UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERIC SMALL, Plaintiff, v. FEATHER RIVER COLLEGE, MERLE TRUEBLOOD, and JAMES JOHNSON, Defendants.	Case No. 2:10-CV-3026-JAM-GGH ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, AND DENYING DEFENDANTS' MOTION TO STRIKE

This matter is before the Court on Defendants' Feather River Community College District (erroneously sued as Feather River College), Merle Trueblood and James Johnson's (collectively "Defendants") Motion to Dismiss (Doc. #14) and Motion to Strike (Doc. #15) Plaintiff Eric Small's ("Plaintiff") First Amended Complaint ("FAC") (Doc. #12). Defendants move to dismiss the FAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and move to strike portions of the FAC pursuant to Rule 12(f). Plaintiff opposes both motions (Docs. #19 and #20). These matters were set for hearing on March 9, 2011, and ordered

submitted on the briefs.[1] For the reasons set forth below, Defendants' motion to dismiss is granted in part and denied in part, and the motion to strike is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff worked at Feather River College ("FRC") from approximately 2005 to 2010. During this time, Plaintiff worked as an assistant football coach, and as an academic advisor. The FAC alleges that Plaintiff's job was classified as "Assistant Football Coach/Instructional Assistant" and that he was the only permanent, full-time employee in the football department, besides the Head Coach. He was provided business cards by FRC, which allegedly identified him as "Associate Head Football Coach." During the time Plaintiff was at FRC, there were four Head Coaches: Coach Simi, Coach White ("White"), Coach Mooshagian ("Mooshagian"), and interim Head Coach Johnson ("Johnson"). The FAC further alleges that Plaintiff did extensive recruiting for FRC's football program, primarily recruiting African American football players from the South. Plaintiff alleges he created a "win-win" situation, in which FRC had a successful football team and fully filled dorms, while players benefitted from Plaintiff's dedication and extensive network, resulting in nearly all recruits moving on to scholarships at four-year colleges after finishing at FRC. However, Plaintiff alleges that he and his African American recruits faced racial hostility and discrimination from the community at-large and from other coaching staff. Plaintiff alleges he was passed up for

[1] These motions were determined to suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

promotion to Head Coach despite his qualifications, and was retaliated against for complaining about discriminatory treatment towards himself and his recruits. When Plaintiff eventually left his job in the fall of 2010, he alleges he was constructively discharged due to a situation of racially motivated hostility that had become intolerable. The FAC alleges that Johnson was particularly hostile towards Plaintiff and African American student athletes, and that defendant Merle Trueblood ("Trueblood"), FRC's Athletic Director, supported Johnson in forcing out Plaintiff and changing the composition of the football team from predominantly African American to predominantly white.

Defendants move to dismiss Plaintiff's claims, alleging that Plaintiff has not plead facts to support his allegations that the conduct complained of was motivated by his race, has not plead that he suffered an adverse employment action, and has not put forth facts demonstrating that he engaged in a protected activity. Accordingly, Defendants move the Court to dismiss all claims in the FAC with prejudice, for failure to state a claim.

II. OPINION

A. Legal Standard-Motion to Dismiss

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,

322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). "Absent prejudice, or a strong showing of any [other relevant] factor[], there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Id.

B. Request for Judicial Notice

Defendants request judicial notice (Doc. #14-2) of the minutes of the Feather River Community College Board of Trustees meeting dated September 25, 2008, consent agenda dated September 27, 2008, and employment offer letter to Plaintiff dated September 27, 2008. Plaintiff objects to Defendants' request for judicial notice. Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the

complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations omitted). Accordingly, Courts may consider extrinsic evidence when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document. . . ." Knievel v. ESPN, 393 F.3d 1069, 1076 (9th Cir. 2005). Defendants argue that the documents are matters of public record, establish Plaintiff's job title and show that Plaintiff was not demoted. However, Plaintiff objects that the board minutes do not describe Plaintiff or his job title, the consent agenda does not state Plaintiff's job title, and the offer of employment, which does state Plaintiff's job title, is not public record and therefore is not appropriate for judicial notice. The Court finds that the meeting minutes and consent agenda are not relevant to establishing Plaintiff's job title or determining whether he was demoted. The letter offering employment to the Plaintiff is not an appropriate document for judicial notice because it is not a matter of public record. Accordingly, the Court will not consider these documents in ruling on the motion to dismiss, and DENIES Defendants' request for judicial notice.

