essential functions of his position . . .

by Defendant with respect to FMLA leave. See Traxler v. Multnomah County, No. 06-1450-KI, 2008 WL 282272, at *17 (D. Or. Jan. 29, 2008) (plaintiff failed to state FMLA retaliation claim when there was no evidence that she , ECF No. 135. Because Plaintiff was able to perform the functions of his job, he was not entitled to leave under FMLA. See Lynch v. Klamath Cty. Sch. Dist., No. 1:13 CV 02028-CL, 2015 WL 2239226, at *6 (D. Or. May 12, 2015) (leave

Second, Plaintiff does not sufficiently allege that he provided notice of medical leave under , ECF No. 135. Plaintiff, however,

does not allege to whom he provided notice, what form that notice took, or what dates he proposed to take off. See Jacobs v. York Union Rescue Mission, Inc., No. 1:12-CV-0288, 2013 WL 433327, allegations setting forth how she provided [Defendant] with adequate notice of her intention to

facts about the notice purportedly provided to Defendant, Plaintiff fails to establish this necessary element of a FMLA claim. Plaintiff admits he was able to perform his job and provides no facts supporting either his eligibility for FMLA leave or his notice to Defendant of his intent to take leave. Thus, Plaintiff fails to properly allege a FMLA claim and the Court recommends that this claim be dismissed with prejudice because amendment would be futile. 2. Count Two: Plaintiff Fails to State a Claim Under OFLA. Count Two of Fourth Claim alleges a claim for medical leave violation under regon Revised Statute 659A.183. Am. Compl., ¶¶ 53- 57, ECF No. 135. Plaintiff again provides no factual allegations but instead merely recites the elements of the claim. Id. OFLA is subject to the same standards and requirements as FMLA. See Or. Rev. Stat. in a manner that is consistent with any

similar provisions of the federal Family and Medical Leave and should be dismissed that he was able to perform the essential functions of his job without accommodation at the relevant

times. E. Fifth, Sixth, Ninth, Tenth, and Twelfth Claims for Relief: Retaliation Claims Should Each Be Dismissed.

attempts to allege at least ten different whistleblower protection provisions that Plaintiff claims Defendant violated. Plaintiff alleges that Defendant retaliated against him for reporting or complaining about Defendant multiple types of allegedly unlawful conduct, including (1) discrimination based on race, national -Frank, (Am. Compl. ¶ 59, ECF No.

135); (3) Medicare and Medicaid claims fraud, (id id.); (5) violations of various health care laws, including HIPAA, (see, e.g., id id. ¶ 140). First, each whistleblower claim fails because Plaintiff has not alleged facts that give rise to a plausible inference that Defendant took any adverse employment action against Plaintiff because of the alleged whistleblowing. Plaintiff does not allege any facts that plausibly suggest that Defendant knew about any reports Plaintiff claims to have made to state or federal agencies at any time before his employment was terminated. Plaintiff knew of any such reports Defendant and learned about his alleged whistleblowing activity. Id. ¶ 88. 5

In ruling on this motion, the Court need not check its common sense at the door. Rather, etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the . . . court to draw on its judicial experience an Iqbal, 556 U.S. at 679; see also Lancaster v. City of Pleasanton, No. C 12-05267, 2013 WL 5182949, at *5 (N.D. Cal. Sept. 13, 2013) (finding that plaintiff failed to state a claim sufficient to permit an - Defendant hacked into his email is conjecture, and Plaintiff does not

alleged facts supporting conclusive nature, are not entitled to the assumption of truth, and they do

not give rise to a plausible inference that any whistleblower protection provision was violated in this case. See Iqbal begin by identifying pleadings that, because they are no more than conclusions, are not entitled to

Nor do the other allegations in the Amended Complaint about complaints Plaintiff asserts he made during the course of his employment support any whistleblower retaliation claims. Plaintiff alleges, for the first time, that he reported what he believed were violations of law to Defendant rts in 2014 the year after Plaintiff

5 on claims, such as those alleged in the Sixth Claim. Those claims (such as Counts Five and Six) are unsupported by any facts suggesting that Defendant employment. But even if the Court considers allegations in the Amended Complaint that are not expressly incorporated into a particular claim or count, none of those allegations is sufficient to state a claim under the applicable pleading standards

for the reasons discussed herein. was fired. 6

However, Plaintiff then alleges, without supporting facts, that he was fired in 2013 when Defendant found out about his reports to the Chief Medical Officer. See Am. Compl. ¶ 99, ECF No. 135. Plaintiff fails to plausibly allege facts giving rise to retaliation claims by alleging that he was fired one year prior to Defendant finding out about reporting actions, which actions Plaintiff claims are the source of his retaliatory termination. Plaintiff also alleges that on October 3, 2012 about one year before his termination he Id. See also id. ¶ 114. First, Plaintiff does not allege what law Plaintiff believes Defendant

violated when it purportedly cr And, the Court finds that the one- year time-lag between Plaintiffs alleged complaint and his termination does not, on its own plausibly allege that his termination was retaliatory. See Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (timing alone was insufficient to support a claim of retaliation when almost two years had passed between the protected activity and the adverse employment action); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir inferred from timing alone where an adverse employment action follows on the heels of protected

For these reasons, each retaliation claim (Fifth, Sixth, Ninth, Tenth, and Twelfth Claims for Relief) fails and should be dismissed. Each claim fails for additional reasons, as further explained below.

