Angel R. Sevilla (State Bar No. 239072)
Jessica C. Shafer (State Bar No. 297856)
Julianna Bramwell (State Bar No. 339794)
JACKSON LEWIS P.C.
50 California Street, 9th Floor
San Francisco, California 94111-4615
Telephone: (415) 394-9400
Facsimile: (415) 394-9401
E-mail: Angel.Sevilla@jacksonlewis.com
E-mail: Jessica.Shafer@jacksonlewis.com
E-mail: Julianna.Bramwell@jacksonlewis.com

Attorneys for Defendant
CALIFORNIA COLLEGE OF THE ARTS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KAREN FISS

Plaintiff,

v.

CALIFORNIA COLLEGE OF THE ARTS,

Defendant.

Case No. 4:24-cv-03415-HSG

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: December 5, 2024
Time: 2:00 p.m.
Ctrm: Courtroom 2, 4th Floor
Judge: Honorable Haywood S. Gilliam, Jr.

Complaint Filed: 06/06/2024
FAC Filed: 09/05/2024
Trial Date: Not Set

I. INTRODUCTION

Plaintiff's Opposition to Defendant's Motion to Dismiss the First Amended Complaint (the "Opposition") is saturated with hyperbole, serving only to obscure the lack of factual and legal merit in her claims and to prejudice the Court with unfounded assertions. At their core, Plaintiff's allegations reflect personal disagreement with academic discussions and

administrative processes—neither of which constitutes a viable legal claim. The Opposition fails to articulate any legitimate basis for this case to proceed.

Plaintiff's disparate treatment and hostile work environment claims are undermined by the academic context in which the alleged conduct occurred, involving political discussions and social media expressions that were neither directed at Plaintiff personally nor motivated by discriminatory animus. In regard to the only action directed to Plaintiff personally, the First Amended Complaint (the "FAC") and the Opposition confirm the following facts: Plaintiff accused students of inhabiting an echo chamber and took photos of them; students subsequently filed complaints about this confrontation, prompting Defendant ("CCA") to investigate; CCA issued a reprimand to Plaintiff for her conduct; and Plaintiff continues to serve as a tenured professor. Plaintiff disagrees with this outcome, arguing that CCA should unequivocally support and enforce her views. She further contends that a failure to do so constitutes discrimination and harassment. Allowing such claims to proceed would set a dangerous precedent, compelling CCA to suppress academic discourse and to elevate certain viewpoints over others. The Court should reject this approach.

Additionally, Plaintiff fails to meet threshold requirements for her claims under Title VI, California Education Code Section 66270, and Government Code Section 12920. Furthermore, Plaintiff's contract claim lacks valid consideration, and she fails to allege compensable damages under basic principles of contract law. For these reasons, Defendant respectfully requests that the Court dismiss Plaintiff's claims in their entirety, without leave to amend.

II. ARGUMENT

A. Plaintiff's Title VII Claim Fails.

The essence of Plaintiff's Title VII claim is that CCA allegedly harassed and discriminated against her on the basis of her religious beliefs by permitting discussions about "colonialism" while disciplining her for expressing her views to a student. This argument disregards the distinct contexts, settings, and manners in which these views were expressed. Allowing Plaintiff to assert Title VII claims based on false equivalencies would have far-reaching implications in the academic setting, where discussion and disagreement on

political topics is inevitable and essential. Furthermore, permitting claims like Plaintiff's to proceed would open the door to similar lawsuits, effectively stifling open dialogue about complex issues. The Court should not allow this to stand.

In addition to the broader policy implications of Plaintiff's claims, her allegations are legally insufficient to establish viable causes of action for disparate treatment and hostile work environment. As discussed below, the Court should dismiss Plaintiff's Title VII claims without leave to amend.

1. Plaintiff Fails to State a *Prima Facie* Case of Disparate Treatment.

Plaintiff's Opposition fails to show that she has pleaded the final two elements of her *prima facie* case of disparate treatment, *i.e.*, that similarly situated individuals outside her protected class were treated more favorably and that Plaintiff was subjected to an adverse employment action.[1] The Court should therefore dismiss her disparate treatment claim.

a. Plaintiff Offers Insufficient Comparators.

