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DISTRICT COURT OF GUAM

GABRIEL LAU,
Plaintiff,

vs.

GUAM DEPARTMENT OF EDUCATION,
Defendant.

Civil Case No. 10-00035

**OPINION AND ORDER
RE: DEFENDANT’S MOTION TO
DISMISS SUMMONS AND
AMENDED COMPLAINT AND
ACTION UNDER FED. R. CIV. P. 9,
19, 12(b)(1), 12(b)(2), 12(b)(6),
12(b)(7), 12(h)(3), 15(a), 17(b)(3), 19
and 41(b)**

This matter comes before the court on motions to dismiss filed by the Defendant Guam Department of Education through the Office of the Attorney General on January 21, 2011 and March 16, 2011. *See* Docket Nos. 5 and 22. The Plaintiff Gabriel Lau filed oppositions to both motions, on February 2, 2011 and April 6, 2011. *See* Docket Nos. 8 and 26. After reviewing the record, the parties’ submissions, as well as relevant statutes and authority, the court hereby **GRANTS** the motions to dismiss, and additionally **GRANTS** the Plaintiff leave of court to file a second amended complaint pursuant to Federal Civil Procedure Rule 15(a)(2).

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff Gabriel Lau (“the Plaintiff”) was employed at the Defendant Guam Department of Education (“DOE”) as a teacher at various public schools on Guam. *See* Docket No. 1, Complaint and Exh. A (letter to Mr. Riera). The Plaintiff obtained his teacher’s certification in August 2008 and submitted to several interviews at public schools. *See* Docket

1 No. 1, Exh. A (letter to Mr. Riera). He was recommended to be hired by the principal of Merizo
2 Elementary School, and the paperwork for the Plaintiff's employment was apparently awaiting
3 the approval of the Superintendent of the Department of Education. *See* Docket No. 1. He
4 followed up on his application at the DOE main office, and apparently was told by the DOE
5 Equal Employment Opportunity Officer that he was not hired because of incidents that occurred
6 during his former employment at George Washington High School and D.L. Perez Elementary
7 School. *See* Docket No. 1; Exh. A. and Exh. 5 (August 23, 2009 letter to Superintendent).

8 On September 21, 2009, the Plaintiff filed a Charge of Discrimination with the EEOC,
9 alleging that "the Superintendent demonstrated retaliation against me by preventing me from
10 being hired after being interviewed and recommended" Docket No. 1, Exh. A (letter to Mr.
11 Riera). The EEOC stated that "the evidence revealed [DOE] retaliated against [the Plaintiff]
12 when it informed him in a letter that it would not make a decision on his application for
13 employment until after the EEOC completed its investigation." Docket No. 1, Exh. B (EEOC
14 Determination). On October 4, 2010, the EEOC advised the Plaintiff that conciliation with
15 DOE was not successful and that it would not be filing a suit in his case. Docket No. 1, Exh. D
16 (letter from Woodard).

17 The Plaintiff, proceeding *pro se*, filed a complaint on December 30, 2010. *See* Docket
18 No. 1. He requested and was granted indigent status on January 19, 2011. *See* Docket No. 3.

19 On January 20, 2011, DOE, through the Office of the Attorney General ("AG's Office")
20 filed a motion to dismiss ("the First Motion"), arguing *inter alia* dismissal is proper because of
21 ineffective service. Docket No. 5. The Plaintiff filed his opposition *pro se* on February 2, 2011.
22 Docket No. 8.

23 On February 15, 2011, the court ordered that the U.S. Marshal serve the summons and
24 complaint.¹ Docket No. 12. Also on February 15, 2011, the Plaintiff through counsel filed an
25 Amended Complaint. Docket No. 14. This Amended Complaint was served on the AG's Office
26 via e-service on February 14, 2011 and by personal service on February 25, 2011. *See* Docket
27 Nos. 15 and 16.

28 ¹ The Marshal served the complaint on March 9, 2011. Docket No. 17.