6 pleading. Even if the exhibits are considered, neither contains any information that suggests that Plaintiff complained to Defendant about any alleged unlawful activity. Rather, contention that Defendant was aware of any alleged whistleblowing is because he suspects that Defendant into his private email account after he was placed on Administrative Leave. 1. Fifth and Sixth Claims for Relief: Plaintiff Has Not Stated, and as a Matter of Law Cannot State, a Claim for Retaliation Under 18 U.S.C. § 1514A. Fifth Claim, and what the Court construes as Count One of Sixth Claim, appear to state the same claim a violation of the whistleblower protection provision of SOX, 18 U.S.C. § 1514A. Both claims should be dismissed for numerous reasons. Section 1514A provides, in relevant part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . . 18 U.S.C. § 1514A(a)(1). First, Plaintiff has not alleged any facts suggesting that Defendant required to file a report under section 15(d) of that Act. Plaintiff instead acknowledges that, during

See Am. Compl. ¶ 63, ECF No. 135. For that reason alone, Plaintiff cannot assert a claim under Section 1514A and the Fifth and Sixth Claims for Relief should be dismissed. Plaintiff also asserts that Defendant subject to Sarbanes Oxley under Lawson v. FMR, LLC. Id. ¶ 64. The Court construes this as a

the Lawson v. FMR LLC, 571 U.S. 429 (2014). The Court need not accept legal conclusions as true, but in any event, as Defendant argues, Plaintiff misconstrues Lawson. Mot. Dismiss 24, ECF No. 37. In Lawson, the Court held that employees of privately held contractors and subcontractors who perform work for a public company are protected under Section 1514A. Lawson, 571 U.S. at 433, 459. But the state is not a public company. Because Plaintiff is not an employee of a contractor working for a public company subject to SOX, Plaintiff can not avail himself of Section 1514A protections. Defendant . Plaintiff has not alleged facts supporting that Defendant is covered by SOX, but even if he had, Plaintiff cannot maintain a whistleblower retaliation claim under SOX because he has failed to allege that he has exhausted his administrative remedies. 18 U.S.C. § 1514A(b)(1) provides that:

[a] person who alleges discharge or other discrimination by any person in violation of [§ 1514A(a)] may seek relief . . . by (A) filing a complaint with the Secretary of Labor; or (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

that he or she has been retaliated against by a covered person in violation of [SOX] may file . . . a be filed with a DOL complainant thereafter may seek a hearing before an Administrative Law J ; then

See id. §§ 1980.106, 1980.110, 1980.112(a). A complainant may bring an action for de novo

ry has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of Id. § 1980.114(a). Accordingly, Plaintiff was required to exhaust his administrative remedies before bringing a judicial action for alleged violations of section 1514A. See, e.g., Wallace v. Tesoro Corp., 796 plaintiff failed to allege tha Amended Complaint now contains allegations about telephone calls he purportedly made to a

number of different state and federal agencies, or complaints he thought he was making to various agencies, none of his allegations establishes that he followed the filing procedures required to assert a whistleblower retaliation claim under section 1514A and its implementing regulations. Plaintiff did not comply with those requirements. Plaintiff filed a complaint with the DOL asserting violations of section 1514A (and 29 U.S.C. § 218c) on April 4, 2016, 920 days after the termination of his employment, or 740 days after the expiration of his 180-day filing window. The ALJ summarily dismi review of that order with the ARB, which remains pending. Req. Judicial Notice Ex. C, ECF No.

138.

Having failed to exhaust his administrative remedies, Plaintiff cannot maintain a claim in this action and the Sixth Claim for Relief, Count One. Both should be dismissed with prejudice because amendment would be futile. 2. Sixth Claim for Relief, Count Two: Plaintiff Has Not Stated a Claim for Retaliation in Violation of Title VII. color, rel -2(a)(1); Woods at Marylhurst, Inc., No. 05-437-HA, 2006 WL 1360946, at *1 (D. Or. May 16, 2006). The

anti-retaliation provision of Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a). An employer violates this provision if the adverse employment action occurs: (1) because an employee opposed what he or she reasonably perceived as discrimination proceeding, or hearing involving charges of discrimination under Title VII. See Learned v. City of

Bellevue, 860 F.2d 928, 932 (9th Cir. 1988); Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997).

Defendant retaliated against 42 U.S.C. § 2000e-3(a). The only violations of Title VII Plaintiff alleges in the Amended

Complaint relate to the so-called discrimination based on race, national origin, or religion. But as noted above, Plaintiff did not identify those bases of discrimination in his charge filed with the EEOC, and nothing in the Amended Complaint suggests that the EEOC considered or investigated any complaints that Defendant retaliated against Plaintiff because he resisted or opposed any a

charge with the EEOC. Additionally, Plaintiff does not allege any facts to support his claim. He vaguely asserts circumstances relating to such resistance or opposition, nor any facts that plausibly suggest that

Defendant recitals insufficient to withstand a motion to dismiss. See Iqbal, 556 U.S. at 678; Hydrick v. Hunter, 669 establish plausible claims against defendants); , 707 F.3d 1114, 1121-22 (9th Cir. 2013). Count Two should be dismissed with prejudice because amendment would be futile. 3. Sixth Claim for Relief, Count Three: Plaintiff Has Not Stated a Claim for Retaliation Under the ADEA. Count Three of the Sixth Claim alleges that Defendant retaliated against Plaintiff in 72, 73, ECF No. 135.