As noted in the Motion, to satisfy this element, Plaintiff must plead that similarly situated employees outside of her protected class were treated more favorably than she was. Plaintiff's proffered comparators must be similarly situated "in all material respects," meaning that they must "have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003); *see also Weiss v. Permanente Med. Grp., Inc.*, No. 23-cv-03490-RS, 2023 U.S. Dist. LEXIS 215605, at *8 (N.D. Cal. Dec. 4, 2023) (holding that the plaintiff failed to plead that relevant comparators "shared job responsibilities" and "engaged in similar conduct"). Even at the pleadings stage, the Court is compelled to evaluate the degree to which proposed comparators are similar.

Plaintiff's Opposition offers three categories of purported comparators, none of which are similarly situated to Plaintiff: (1) "numerous professors"; (2) unidentified individuals who allegedly made an "obscene denunciation of Plaintiff's beliefs at official CCA faculty

///

[1] For the purposes of this Motion to Dismiss (the "Motion"), CCA does not dispute that Plaintiff has pleaded membership in a protected class. Therefore, the Court should disregard the Amicus Brief submitted by Zachor Legal Institute in evaluating the sufficiency of the pleadings.

meetings"; and (3) individuals that liked the Instagram post that is the subject of the FAC.[2] Opposition ("Opp.") at 4. Plaintiff does not allege that these individuals are outside of her protected class.[3] These vague allegations of the identities of the comparators are insufficient to establish that they are similarly situated to Plaintiff. *See Johnson v. Buttigieg*, No. 22-cv-00512-DMR, 2022 U.S. Dist. LEXIS 222371, at *20-21 (N.D. Cal. Dec. 9, 2022) (holding that the plaintiff failed to plead this element by merely alleging that "unspecified, other employees" received more favorable treatment). Further, although Plaintiff asserts that these individuals are faculty members, there is no detail regarding the positions they held. It is therefore impossible to determine whether they had similar jobs or shared job responsibilities.

Plaintiff also fails to plead that these comparators engaged in similar workplace conduct, but received preferential treatment. *See Hasan Loggins v. Leland Stanford Junior Univ.*, No. 24-cv-02027-JSC, 2024 U.S. Dist. LEXIS 152886, at *13-14 (N.D. Cal. Aug. 26, 2024) (holding that a college lecturer and a college professor were not similarly situated because their alleged conduct was substantively different). The Opposition notes that Plaintiff spoke "to a Middle Eastern student about her country and telling her things she did not know . . ., while at the same time numerous professors used compulsory class time to convey to students their own opinions . . ." Opp. at 5. The Opposition neglects to mention that CCA received a student complaint about her, which it was obligated to investigate and resolve. FAC ¶¶ 91-92. Comparable conduct would therefore include instances in which a non-Jewish professor shared their views with students in the same manner in which Plaintiff did, which culminated in a

[2] Plaintiff's Opposition does not address CCA's argument that the Middle Eastern students who complained about Plaintiff are insufficient comparators. Motion ("Mot.") at 7. Thus, the Court should view Plaintiff's failure to oppose the argument as a concession that it is waived. *Jones v. Regents of the Univ. of Cal.*, No. 21-cv-07844-JSW, 2022 U.S. Dist. LEXIS 70745, at *6-7 (N.D. Cal. Apr. 18, 2022); *see also Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) (litigants waive arguments by failing to raise them in an opposition to a motion to dismiss).

[3] On this point, the Opposition references paragraph 151 of the FAC, which states that "Defendant treated Plaintiff differently from, and worse than, the way it treated others who do not share Plaintiff's ancestral, ethnic, and religious commitments." Opp. at 4. It is unclear if these "others" are the proposed comparators. Moreover, the fact that these "others" do not share Plaintiff's "ancestral, ethnic, and religious commitments" does not necessarily exclude them from Plaintiff's protected class. For example, some Jews keep kosher while others do not.

student complaint against the professor. Plaintiff has not alleged any such conduct. Moreover, she does not allege that a non-Jewish professor received preferential treatment in the form of a student complaint being resolved in their favor. With regard to the individuals who allegedly made an "obscene denunciation of Plaintiff's beliefs at official CCA faculty meetings" or liked the relevant Instagram post, this conduct is different because it was not specifically directed to students who then lodged complaints. Given these deficiencies, Plaintiff has failed to allege a claim for disparate treatment.

b. Plaintiff Was Not Subjected to an Adverse Employment Action.