1 On March 16, 2011, DOE filed another motion to dismiss (“the Second Motion”),
2 arguing *inter alia* that the Plaintiff’s Amended Complaint was not timely filed. *See* Docket No.
3 22. The Plaintiff filed his opposition through counsel on April 6, 2011. *See* Docket No. 26.

4 **II. ANALYSIS**

5 Both motions to dismiss are discussed herein. In the First Motion, DOE attacks the
6 validity of the original summons and complaint (Docket No. 1), arguing primarily that the
7 Plaintiff did not properly serve DOE. Docket No. 5. DOE also argues that personal jurisdiction
8 is lacking, and that the complaint fails to state a claim. *See id.* The Plaintiff filed a *pro se*
9 opposition. *See* Docket No. 8.

10 In the Second Motion, DOE argues that the Amended Complaint (Docket No. 14) was
11 not timely filed in accordance with Federal Civil Procedure Rule 15. *See* Docket No. 22. DOE
12 also argues that subject matter jurisdiction is lacking, the Plaintiff lacks standing, and that the
13 Amended Complaint fails to state a claim. The Plaintiff, through counsel, refuted each ground
14 for dismissal raised by DOE. *See* Docket No. 26.

15 **A. The Original Summons and Complaint**

16 The court first addresses the arguments DOE raised in the First Motion, specifically, that
17 the Plaintiff did not effect proper service of the original summons and complaint. Docket No. 5.

18 A defendant in a suit must be served with a summons and copy of the complaint, and
19 “[t]he plaintiff is responsible for having the summons and complaint served within the time
20 allowed by Rule 4(m).” Fed. R. Civ. P. 4(c)(1). Service may be effected by “[a]ny person who
21 is at least 18 years old and not a party.” Fed. R. Civ. P. 4(c)(2).

22 It is undisputed that the Plaintiff, proceeding *pro se*, filed his initial complaint on
23 December 30, 2010. *See* Docket No. 1. He apparently personally delivered a copy of the
24 summons to an employee at the DOE Superintendent’s Office on January 3, 2011. *See* Docket
25 No. 6 (Declaration of Maria Roberto). He attempted to cure the defect in service by serving both
26 the summons and original complaint, but effected service himself. Because he is a party to the
27 suit, such attempted service by the Plaintiff is invalid. Thus, DOE correctly argues that
28 Plaintiff’s attempts at serving the original summons and complaint were insufficient.

1 **B. The Amended Complaint**

2 Nevertheless, the analysis does not end here; the court must next consider DOE's
3 arguments as to the Amended Complaint. In the Second Motion, DOE contends that the court
4 must dismiss the Amended Complaint filed by the Plaintiff on February 15, 2011. *See* Docket
5 No. 14.

6 Amended pleadings are governed by Federal Civil Procedure Rule 15(a), and prior to
7 2009, the rule stated:

8 A party may amend the party's pleading once as a matter of course at any
9 time before a responsive pleading is served, or, if the pleading is one to which no
10 responsive pleading is permitted and the action has not been placed upon the trial
11 calendar, the party may so amend it at any time within 20 days after it is served.

12 The Ninth Circuit stated this rule created an "absolute right to amend, which ended upon the
13 filing of a 'responsive pleading' (e.g., an answer) 'or the entry of final judgment following
14 dismissal of its action.'" *Rick-Mik Enters. Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 977 (9th
15 Cir. 2008) (quoting *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir.1984)).

16 In 2009, however, Rule 15(a)(1) was amended, and now states:

17 A party may amend its pleading once as a matter of course within:

- 18 (A) 21 days after serving it, or
19 (B) if the pleading is one to which a responsive pleading is required, 21
20 days after service of a responsive pleading or 21 days after service of a motion
21 under Rule 12(b), (e), or (f), whichever is earlier.

22 The change addresses situations, as in this case, where a defendant files a Rule 12 motion to
23 dismiss before filing an answer to the complaint.