29 U.S.C. § 623(d) makes it unlawful for an employer to discriminate against an employee a claim for retaliation under the ADEA, Plaintiff must prove that: (1) he engaged in conduct

protected under the ADEA; (2) he suffered an adverse employment decision; and (3) there was a causal link between his activity and the adverse employment decision. See Rucker v. Vilsack, No. 08-6150-HO, 2010 WL 1541670, at *3 (D. Or. Apr. 16, 2010) (citing Poland v. Chertoff, 494 F.3d 1174, 1179-80 (9th Cir. 2007)). Here, the activity in which Plaintiff contends he engaged is not protected under the ADEA, which pertains to discrimination in the employment context. See 29 U.S.C. ADEA retaliation claim does not allege that he complained about or resisted any age

discrimination against any Defendant employees. Rather, Plaintiff alleges that Defendant created ning factor in granting referrals, treatment, Am. Compl. ¶ 71, ECF No. 135. In other words, Plaintiff complains that he objected to Defendant alleged inclusion of age in reports used to make health care decisions for persons under health care

plans offered by Defendant. Such allegations cannot form the basis of a retaliation claim under the ADEA. See EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013 (9th C some practice by the employer that is allegedly unlawful. . . . [O]pposition clause protection will

be accorded whenever the opposition is based engaged in an unlawful employment Yap v. Slater, 165

tions must oppose an employment practice Moreover, Plaintiff does not allege facts suggesting a causal link between his opposition to alleged

age-related discrimination and any adverse employment action taken by Defendant. ADEA claim should be dismissed with prejudice because amendment would be futile. 4. regon Revised Statute 659A.030(1)(f) Fails. In addition to citing federal statutes, Plaintiff also alleges in that Defendant violated Oregon Revised Statute 659A.030(1)(f) by retaliating against him for opposing the alleged discrimination based on age, religion, and race/national origin. Oregon Revised Statute 659A.030(1)(f) makes it against any other person because that other person has opposed any unlawful practice, or because

that other person has filed a complaint, testified or assisted in any proceeding under this chapter As with discrimination claims, the substantive analysis for retaliation claims in violation of Oregon Revised Statute 659A.030(1)(f) and 42 U.S.C. § 2000e-3 under Title VII is substantially similar. See Warzecha v. Kemper Sports Mgmt., Inc., No. 6:11-CV-06221-SI, 2012 WL 2396888, ht

Plaintiff has not asserted a claim in this action for an alleged violation of Oregon Revised Statute 659A.030(1)(f) until now. Oregon law gives a plaintiff one year to file a lawsuit or complaint with BOLI for alleged unlawful employment discrimination. Or. Rev. Stat. 659A.875(1). In of his Amended Complaint, Plaintiff vaguely alleges that he filed administrative complaints with BOLI and the EEOC and identified Oregon Revised Statute 659A.030(1)(f) as a statute cited in those complaints. He attaches the EEOC Notice of Charge of Discrimination but not the BOLI complaints to the motion. Plaintiff filed his first verified written complaint with BOLI on or about January 13, 2014 (BOLI Case

DPEMDP140113- Oregon Revised Statute 659A.030(1)(f) as a statute on which his complaint was based. Req. Judicial Notice Ex. D, ECF No. 138. Although he cited the statute, the verified statement that accompanied the complaint does not contain any allegations that identifies any alleged discrimination based on race, national origin or religion (or retaliation for opposition to any such discrimination) as circumstances giving rise to such discrimination or retaliation. 7

Id. Plaintiff also did not identify religion, race, or national origin as circumstances giving rise to any alleged

7 See Req. Judicial Notice Ex. G, ECF No. 138. This letter is dated a few weeks after Plaintiff voluntarily dismissed the 2014 employment case. See Req. Judicial Notice Ex. A, ECF No. 138. discrimination in the EEOC Notice of Charge of Discrimination, dated January 23, 2014 (and that complaint also does not reference ORS 659A.030). See Am. Compl., Ex. 2, ECF No. 135; see also discussion supra Section II.A.1. Plaintiff then filed a second verified written BOLI complaint on August 25, 2014 (BOLI Case # STEMWB140825- Oregon Revised Statute 659A.030 or include any allegations of purported discrimination based on

race, religion or national origin or retaliation for opposition to such alleged discrimination. See Req. Judicial Notice Ex. E, ECF No. 138. Because Plaintiff did not identify race, religion or national origin discrimination as being at issue in any BOLI or EEOC complaint filed within one year of the termination of his employment or any other alleged adverse employment action by Defendant, and because this claim was not filed in this lawsuit until now more than 4 years after his termination Plaintiff is precluded from bringing any action pursuant to Oregon Revised Statute 659A.030 based on alleged retaliation for opposition to any such purported discrimination. Even if not time-barred, Count Four also fails because Plaintiff has not alleged sufficient

factual allegations regarding the circumstances of such opposition that could give rise to a plausible inference that retaliation occurred. Plaintiff has not alleged facts regarding to whom he complained, what specific practices he opposed, whether those practices were employment- related, or any facts suggesting that any adverse employment action was taken against him because

standards. See Iqbal, 556 U.S. at 678; Hydrick, 669 F.3d at 941. Count Four should be dismissed with prejudice for failure to state a claim because amendment would be futile. 5. Sixth Claim for Relief, Counts Five and Six: Plaintiff Alleges No Facts That Plausibly Give Rise to a Reasonable Inference of Retaliation in Violation of Oregon Revised Statutes 659A.199 or 659A.230. Also for the first time in this action, Plaintiff alleges that Defendant violated Oregon Revised Statutes 659A.199 and f and opposed what he reasonably believed were violations of law, regulation, or rule including violations of HIPAA regulations, Am. Compl. ¶¶ 78, 79, ECF No. 135. 8 Oregon Revised Statute 659A.199 prohibits an employer from retaliating against an employee who reports potentially unlawful activity, and Oregon Revised Statute 659A.230