Plaintiff's Opposition fails to address the simple truth that the required additional training and notice of investigation outcome did not affect her compensation or terms of employment. *Campbell v. State Dep't of Educ.*, 892 F.3d 1005, 1015 (9th Cir. 2018). Plaintiff asserts that the notice of complaint determination (Ex. N to the FAC) was a form of progressive discipline. Opp. at 4. This Court has held that such notices or written warnings alone do not affect the terms and conditions of employment. *Green v. City & Cty. of San Francisco*, No. 17-cv-00607-TSH, 2021 U.S. Dist. LEXIS 161990, at *113-114 (N.D. Cal. Aug. 26, 2021). Only when an employee is subject to *multiple* warnings can they begin to affect "an employee's salary, benefits, and/or promotional prospects." *Id.; see also Van v. Black Angus Steakhouses, LLC*, No. 5:17-cv-06329-EJD, 2018 U.S. Dist. LEXIS 198102, at *7 (N.D. Cal. Nov. 20, 2018). Here, Plaintiff has received only one such notice, which expressly states that "an oral or written warning is not discipline." FAC, Ex. N. Again, Plaintiff remains employed as a tenured professor at CCA. Her argument that the reprimand impacts her reputation or future job prospects are speculative, at best. Plaintiff has not suffered an adverse employment action and, as a result, her disparate treatment claim fails.

2. Plaintiff Fails to Plead a Claim for Hostile Work Environment.

Plaintiff's Opposition asserts that three categories of conduct support her hostile work environment claim: (1) professors allegedly "us[ing] class time to advance to students their own political opinions denouncing Israel and the entire idea of a Jewish state"; (2) the

Instagram post; and (3) CCA's compulsory investigation and resolution of the student complaint against Plaintiff. Opp. at 6. The Court must consider this conduct in the context of an academic setting, where political discussions are both encouraged and commonplace. *See Lee v. Foothill-De Anza Cmty. Coll. Dist.*, No. 23-cv-03418-PCP, 2024 U.S. Dist. LEXIS 83240, at *26-27 (N.D. Cal. May 7, 2024) (dismissing a hostile work environment claim because "even obnoxious ideas may form part of diverse discussion at any college"). "[S]howing a hostile work environment requires more than disagreement or academic discussion of offensive ideas." *Id*.

Here, the Instagram post notes that the Critical Ethnic Studies Program educates students "in decolonial, post-colonial, anti-colonial, and transnational theory and praxis" and has "a responsibility to help [students] use their brilliance to build a world without colonization, genocide, and war." FAC, Ex. F. Likewise, the alleged professors addressed political topics during class discussions.[4] Although Plaintiff may have disagreed with the ideas presented in the Instagram post or by CCA professors during class, the ideas were offered in the realm of academic discussion and, therefore, do not constitute a basis for a hostile work environment claim.

Plaintiff's Opposition contends that the alleged conduct, even that which was not directed at Plaintiff, supports her claim because "individual targeting is not required to establish a Title VII violation." *Id.* at 7 (quoting *Sharp v. Activewear, L.L.C.*, 69 F.4th 974, 978 (9th Cir. 2023). Assuming that is correct, Plaintiff must nevertheless plausibly plead that CCA subjected her to this conduct *because she is Jewish and a Zionist*. *Manatt v. Bank of America*, 339 F.3d 792, 798 (9th Cir. 2003). Given that the alleged conduct appears limited to academic discourse and lacks traditional allegations of bias such as proper comparators or discriminatory comments, Plaintiff has not plausibly alleged that she was subjected to the conduct because she is Jewish and a Zionist.