C. Claims for Relief

1. First Claim for Relief: Constructive Discharge, 42 U.S.C. § 1981

Plaintiff brings a claim of constructive discharge under Section 1981 against defendants Trueblood and Johnson, alleging

that he was constructively forced out of his employment when, after complaining of protected activity his working conditions became intolerable. Defendants argue that Plaintiff's allegations are not sufficient to state a claim for constructive discharge.

> 42 U.S.C. § 1981 provides that all persons shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. The statute defines, make and enforce contracts to include the making, performance, modification and termination of contract, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

Flores v. Von Kleist, 739 F.Supp.2d 1236, 1256 (E.D. Cal. 2010) (internal citations omitted). The legal principles guiding a court's analysis of a Title VII claim apply with equal force in a Section 1981 claim. Jackson v. ABC Nissan, Inc., 2006 WL 2256908, FN9 (D. Ariz. 2006), citing Manatt v. Bank of America, NA, 339 F.3d 792, 797 (9th Cir. 2003).

"Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007). Constructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." Id. The Ninth Circuit does not require a plaintiff to establish that his employer created the

intolerable conditions with the intent to cause the employee to resign. Id. at FN 7. In general, a single isolated instance of employment discrimination is insufficient as a matter of law to support a finding of constructive discharge. See Nolan v. Cleveland, 6986 F.2d 806, 812 (9th Cir. 1982). Hence, a plaintiff alleging a constructive discharge must show some aggravating factors, such as a continuous pattern of discriminatory treatment. Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984).

Plaintiff has alleged that in 2010, Johnson made the decision to exclude from the FRC football team the African American student athletes that Plaintiff had recruited. Plaintiff believed that this decision was made based on the students' race. Plaintiff alleges that when he tried to advocate for the excluded student athletes, Johnson swore and yelled at him. Trueblood then allegedly instructed Plaintiff to deceive the excluded players so that they would pay their dorm and registration fees, not knowing they would not be allowed to play football. Plaintiff also alleges that he was excluded from football department meetings, moved away from the other coaching staff to a small office in a janitor's closet, threatened with bad performance reviews, and falsely reported to the California College Athletic Commission. These actions, coupled with previous failure to promote and previous complaints that Plaintiff had made regarding racism against African American student athletes he recruited, form the basis of Plaintiff's claim. Plaintiff alleges that his race and color, and his complaints about unfair discriminatory treatment in the workplace were the motivating factors in defendants' decision to force him out of his job. Plaintiff suffered anxiety and emotional

and physical distress. While on Family Medical Leave Act ("FMLA") leave in fall 2010, Plaintiff resigned from FRC. Thereafter, he filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC").

Defendants argue that Plaintiff has failed to plead facts supporting a claim of constructive discharge. Defendants argue that Plaintiff was not demoted, that the FAC does not describe how his coaching responsibilities changed, and that being moved to a different office does not trigger a constructive discharge claim. Defendants contend that the FAC shows that Plaintiff was dissatisfied with his job and angry about not being selected as Head Coach, but that such dissatisfaction does not support a constructive discharge claim. Defendants note that the bar for constructive discharge is a high bar, because federal antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment situation was intolerable. See Poland, 494 F.3d at 1184.

At this early stage in the pleadings, the Court must take the facts alleged in the FAC as true, and construe them in the light most favorable to Plaintiff. Plaintiff has plead that the actions against him were racially motivated, that he was yelled at and ostracized from the football department, and that his working conditions became intolerable. The FAC pleads sufficient allegations to support his claim for constructive discharge. Accordingly, the motion to dismiss the first claim for relief is DENIED.

2. Second Claim for Relief: Failure to Promote, 42 U.S.C. § 1981

Plaintiff brings a claim for failure to promote in violation of 42 U.S.C. § 1981, against defendant Trueblood. Plaintiff alleges that he was passed over for promotion to head coach, despite having superior qualifications to those of the person ultimately selected for the job. As a member of a protected class (African American), Plaintiff alleges that he was not promoted due to his race, and instead a white person was hired (first Mooshagian, then Johnson). The FAC alleges that Trueblood participated in the decision not to promote Plaintiff, and cultivated a culture where discrimination against African Americans was allowed.

The standards articulated under Title VII govern employment discrimination claims brought pursuant to Section 1981. Martinez v. Marin Sanitary Service, 349 F.Supp.2d 1234, 1256 (N.D. Cal. 2004). Title VII provides that all personnel decisions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race. . . . 42. U.S.C § 2000e-16(a). Martinez, 349 F.Supp.2d at 1256. Plaintiff must make a prima facie showing of the elements of a failure to promote claim under Section 1981, which are: (1) That Plaintiff belongs to a protected class, (2) that he was qualified for the employment position for which he applied; (3) that he was subject to adverse employment actions (i.e., he was not promoted); and (4) similarly situated individuals who did not belong to plaintiff's protected class were treated more favorably. Id. at 1257 (internal citations

omitted).

