

FILED

AUG 21 2020

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE GOENS,

Plaintiff-Appellant,

v.

ADAMS & ASSOCIATES, INC.,

Defendant-Appellee.

No. 18-16750

D.C. No.

2:16-cv-00960-TLN-KJN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Argued and Submitted February 12, 2020
San Francisco, California

Before: RAWLINSON and CALLAHAN, Circuit Judges, and BOLTON,**
District Judge.

Maurice Goens (Goens) appeals the district court's order dismissing his
action brought under the Fair Employment and Housing Act (FEHA). We review
de novo a dismissal for failure to state a claim under Federal Rule of Civil

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Susan R. Bolton, United States District Judge for the
District of Arizona, sitting by designation.

Procedure 12(b)(6). *See Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1248 (9th Cir. 2019).

1. The district court did not apply a heightened pleading standard to evaluate Goens' claims. Rather, the district court applied binding precedent to determine whether Goens' claims were facially plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (stating that the facts must "permit the court to infer more than the mere possibility of misconduct" to survive a motion to dismiss); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (explaining that the pleader must provide "enough facts to state a claim for relief that is plausible on its face.")

2. The district court properly dismissed Goens' discrimination claims based on race, gender, and religion because Goens failed to sufficiently allege facts to state a plausible claim. To state a discrimination claim under the FEHA, a plaintiff must plausibly allege that he 1) "was a member of a protected class"; 2) "was performing competently"; 3) "suffered an adverse employment action"; and 4) "circumstances suggest a discriminatory motive." *Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 885 (2019) (citation and footnote reference omitted). Conclusory allegations that Adams terminated Goens because of his membership in a protected class do not suffice. *See Iqbal*, 556 U.S. at 678.

3. The district court correctly dismissed Goens' claim for wrongful termination, as a wrongful termination action is "limited to [] claims finding support in an important public policy based on a *statutory* or *constitutional* provision." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 336 (9th Cir. 2017) (applying California law) (citation omitted) (emphasis in the original). Absent an actionable discrimination claim, the wrongful termination claim must fail. *See Davis v. Farmers Ins. Exch.*, 245 Cal. App. 4th 1302, 1323 (2016), *as modified* ("[W]here a wrongful termination claim would not be cognizable under the provisions of FEHA, the conduct at issue cannot offend fundamental public policy. . . .").

4. The district court properly dismissed the FEHA retaliation claim, as Goens did not allege a statutorily cognizable protected activity. *See* Cal. Gov't Code § 12940(h) (prohibiting retaliation against a person who opposed a forbidden practice, filed a complaint, testified, or assisted in a proceeding under the FEHA); *see also Moore v. Regents of Univ. of California*, 248 Cal. App. 4th 216, 244 (2016) (listing the elements of a FEHA retaliation claim). Non-specific assertions of protected activities do not suffice. *See Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1046 (2005) (stating that "an employee's unarticulated belief that an

employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation”).

5. The district court properly dismissed Goens’ harassment claim, as Goens failed to state a plausible allegation that “the alleged harassment was so severe that it created a hostile work environment.” *Lawler v. Montblanc North America, LLC*, 704 F.3d 1235, 1244 (9th Cir. 2013); *see also* Cal Gov’t Code § 12940(j)(1). Personnel actions “such as hiring and firing . . . do not come within the meaning of harassment.” *Lawler*, 704 F.3d at 1244.

6. Absent an actionable claim of discrimination, Goens cannot maintain a claim for failure to prevent discrimination. *See Caldera v. Dep’t of Corr. & Rehab.*, 25 Cal. App. 5th 31, 43-44 (2018).

7. The district court properly dismissed the claim for intentional infliction of emotional distress, as Goens failed to plausibly allege that Adams engaged in “extreme and outrageous conduct.” *Sarver v. Chartier*, 813 F.3d 891, 907 (9th Cir. 2016). Hiring decisions do not fall within the class of conduct meeting this standard. *See Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 80 (1996).

8. Finally, the district court did not abuse its discretion in declining to *sua sponte* grant leave to amend, as Goens failed to remedy the deficiencies in his

complaint after the district court previously granted leave to amend. *See Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1116 (9th Cir. 2014) (explaining that “the district court’s discretion in denying amendment is particularly broad when it has previously given leave to amend”).

AFFIRMED.