[4] The FAC notes that "a professor began using the classroom to advocate for antisemitic ideology . . ." FAC at ¶ 15. This allegation is too vague. Not only does it fail to identify when this incident occurred, it also fails to state the substance of that "antisemitic ideology," depriving CCA and the Court of the opportunity to evaluate whether the incident can support Plaintiff's hostile work environment claim.

Finally, Plaintiff's Opposition concedes that the only conduct directed at Plaintiff was CCA's investigation and resolution of the student complaint against her. CCA had an obligation to investigate the complaint. *See* FAC, Ex. N ("The college is committed to taking all reasonable steps to prevent harassment."); *see also* Cal. Gov't Code § 12940(k). Plaintiff offers no other allegations to support the notion that CCA conducted the investigation or reached its findings due to Plaintiff's membership in a protected class.

Ultimately, Plaintiff's "harassment" claim is premised on her disagreement with CCA's decision to reprimand her for the manner in which she expressed her views to students who held a view she disagreed with. Plaintiff contends that that the disciplinary action that CCA took following its investigation amounted to "harassment." If so, Plaintiff would have free reign to express her views in the manner she deems fit, and CCA would be without recourse to enforce its policy for discussions to be healthy and respectful. This is not and cannot be the law. It is well established that personnel management decisions, such as the one at issue here, do not come within the meaning of harassment as a matter of law. *See Pichon v. Hertz Corp.*, No. 17-cv-02391-EMC, 2017 U.S. Dist. LEXIS 119121, at *11-12 (N.D. Cal. July 28, 2017). For these reasons, the Court should dismiss Plaintiff's Title VII claim.

B. Plaintiff's Title VI Claim Fails.

Plaintiff's Title VI claim fails for several reasons. First, it is Plaintiff's burden – not CCA's, as she suggests in her Opposition – to meet the pleading requirements of her Title VI claim. She offers no authority to the contrary; rather, she concedes the point, stating that "a Title VI employment discrimination claim must allege that federal assistance supported the program at issue." Opp. at 11. Given this deficiency, Plaintiff requests the opportunity to take discovery to gather this information. *Id.* at 12. In support of this request, Plaintiff proffers cases that indicate that such a request may be granted "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Id.* (quoting *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003)). The question before the Court is not one of jurisdiction, but is a merits-based challenge to the sufficiency of Plaintiff's allegations. *See Glaser v. Upright Citizens Brigade,*

LLC, 377 F. Supp. 3d 387, 394 (S.D.N.Y. 2019). The Court should therefore deny Plaintiff's request to conduct discovery on a claim that she cannot adequately plead.

Second, Plaintiff's Opposition does not dispute that she failed to plead direct discrimination or hostile environment for the purposes of Title VI. Accordingly, any argument to the contrary should be deemed waived. *Jones, supra,* 2022 U.S. Dist. LEXIS 70745, at *6-7; *Shakur, supra,* 514 F.3d at 892. The Court should dismiss Plaintiff's Title VI claim with prejudice.

C. Plaintiff's Claim Under Education Code Section 66270 Fails.

CCA asserted in its Motion that only students have standing to bring a claim under Education Code section 66270. *See* Educ. Code § 66252(a) ("All *students* have the right to participate fully in the educational process, free from discrimination and harassment." (emphasis added.)) Plaintiff responds that Subsection (c) of Section 66252 addresses "harassment on school grounds directed at an individual," and Section 66270 further provides that "no person" shall be discriminated against. Opp. at 13. Plaintiff asserts that these sections confer standing on professors.