The FAC describes two incidences in which Plaintiff was passed up for promotion to Head Coach, once when Mooshagian was hired, and once when defendant Johnson was hired. In both cases, Plaintiff has alleged that he is a member of a protected class (African American), that he was qualified for the job of Head Coach, and that the candidate who was ultimately hired in both cases was a white male with lesser qualifications. Accordingly, Plaintiff has alleged a prima facie case of discriminatory failure to promote. Defendant Trueblood argues that Plaintiff was not discriminated against and passed up for promotion based on his race, but rather he was the lesser qualified candidate for the job. Trueblood further argues that the FAC does not plead any facts showing racial animus by Trueblood or anyone on the hiring committee. The FAC notes that Trueblood was not on the hiring committee that chose Mooshagian, however, he was on the hiring committee that selected Johnson. The FAC states that Plaintiff's race and color, and his complaints about unfair discriminatory treatment in the workplace on behalf of himself and African American student athletes motivated Trueblood's decision not to promote him to head coach. The FAC further alleges that Trueblood was overheard stating that Plaintiff would never be head coach because of the players he was recruiting, which Plaintiff asserts referred to Plaintiff's recruitment of African Americans.

As previously discussed, the Court must accept the allegations of the FAC as true and draw all inferences in favor of Plaintiff. Trueblood's arguments that Plaintiff was actually the lesser qualified candidate, or that race discrimination was not a factor

in hiring, are more appropriate for a summary judgment motion than a motion to dismiss. Accordingly, Defendants' motion to dismiss the second claim for relief is DENIED.

3. Third Claim for Relief: Retaliation, 42 U.S.C. § 1981.

Plaintiff brings a claim for relief against Trueblood and Johnson, alleging that they retaliated against him for complaining of racially motivated violations of the rights of African American student athletes. The FAC alleges sixteen actions which Plaintiff asserts occurred as retaliation for his complaints. See FAC pp. 36-38. These actions include demotion, threats of discipline, exclusion from the football program, refusal to accept Plaintiff's recruits for the football team, and compulsion to work in a racially hostile environment.

To make out prima facie case of retaliation, Plaintiff must establish that: (1) he engaged in a protected activity, such as the filing of a complaint alleging racial discrimination (or was involved in opposition of an unlawful employment practice), (2) defendant subjected him to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse action. Manatt v. Bank of America, NA, 339 F.3d 792, 800 (9th Cir. 2003); Freitag v. Ayers, 468 F.3d 528, 541 (9th Cir. 2006). With respect to the first element, "opposition clause protection will be accorded whenever the opposition is based on a reasonable belief that the employer has engaged in an unlawful employment practice." Freitag, 468 F.3d at 541. Additionally, "when an employee protests the actions of a supervisor such opposition is also protected activity." Trent v. Valley Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994). An employment action

qualifies as adverse "if it is reasonably likely to deter employees from engaging in protected activity." Ray v. Henderson, 217 F.3d 1243 (9th Cir. 2000). Under this standard, "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment decisions" as well as exclusions from meetings. Id. at 1241. However, there must be some adverse effect on the employee's work or status. Id. The inquiry is objective: whether a reasonable person in the same situation would view the action as disadvantageous. Otherwise, every minor employment action that an employee did not like could become the basis of a discrimination suit. Vasquez v. County of L.A., 307 F.3d 884, 881 (9th Cir. 2002). Causation "may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision." Ray, 217 F.3d at 1244 (internal quotations omitted). There is no bright line amount of time necessary to establish a causal connection in a retaliation claim. See Coszalter v. City of Salem, 320 F.3d 968, 977-978 (9th Cir. 2003) (court rejected a bright line rule for establishing causation and found that three to eight months is within a time range that can support an inference of retaliation).

Defendants argue that Plaintiff's claim fails because it lacks allegations that he participated in a protected activity and that he suffered an adverse employment action, and because it does not show a causal link between the alleged protected activity and the alleged adverse employment action. As to the first prong, whether Plaintiff engaged in a protected activity, Defendants argue that making complaints to other employees and supervisors about the treatment of student athletes does not constitute a protected

activity. Defendants also argue that Plaintiff's complaints regarding treatment of the athletes were part of his job and therefore not a protected activity. Moreover, Defendants argue that in order for Plaintiff's complaints about the treatment of others to be protected by Section 1981, such complaints would have to be regarding unlawful employment actions against others, as Section 1981 specifically protects the right to make and enforce contracts. Since none of the student athletes are employees, Defendants contend that even if Plaintiff's complaints regarding their treatment constituted a protected activity, this is not protected by section 1981 because Plaintiff is not complaining about unlawful employment practices.