Plaintiff was required to file a lawsuit or complaint with BOLI alleging such claims within one year of the adverse employment action. See Or. Rev. Stat. 659A.875(1). Neither the First BOLI Complaint nor the EEOC Complaint references Oregon Revised Statute 659A.199 or 659A.230. See Req. Judicial Notice Ex. D, ECF No. 138; Am. Compl. Ex. A, ECF No. 135. The Second BOLI Complaint cites Oregon Revised Statute 659A.199, but not Oregon Revised Statute 659A.230. See Req. Judicial Notice Ex. E, ECF No. 138. Thus, Plaintiff is barred from bringing any claim pursuant to Oregon Revised Statute 659A.230 because he neither filed a claim based on that statute with BOLI or with this Court within one year of the alleged unlawful employment practice. Plaintiff is also barred from bringing a claim based on Oregon Revised Statute 659A.199. See Req.

8 Plaintiff has included no allegations indicating why he believes 42 U.S.C. § 1395dd (relating to treatment of emergency medical conditions) or Oregon Revised Statute 192.537 (relating to individual rights in genetic information) were violated. Thus there are no facts to support whether his belief that these statutes were violated is a reasonable belief. Judicial Notice Ex. F, ECF No. 138. Thus, Plaintiff was required to file a civil lawsuit on or before March 2, 2015. This lawsuit was not filed until June 4, 2015, and his Oregon Revised Statute 659A.199 claim was not asserted until now. Plaintiff did not timely file a claim for an alleged violation of Oregon Revised Statute 659A.199, and it should be dismissed with prejudice. Even if not time- discrimination and retaliation claims, Plaintiff must allege facts that give rise to a plausible

inference that Plaintiff engaged in protected activity and that there is a causal link between that protected activity and an adverse employment action. To establish causation, Plaintiff must show Huitt v. Optum Health Servs., 216 F. Supp. 3d 1179, 1190 (D. Or. 2016) (citation omitted).

As explained above, Plaintiff has not alleged facts that suggest that Defendant was aware ports of suspected unlawful activity, nor has he

employment or any other adverse employment action. See Breeden, 532 U.S. at 273 (no causation where there was activity at the time of the adverse employment action); see also discussion supra Section II.E.

Moreover, with respect to Oregon Revised Statute 659A.230, Plaintiff lists a number state and factual allegations about what that purported cooperation or contact entailed, what criminal activity

he claims to have reported, when such contacts were made, or whether Defendant was aware of it at the time his employment was terminated. Instead, Plaintiff merely recites the elements of the cause of action, which is insufficient to state a claim under Iqbal. This claim should be dismissed with prejudice because amendment would be futile. 6. Ninth Claim for Relief: Plaintiff Cannot State a Claim for Whistleblowing Under 5 U.S.C. § 552a.

violation of -104, ECF No. 135. It is unclear how any of the allegations contained within the Ninth

Claim for Relief relate to the Privacy Act, but in any event, the statute does not apply to Defendant. ernment information systems by regulating the collection, maintenance, use, and dissemination of personal information and prohibiting unnecessary and excessive exchange of such information within the Menchu v. U.S. D , 965 F. Supp. 2d 1238, 1243 (D. Or. 2013) (citing , 567 F.3d 408, 413 (9th Cir. 2009)). It provides a cause of action only against agencies of the U.S. government. See 5 U.S.C. § 552a(g)(1); 5 U.S.C. § 552(f)(1); see also 5 U.S.C. § 551(1). As explained by the Ninth

Unt v. Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1985) (citations omitted); see also Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122 (2d Cir. 2008) (third-party collection company that provided collection services for public and private clients, including federal a subject to civil suits under the Privacy Act). As Plaintiff alleges, Defendant is a private company. Am. Compl. ¶¶ 7, 63, ECF No. 135. nd no allegation in the Amended Complaint suggests otherwise. The Ninth Claim for Relief should be dismissed with prejudice because amendment would be futile. 7. Tenth Claim for Relief: Plaintiff Cannot State a Claim for Whistleblower Retaliation Under the ACA or Dodd-Frank. The Tenth Claim for Relief asserts a violation of the whistleblower protection provision of the Affordable Care Act , 29 U.S.C. § 218c, which Plaintiff previously asserted in his original complaint. However, Plaintiff in his Amended Complaint for the first time also adds claims under Dodd-Frank. Specifically, Plaintiff cites 15 U.S.C. § 78u-6, 12 U.S.C. § 5567, and certain implementing regulations, 17 C.F.R. §§ 240.21F-1 to 240.21F-17. Plaintiff cannot maintain a claim in this action under any of these statutes, and the Tenth Claim for Relief should be dismissed with prejudice. a. 29 U.S.C. § 218c 29 U.S.C. § 218c(a)(2) (part of the Fair Labor Standards Act) provides, in relevant part, that,

[n]o employer shall discharge . . . any employee . . . because the employee . . . provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title[.] ACA, Pub. L. No. 111-148, 124 Stat. 119. , 143 F.