A deeper look at Section 66252 illustrates that this interpretation is incorrect. Subsection (c) of Section 66252 states: "Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and *jeopardizes equal educational opportunity* as guaranteed by the California Constitution and the United States Constitution." Subsection (e) states, "[t]here is an urgent need to teach and inform students . . . about their rights . . ." Finally, Subsection (f) states, "[i]t is the intent of the Legislature that each postsecondary educational institution undertake . . . to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal education opportunity." In drafting this Chapter, the Legislature intended to protect the rights and equal education opportunity of students and students alone. Cases alleging claims under these provisions of the Education Code exclusively support CCA's interpretation of the Code. *See, e.g., Sherman v. Regents of Univ. of Cal.*, No. 20-cv-06441-VKD, 2022 U.S. Dist. LEXIS 70765, at *34-37 (N.D. Cal. Apr. 8, 2022); *Karasek v. Regents of the Univ. of Cal.*,

No. 15-cv-03717-WHO, 2015 U.S. Dist. LEXIS 166524, at *55-58 (N.D. Cal. Dec. 11, 2015); *King v. San Francisco Cmty. College Dist*, No. C 10-01979 RS, 2010 U.S. Dist. LEXIS 110012, at *13-19 (N.D. Cal. Oct. 7, 2010); *Aguilar v. Corral*, No. Civ. S-07-1601 LKK/KJM, 2007 U.S. Dist. LEXIS 77359, at *7-12 (E.D. Cal. Oct. 9, 2007).

In addition, the Opposition does not dispute that a Title VI analysis applies to this Section 66270 claim. Plaintiff also does not dispute that she has failed to state a claim under Title VI and therefore under Section 66270. As a result, the claim must be dismissed.

D. Plaintiff's Claim Under Government Code Section 12920 Fails.

Under Government Code Section 12920, Plaintiff must plead that she exhausted her administrative remedies, including through the California Civil Rights Department. Although Plaintiff may have belatedly obtained a right to sue letter from the California Civil Rights Department after she filed this suit, she failed to include this in her pleadings despite having the opportunity to do so in her FAC. Accordingly, she failed to sufficiently plead her claim.

Plaintiff's Opposition further fails to address the FAC's vague and unsupported reference to the California Labor Code. As discussed in the Motion, a complaint must provide "fair notice" so that CCA can mount an efficient defense. *Starr v. Baca*, 653 F.3d 1202, 1216 (9th Cir. 2011). Here, the pleadings are vague and ambiguous such that CCA would have to speculate as to the alleged violations, and thus, cannot reasonably respond. Fed. R. Civ. P. 12(e).

Finally, to the extent Plaintiff's Title VII claims fail, so must her claim under Section 12920.

E. Plaintiff's Breach of Contract Claim Fails.

Plaintiff's FAC and Opposition do not adequately allege valid consideration under the alleged contract. CCA's alleged promise to adhere to its internal policies does not amount to consideration, as it lacks the mutual exchange of legally binding obligations necessary for a contract. An agreement is illusory and unenforceable if one party assumes no obligation. *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc*., 188 Cal. App. 4th 401, 202. Even if CCA's

///

commitment to follow its policies were deemed consideration, Plaintiff has not alleged any consideration on her part.

Plaintiff also fails to allege cognizable damages for the alleged breach of contract. Plaintiff incorrectly asserts that her request for injunctive relief is sufficient. Injunctive relief is generally only appropriate where monetary damages are insufficient. *Tamarind v. Lithography Workshop, Inc. v. Sanders*, 143 Cal. App. 3d 571, 575 (1983). Plaintiff has not alleged facts to support her request for injunctive relief or that she suffered standard contract damages. Therefore, Plaintiff has failed to sufficiently plead a breach of contract claim.

III. THE COURT SHOULD NOT GRANT LEAVE TO AMEND.

CCA informed the Court and Plaintiff of these deficiencies in CCA's Motion to Dismiss Plaintiff's Complaint. Dkt. No. 19. Plaintiff had the opportunity to address these issues and purportedly attempted to do so in filing her FAC. Dkt. No. 30. Despite having had this opportunity, Plaintiff has not cured these deficiencies. Plaintiff cannot add additional facts to raise viable claims. For this reason, the Court should grant Defendant's Motion to Dismiss the FAC without leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's claims without leave to amend.

Dated: November 19, 2024

JACKSON LEWIS P.C.

By: /s/ Jessica C. Shafer
Angel R. Sevilla
Jessica C. Shafer
Julianna Bramwell
Attorneys for Defendant
CALIFORNIA COLLEGE OF THE ARTS

4854-4974-4893, v. 2