Plaintiff states that he engaged in a protected activity when he complained to FRC officials and to human resources regarding racial discrimination toward African-American student athletes. Plaintiff states that in protesting the racial discrimination of the students, he was also asserting his right to be free from racial hostility in his work environment. Additionally, Plaintiff states that he complained not only about the conduct of certain individuals, but also about the supervisors who refused to remedy the racial hostility. Viewing the facts in the light most favorable to the Plaintiff, the Court can infer that Plaintiff reasonably believed he was engaging in a protected activity.

To establish the second element of retaliation Plaintiff must plead facts showing that he suffered an adverse employment action. Plaintiff states that he was demoted, rejected for promotion, and isolated and excluded in his workplace with diminished job responsibilities as a result of his participation in the protected

activity. Defendants argue that Plaintiff has failed to plead facts showing adverse employments actions under Federal law. Specifically, Defendants argue that facts showing that Plaintiff was ignored by other coaches, moved to a different office, told he had performance issues, and told to call recruits and tell them they may not be invited to play football all do not constitute adverse employment actions. However, the Court may not delve into this factual dispute or the parties' disagreement over the conclusions to be drawn from the facts that have been pled. Such an inquiry is better suited to summary judgment. Plaintiff has pled sufficient facts to support this element of his claim at this stage.

The final element of retaliation is causation. Defendant FRC argues that Plaintiff failed to plead facts showing that there was a causal connection between his complaints and any alleged retaliatory conduct that occurred. Plaintiff asserts that there is a causal link in time between his protected activity and the adverse employment actions he suffered. He began complaining in 2007, and complained throughout the 2009/2010 school year and into July 2010, while the adverse actions were ongoing. Defendants argue that the period between when Plaintiff initially complained and the alleged retaliatory conduct is too attenuated to establish a causal connection. Because Plaintiff has plead an ongoing series of complaints and adverse actions, there is a sufficient basis for the Court to infer a causal link, and for Plaintiff to maintain his claim for retaliation. Accordingly, the Court DENIES the motion to dismiss the third claim for relief.

4. Fourth Claim for Relief: Constructive Discharge, Title VII, 42 U.S.C. § 2000e, et seq.

Plaintiff brings a claim for constructive discharge under Title VII of the Civil Rights Act of 1964, against defendant FRC. Plaintiff alleges that his workplace became such a racially hostile and intolerable environment that he could not remain on the job. Plaintiff left on FMLA leave on August 4, 2010, and resigned while on leave. Defendant FRC argues that Plaintiff fails to state a claim for constructive discharge because the FAC lacks allegations that Plaintiff's allegedly intolerable working conditions were known to FRC. Moreover, FRC argues that none of the allegations proffered by Plaintiff regarding his working conditions are sufficient to trigger a claim of constructive discharge.

As previously noted, Title VII and Section 1981 are analyzed under the same standards. As discussed in relation to Plaintiff's constructive discharge claim under Section 1981, Plaintiff has plead sufficient facts at this stage to maintain his claim for constructive discharge. Accordingly, the motion to dismiss the fourth claim for relief is DENIED.

5. Fifth Claim for Relief: Failure to Promote, Title VII

Plaintiff brings a claim for discriminatory failure to promote in violation of Title VII, against FRC. As with his failure to promote claim under Section 1981, Plaintiff alleges that while working at FRC he was twice passed up for promotion to head coach, despite being the better qualified candidate, and the job was instead given to a white candidate. Plaintiff alleges that FRC participated in the decision not to promote him, and cultivated a culture where discrimination against African Americans was allowed.

FRC argues that Plaintiff was not the more qualified candidate, and that the FAC fails to show that Plaintiff was not hired as the Head Coach due to his race. For the same reasons as this Court denied the motion to dismiss Plaintiff's Section 1981 claim for failure to promote, this Court also DENIES Defendants' motion to dismiss Plaintiff's Title VII failure to promote claim.