Supp. 3d 1097, 1103-04 (W.D. Wash. 2015); Rosenfield v. GlobalTranz Enters., Inc., No. CV 11-02327-PHX-NVW, 2012 WL 2572984, at *1-4 (D. Ariz. July 2, 2012); see also ACA § 1558. discharged or otherwise discriminated against by any employer in violation of this section may

seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and § 2087(b), in turn, states, in relevant part:

(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. . . . (2)(A) . . . the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person

alleged to have committed a violation of subsection

. . . . (4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. are very similar to those that apply to such claims under SOX. See discussion supra Section II.E.1.

that he or she has been retaliated against in violation of [29 U.S.C. § 218c] . . . may file . . . a complaint alleging such DOL OSHA office. See 29 C.F.R. § 1984.103(a), (d). A complainant thereafter may seek a hearing before an ALJ; then review of the of Appeals for the appropriate circuit. See 29 C.F.R. §§ 1984.106, 1984.110, 1984.112(a). A

complainant may bring an action for de novo review in the district court under two circumstances:

there has been no final decision of the Secretary; or (2) [i]f there has been no final decision of the C.F.R. § 1984.114(a)(1), (2). Accordingly, Section 218c requires a plaintiff to exhaust administrative remedies before filing a civil action in court. A plaintiff who has failed to exhaust his or her administrative remedies cannot maintain an action in the district court. See, e.g., Richter v. Design at Work, LLC, No. 14- CV-650, 2014 WL 3014972, at *4 (E.D.N.Y. July 3, 2014) (plaintiff failed to state a claim under section 218c where she did not allege that she exhausted her administrative remedies as required by the statute); Wilson v. E.I. DuPont de Nemours & Co., No. 15-967-LPS, 2017 WL 960395, at *3- failed to exhaust administrative remedies and therefore failed to state a claim upon which relief

may be granted). Just as Plaintiff failed to exhaust his administrative remedies with respect to his SOX whistleblower protection claim, Plaintiff also has failed to exhaust his administrative remedies with respect to his claim under the ACA. The Court takes judicial notice of the fact that Plaintiff has filed a complaint with the DOL, but because he waited until April 4, 2016 to do so or 920 days after the termination of his employment, or 740 days after the expiration of his 180-day filing window his complaint was summarily dismissed by the ALJ. Plaintiff has appealed that decision (which also relates to the SOX retaliation claim) to the ARB, and that proceeding should be allowed to run its course. None of the circumstances giving rise to de novo review in this Court is claims. Each claim should be dismissed with prejudice.

b. 15 U.S.C. § 78u-6 Another new claim the Amended Complaint asserts is for retaliation under 15 U.S.C. § 78u- about securities law violations. That statute makes it unlawful for an emplo demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done in any investigation or judicial or administrative action of the [SEC] based upon or related to such

subject to the jurisdiction of the SEC. See 15 U.S.C. § 78u-6(h)(1)(A).

a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by Id. § 78u-6(a)(6); see also 17 C.F.R. § 240.21F-2. Th the Securities Act of 1933, the Securities Exchange Act of 1934, SOX, the Trust Indenture Act of

1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Investor Protection Act of 1970. See 15 U.S.C. § 78c(47). The sole allegations in the Amended Complaint that could relate to this claim are in are incorporated by reference in the Tenth Claim, but the Tenth Claim contains no other factual

allegations that could relate to alleged whistleblower retaliation for providing information about

a describes insider trading and financial irregularities by [Defendant], including irregular accounting practices,

including the keeping of alternative books and records that were unlawfully filed with federal , ECF No. 135. Plaintiff alleges no other details or information about what securities laws purportedly were violated, what information he allegedly provided to rules or regulation, or whether Defendant knew about such reports before it terminated his

employment. with the SEC, paragraph 60 implies that it was on September 26, 2013, while Plaintiff was already

was on administrative leave and the day before he was terminated. Considering these allegations

employment had anything to do with any purported discussions Plaintiff had with the SEC. Finally, any claim under 15 U.S.C. § 78u-6 is time-barred. A cause of action under the (of action are

known or reasonably should have been known by the employee alleging a violation of subparagraph § 78u-6(h)(1)(B)(iii)(I)(aa), (bb). 15 U.S.C. § 78u- 6(h)(1)(B)(iii)(I)(bb) has been held to constitute a statute of limitations, which bars a plaintiff from filing suit more than three years after the cause of action accrues. See Igwe v. City of Miami, No.: 1:15-cv-21603, 2016 WL 7671370, at *4 (S.D. Fla. Sept. 29, 2016). As noted above, the Amended Complaint contains no factual allegations regarding whether, or when, Defendant However, Plaintiff alleges that he attempted to file whistleblower retaliation complaints, including under Dodd-Frank, on March 21, 2014. See , ECF No. 135. As complied with the administrative requirements for asserting claims under the whistleblower protection provisions of SOX or the ACA. Further, the ALJ also determined that Plaintiff was not entitled to equitable tolling of his ACA or SOX retaliation claims because he was represented by counsel throughout the relevant time period following his termination. See Req. Judicial Notice Ex. C, 16-20, ECF No. 138; see also Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).