24 DOE argues that under this new rule, the Plaintiff was not permitted to amend his
25 complaint "as a matter of course." The First Motion was filed on January 20, 2011, thus giving
26 the Plaintiff until February 11, 2011 (21 days after service of the First Motion) to amend his
27 complaint. *See* Fed. R. Civ. P. 6 (a)(1). It is undisputed that Plaintiff filed his Amended
28 Complaint on February 15, 2011, four days after the deadline set forth in Rule 15(a)(1)(B).
Docket No. 14. Therefore, the Plaintiff could not rely on Rule 15(a)(1)(B) as permitting him
leave to file an amended complaint "as a matter of course."

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1 **C. Leave to File an Amended Pleading**

2 The court recognizes, however, that a party may file amended pleadings “with the
3 opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Moreover, Rule
4 15 instructs that “[t]he court should freely give leave when justice so requires.” Fed. R. Civ. P.
5 15(a)(2). Earlier this month, the Ninth Circuit held that leave to amend under this rule
6 “generally shall be denied only upon showing of bad faith, undue delay, futility, or undue
7 prejudice to the opposing party.” *Chudacoff v. Univ. Med. Ctr. of S. Nevada*, Nos. 09–17558,
8 09–17652, 2011 WL 2276774, 6 (9th Cir. June 9, 2011); *see also Roth v. Garcia Marquez*, 942
9 F.2d 617, 628 (9th Cir. 1991) (“Four factors are commonly used to determine the propriety of a
10 motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party,
11 and futility of amendment.”).

12 It is undisputed that the Plaintiff did not seek leave of court before filing the Amended
13 Complaint. Without obtaining leave to amend, the Plaintiff’s Amended Complaint is a nullity.

14 However, the court adheres to the standard under Rule 15(a)(2) to “freely give leave” to a
15 party seeking to amend his pleading.² Furthermore, the court also applies the Ninth Circuit’s
16 four factors in evaluating leave to amend, and the court concludes that the Plaintiff should be
17 granted leave to file an amended complaint.

18 First, there is no allegation of bad faith or undue delay on the part of the Plaintiff in filing
19 the amended complaint. In fact, he stated on the record in his Opposition filed on February 2,
20 2011, that he was in the process of hiring an attorney. *See* Docket No. 8. Six days later, his
21 attorney entered an appearance in this case and filed the Amended Complaint a week later. *See*
22 Docket Nos. 10 and 14. The time it took for the Plaintiff to obtain counsel, and for counsel to
23 file the Amended Complaint, cannot be interpreted as evidence of bad faith or undue delay.
24 Second, allowing amendment of the original complaint would not be futile. The Plaintiff filed
25 his original complaint *pro se*. *See* Docket No. 1. Now, he has the benefit of legal counsel to
26 clarify his arguments as to potentially meritorious claims. Finally, allowing an amendment

27 ² Although not formally requested by motion, the court will construe the Plaintiff’s *pro se*
28 opposition to the First Motion as requesting leave of court to file an amended complaint.

1 would not create undue prejudice to DOE because the case is in the initial stages of litigation and
2 discovery. *See* Docket No. 24.

3 The plain words of Rule 15 instruct that the court should “freely give leave when justice
4 so requires.” Fed. R. Civ. P. 15(a)(2). This rule is designed “to facilitate decision on the merits,
5 rather than on the pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th
6 Cir. 1981). Granting leave for the Plaintiff to file his Amended Complaint conforms to the Ninth
7 Circuit’s desire to “facilitate decision on the merits.” *Id.*

8 Finally, the court is mindful that Ninth Circuit has held that “Rule 15’s policy of favoring
9 amendments to pleadings . . . is applied even more liberally to pro se litigants.” *Eldridge v.*
10 *Black*, 832 F.2d 1132, 1135 (9th Cir. 1987) (quotation marks and citation omitted).

11 In light of the foregoing, the court **GRANTS** the motions to dismiss filed by DOE
12 (Docket Nos. 5 and 22), but grants leave of court for the Plaintiff to file a second amended
13 complaint pursuant to Federal Civil Procedure Rule 15(a)(2). Such second amended complaint
14 shall be filed within seven (7) days of this Order.

15 **SO ORDERED.**



/s/ **Frances M. Tydingco-Gatewood**
Chief Judge
Dated: Jun 23, 2011