have known of the claim he now asserts under 15 U.S.C. § 78u-6 on or before March 21, 2014. Plaintiff waited until May 12, 2018 more than four years to assert his claim. It is time-barred and should be dismissed with prejudice. c. 12 U.S.C. § 5567 Plaintiff asserts another new claim in the Tenth Claim for Relief this time, for alleged retaliation under section 1057 of Dodd-Frank, codified at 12 U.S.C. § 5567. This statute creates

for engaging in certain conduct, including, among other things, reporting information to an employer, the

governmental authority that the employee reasonably believes to be a violation of law subject to CFPB. See 12 U.S.C. § 5567(a); see also Calderone v. Sonic Houston JLR, L.P., 879 F.3d 577, 580 (5th Cir. 2018) (Section 5567(a) preclude

financial-related consumer protection laws, such as the Consumer Leasing Act of 1976, 15 U.S.C.

§ 1667, et seq., the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., and the Truth in Lending Act, 15 U.S.C. § 1601, et seq. covered person in connection with the offering or provision by such covered person of a consumer

al

products or services offered or provided for use by consumers for personal, family, or household or provision of a consumer financial product or service.

The Amended Complaint contains no allegations that suggest that Defendant which Plaintiff alleges offered various health insurance plans, (see Am. Compl. ¶¶ 108-09, ECF No. 135) allegations suggesting that Plaintiff ever complained about or reported any purported violations of

any laws subject to the Defendant or the government or law enforcement authority. Finally, there are no allegations suggesting that Plaintiff a former Data Warehouse manager lleged any facts suggesting that section 5567 applies to Defendant, and in fact, it does not. Moreover, even if 12 U.S.C. § 5567 applies, it too includes an administrative exhaustion requirement that Plaintiff has not satisfied. Similar to the procedures that apply to claims under the SOX and ACA whistleblower protection provisions, Section 5567(c)(1) also requires a complainant to file a complaint with the Secretary of Labor no later than 180 days after the date on which the alleged violation occurs. The Amended Complaint contains no allegations that Plaintiff ever filed a complaint for an alleged violation of 12 U.S.C. § 5567 with the DOL in a manner that complies with the statute and implementing regulations. This jurisdictional requirement is not satis refused, to dually or cross-file his whistleblower retaliation complaints on or about March 21,

2014. See , ECF No. 135. violation of 12 U.S.C. § 5567 should be dismissed with prejudice because

amendment would be

futile. 8. Twelfth Claim for Relief: Plaintiff Fails to State a Claim for Retaliation Under the FCA. In his Twelfth Claim for Relief, Plaintiff asserts that Defendant retaliated against him in violation of the False Claims Act, 31 U.S.C. § 3730(h), after discovering that he was reporting purportedly fraudulent Medicaid and Medicare billing activities to various state and federal agencies. Am. Compl. ¶¶ 139-51, ECF No. 135 dem the plaintiff engaged in a protected activity; and (3) the employer discriminated against the plaintiff

United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 907 (9th Cir. 2017) (ellipsis in original) (quoting Mendiondo v. Centinela Hosp. Med. Ctr., 521 sufficient facts in support of the second element of the claim because it contains no support for the

allegation that Defendant oyer United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996) (citing Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 952 (5th Cir. 1994)). retaliatory discharge under the FCA, plaintiff has the burden of pleading facts which would demonstrate that defendants had been put on notice that plaintiff was either taking action in furtherance of a private qui tam act Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 567 (6th Cir. 2003) (quoting United States ex rel.

Ramseyer v. Century Healthcare Corp., appeals have held that the knowledge prong of § 3730 liability requires the employee to put his

employer on notice Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 188 (3d Cir. 2001) (emphasis added; citation omitted); see also Hopper, 91 F.3d at 1269; United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 739 (D.C. Cir. 1998); Childree v. UAP/GA AG CHEM, Inc., 92 F.3d 1140, 1146 (11th Cir. 1996); Neal v. Honeywell Inc., 33 F.3d 860, 864 (7th Cir. 1994), abrogated on other grounds by Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409 (2005). determined, discovered that plaintiff had reported that [sic] fraud, medical redlining, and HIPAA

, ECF No. 135. While a plaintiff is required to sufficiently allege that he put a defendant on notice of his intent to file a FCA claim in order to show the defendant retaliated against him for that act, Plaintiff concedes that he does not know when Defendant purportedly learned of his alleged activities. As discussed above, Plaintiff Defendant learned of these activities by hacking into his private email Id. ¶ 88. Unlike valid claims in other cases in which plaintiffs directly notified employers of fraudulent activity, Plaintiff asks the Court to entertain a speculative theory that Defendant learned of his intentions and activities through hack email. Because he alleges no facts in support of these assumptions, his FCA retaliation claim fails and this claim should be dismissed with prejudice. F. Seventh Claim for Relief Discrimination. claim. (Id. ¶¶ 83- employment practice for

an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures

To establish a prima facie discriminated against in the tenure, terms or conditions of employment; and (3) that the

employer discriminated against the plaintiff in the tenure or terms of employment

Williams v. Freightliner, LLC, 196 Or. App. 83, 90, 100 P.3d 1117 (2004) (quoting Hardie v. Legacy Health Sys., 167 Or. App. 425, 433, 6 P.3d 531 (2000)). Plaintiff fails to allege facts sufficient to support any of the three required elements. First, Plaintiff alleges no facts rega to allege what the injuries were or how, when, and to whom he reported the alleged injuries. Am.

Compl. ¶¶ 84-85, ECF No. 135. In his BOLI charge filed on January 13, 2014, Plaintiff in fact . Judicial Notice Ex. D, 8, ECF No. 138. Second, Plaintiff alleges no facts regarding Defendant requests, such as how and when Defendant responded, who communicated the response, or

whether any justification was given for the alleged rejection. Finally, Plaintiff alleges no facts that would support the conclusory statement that he was that would indicate proximity in time between his alleged requests and his termination, nor does

he provide any other support for the contention that his termination was due to a request for

with prejudice. G. Eighth Claim for Relief: Plaintiff Fails to State a Claim for Unlawful Search of Private Email. cloud accounts to read

correspondence with various state and federal agencies. Am. Compl. ¶ 88, ECF No. 135. This claim fails because Plaintiff fails to allege facts sufficient to state a claim, and his claim is not plausible. The CFAA is primarily a criminal statute that prohibits unauthorized access to computers used in government or interstate commerce. In addition to criminal penalties, it grants a private atute. 18 U.S.C. § 1030(g). A civil action for monetary damages, however, may only be brought if the damages total at least $5,000. Id.

required elements. In fact, it is not clear which provision of the CFAA Plaintiff alleges was violated. The most likely candidate is section 1030(a)(2)(C), which prohibits intentionally obtaining information from a computer used in interstate commerce either without authorization or by exceeding authorized access. See also id. under this section, Plaintiff must allege that Defendant:

(1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that [it] (3) thereby obtained information (4) from any protected computer (if the conduct involved an interstate or foreign communication), and that (5) there was loss to one or more persons during any

one- year period aggregating at least $5,000 in value. LVRC Holdings LLC v. Brekka, 581 F.3 Complaint fails to properly allege any of these elements. First, Plaintiff does not allege which computer Defendant accessed. He asserts that Defendant logged into no allegation about which computer was used. If it was not a computer used in interstate or foreign communication, it is not

Second, Plaintiff does not allege that Defendant exceeded its authorization in accessing the computer. He implies that Defendant did not have authority to access his email and cloud accounts, but the statute protects access to computers, not web-based services. In Owen v. Cigna, the only court to consid puters,

not unauthorized access to web- see also Cenveo, Inc. v. Rao, 659 F. Supp. 2d 312, 317 (D. Conn. 2009) (citing 18 U.S.C. § 1030(e)(6)) (dismissing CFAA claim because the plaintiff failed to allege that the confidential and proprietary information was in the computer). Third, Plaintiff has not alleged a loss of at least $5,000, which is required in order to f such damages fails to quantify those damages. Am. Compl. ¶ 90, ECF No. 135. Even if Plaintiff had alleged an amount higher than $5,000, his claim would still fail because his purported damages arise out of his termination

to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption solely for lost wages and Id. To the extent Plaintiff alleges lost wages or increased medical expenses, those losses

arose from his termination, which is distinct from the alleged intrusion into his email. In Nexans Wires S.A. v. Sark-USA, Inc., the Southern District of New York held that use of information gained through unauthorized access did not constitut D.N.Y. 2004) (brackets in

original) (quoting Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 252 n.12 (S.D.N.Y. 2000), , 356 F.3d 393 (2d Cir. 2004)), use of the information, rather than a loss of business because of

computer impairment, was too far removed from computer damage to count toward the Id. Defendant terminated him because of information it found in his private email, any losses resulting from the

Even if Plaintiff had pleaded all of the required elements, his claim would still fail because it is not plausible on its face. See Chavez, 683 F.3d at 1108-09 (citing Iqbal, 556 U.S. at 678-79) (courts use common sense to discount implausible claims in order to protect from needless implausible because he provides no explanation for how Defendant Defendant Am. Compl. ¶ 88, ECF No. 135. This type of pure speculation, however, cannot form the basis of a claim for relief. See Dahlia as implausible, allegations that are too speculative to war Absent an allegation of a reasonable basis for the belief that Defendant email, Eighth Claim should be dismissed with prejudice.

H. Eleventh Claim for Relief: Plaintiff Fails to State a Claim for Defamation. regon Revised Statute 135.733.

Am. Compl. ¶¶ 128-38, ECF No. 135. This claim fails for the following reasons: (1) Plaintiff fails to allege sufficient facts to state a claim for relief; (2) the defamation claim is barred by the statute of limitations; and (3) the referenced statutes are criminal provisions that do not provide a private right of action. Neumann v.

Liles, 358 Or. 706, 711, 369 P.3d 1117 (2016) (citing Wallulis v. Dymowski, 323 Or. 337, 342-43, 918 P.2d 755 (1996)). As an initial matter, Plaintiff fails to allege basic facts related to the

leve Harris v. City of Seattle, 315 F. Supp. 2d 1112, 1123-24 (W.D. Wash. 2004)

(quoting Flowers v. Carville, 310 F.3d 1118, 1130-31 (9th Cir. 2002)), (9th Cir. 2005). Here, Plaintiff uses general descriptions and conclusory language, alleging that

but fails to allege the content of the purported statements. Am. Compl. ¶¶ 129-30, 136, ECF No. 135. As an initial matter, it is not enough to allege that a statement is false because, to be actionable, a statement must be both false and defamatory. Reesman v. Highfill, 327 Or 597, 603, who made the statements, what was said, or when, where, or to whom they were made. 9

Without this basic information, these allegations cannot support a claim for defamation. 10

9 Plaintiff , ECF No. 135) cannot form the basis of a defamation claim because such statements are absolutely privileged. See Allen v. Nw. Permanente, P.C., No. 3:12-cv-0402-ST, 2013 WL 865967, at *10 (D. Or. Jan. 2, 2013) (recognizing that it is - (quoting DeLong v. Yu Enters., Inc., 334 Or. 166, 171, 47 P.3d 8 (2002))); deParrie v. Hanzo, No. CIV. 99-987-HA, 2000 WL 900485, at *9 (D. Or. Mar. 6, 2000) (defendant was entitled to dismissal of defamation claim because she Troutman v. Erlandson, 286 Or. 3, 7, 593 P.2d 793 (1979); Wallulis, 323 Or. at 347-48)). 10 See, e.g., White v. Hansen, No. C 05-784 SBA, 2005 WL 1806367, at *9 (N.D. Cal. July 28, 2005) (dismissing slander claim for failure to identify specific statements or indicate to whom statements were made); Ahmed v. Gelfand, 160 F. Supp. 2d 408, 416 (E.D.N.Y. 2001) (defamation cla Celli v. Shoell, famatory statements Tiernan v. Fujitsu Imaging Sys. of Am., Inc., No. 88 C 7445, 1989 WL 91879 (N.D. Ill. Aug. 9, 1989) (dismissing slander claim because speaker was not identified); Weeks v. Distinctive Appliance Corp., No. 84 C 9716, 1985 WL 3536 (N.D. Ill. Oct. 24, 1985) (defamation claim failed where plaintiff failed to identify when, where, or to whom statements were made or the substance of the defamatory statements); 497 F. The only allegation that comes close to providing sufficient Am. Compl. ¶ 133, ECF No. 135

specifically identify who made the statements, when they were made and to whom they were PAI Corp. v. Integrated Sci. Sols., Inc., No. C-06-5349 JSW(JCS), 2007 WL 1229329, at *9 (N.D. Cal. Apr. 25, 2007). The fai Id. Even if Plaintiff had alleged sufficient facts to support his claim, they would

nonetheless be barred by the statute of limitations. A defamation claim is subject to a one-year statute of limitations, which begins to run on the date of the publication of the false or defamatory statement. ORS 12.120(2); Allen v. Nw. Permanente, P.C., No. 3:12-cv-0402-ST, 2013 WL 865967, at *4 (D. Or. Jan. 2, 2013); Kraemer v. Harding, 159 Or. App. 90, 103, 976 P.2d 1160 (1999). Though Plaintiff does not provide dates for any of the allegedly defamatory statements, they are all alleged in conjunction with his employment at Defendant, which was terminated on September 27, 2013. Am. Compl. ¶ 9, ECF No. 135. Plaintiff therefore had until September 27, 2014, at the latest, to bring his defamation claims, but he did not file this action until June 4, 2015. Therefore, any claims based on statements that occurred at or near the time he was employed at Defendant are time- barred. Finally, Plaintiff cites two statutes in support of his defamation claim, but both are criminal statutes that do not provide a private right of action. Plaintiff cites to Oregon Revised Statute Oregon Revised Statute State v. Hill, 277 Or. App. 751, 765, 373 P.3d 162, rev. denied, 360 Or. 568 (2016). There is no basis for a private litigant to bring a civil claim under this statute. Likewise, while Section 1512(c) of SOX makes it a crime to destroy or alter a or availability for use in an official proceeding, 18 U.S.C. § 1512(c), the statute does not provide a private right of action. Shahin v. Darling, 606 F. Supp. 2d 525, 538 (D. Del. 2009) (citing Gipson v. Callahan, 18 F. Supp. 2d 662, 668 (W.D. Tex. 1997)), Eleventh Claim should be dismissed with prejudice because amendment would be futile.

RECOMMENDATION For the reasons discussed above, this Cou dismissed with prejudice. The Court recommends that specific claims be dismissed with prejudice

because amendment would be futile. 11

In addition, the Court recommends that all remaining claims be dismissed with prejudice because Plaintiff has had ample time and opportunity to move the Court for leave to amend his complaint after filing his Amended Complaint May 18, 2018. Since filing the Amended Complaint, Plaintiff has filed hundreds of pages of documents through 32 separate filings. Plaintiff has had five attorneys during the nearly four years this case has been litigated. Further delay would unduly prejudice Defendant. For these reasons, the Court recommends that all of remaining claims also be dismissed with prejudice. This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of parties shall have fourteen (14) days from the date of service of a copy of this recommendation

11 The following claims should be dismissed with prejudice: Claim One, Claim 3 Count 1 and Count 3, Claim Four, Claim 5, Claim 6, Claim 9, Claim 10, and Claim 11. within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections

right to de novo consideration of the to appellate review of the findings of fact in an order or judgment entered pursuant to this

recommendation.

DATED this 25th day of March 2019.

s/ Mustafa T. Kasubhai MUSTAFA T. KASUBHAI United States Magistrate Judge