6. Sixth Claim for Relief: Retaliation, Title VII

Plaintiff brings a claim of retaliation pursuant to Title VII, against defendant FRC. Plaintiff alleges that FRC retaliated against him because he complained of racial discrimination against himself and African American student athletes. Plaintiff alleges that FRC cultivated a culture in which discrimination against African Americans became the norm, and that following his complaint, he lost a promotion, was forced out of the football department, demoted, ostracized and constructively discharged. FRC contends that Plaintiff was not engaged in a protected activity, and that Plaintiff did not complain that anyone was discriminating against him, until he quit his job and filed an EEOC complaint. FRC asserts that Plaintiff's complaints regarding alleged discrimination against students was simply part of his job responsibility. Further, FRC argues that Plaintiff did not suffer an adverse employment action.

The elements of a Title VII retaliation are the same as the elements for a 1981 retaliation claim, and this Court's analysis of the Title VII retaliation claim is the same as its analysis of the Section 1981 retaliation claim. Accordingly, the motion to dismiss this claim is likewise DENIED.

7. Seventh Claim for Relief: Racially Hostile Work Environment, Title VI, 42 U.S.C. § 2000d

Plaintiff's seventh claim for relief is a Title VI hostile work environment claim against FRC. The FAC states that Plaintiff suffered retaliation and harassment after he acted to protect the rights of African American student athletes, and was subjected to working conditions that were permeated with racial hostility, antagonism, mistreatment and humiliation towards African American students and towards him.

Title VI prescribes that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "To state a claim for damages under Title VI, plaintiff must allege that (1) the defendant entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance. Although the Plaintiff must prove intent at trial, it need not be pled in the complaint." Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1447 (9th Cir. 1994), overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001).

As a threshold matter, FRC argues that Plaintiff does not have standing to bring a Title VI claim and that Plaintiff has not pled facts showing that he suffered an injury because he was denied Federal funds or that the objective of the Federal funds was to provide employment. However, courts have upheld standing where an individual was not the direct target of discrimination. See Clemes

v. Del Norte County Unified Sch. Dist., 843 F.Supp. 583 (N.D. Cal. 1994) (court upheld standing for a white male teacher who alleged retaliation for his conduct in acting to protect the rights of Native American and female students). Therefore, Plaintiff has standing to bring the Title VI claim, even to the extent that he was not the direct target of all instances of racial discrimination.

FRC also argues that Plaintiff has failed to plead facts showing that he was deprived access to the educational benefits or opportunities provided by the District. However, Title VI does not require a plaintiff to plead that he was an intended beneficiary of the federally funded program. See Fobbs, 29 F.3d at 1447. To plead a Title VI claim, Plaintiff need only show that FRC received Federal financial assistance. Id. Here, Plaintiff states that FRC receives Federal financial assistance for many of its programs (FAC ¶ 115). Therefore, the funding prong of a Title VI claim has been satisfied.

Additionally, FRC raises the argument in a footnote that Title VI restricts claims of employment discrimination to instances where the primary objective of the financial assistance is to provide employment. See 42 U.S.C. § 2000d-3 ("Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."). "Accordingly, in order to state a claim for employment discrimination under Title VI, a plaintiff must allege and prove that the defendant received

federal financial assistance, the primary object of which was to provide employment, and that the funds went to discriminatory programs or activities." Gao v. Hawaii Dep't. of the Attorney General, 2010 WL 99355, *5 (D. Hawaii, Jan. 12, 2010) aff'd, 2011 WL 1097751 (9th Cir. 2011).

The caption of Plaintiff's seventh claim for relief states that it is a hostile work environment claim. The body of the claim states that Plaintiff suffered from retaliation and harassment for aligning himself with members of a protected class and for being a member of a protected class. Defendants attack the claim as failing to state a claim for retaliation, and failing to state a claim for harassment.

The Court finds that the basis of the claim is unclear from the allegations of the FAC. The convoluted claim includes allegations of retaliation and harassment against Plaintiff, allegations of a hostile work environment towards Plaintiff, and allegations of the denial of educational benefits to students. While Plaintiff alleges that FRC receives federal funds, the claim does not include allegations that the primary objective of the federal funds received is to provide employment. As pled, Plaintiff has failed to state a claim under Title VI. Accordingly, the motion to dismiss the Title VI claim is GRANTED, WITH LEAVE TO AMEND.

8. Eighth Claim for Relief: 42 U.S.C. § 1983

Plaintiff brings a claim for violation of the Fourteenth Amendment equal protection clause, pursuant to 42 U.S.C. § 1983, against Trueblood and Johnson. Plaintiff withdrew his § 1983 claim against FRC. The FAC states that Plaintiff became the target of

discriminatory conduct depriving him of his constitutional rights when he offered to protect the African American student athletes from racial discrimination. Plaintiff also states that he has pled facts showing intentional acts of discrimination against him and the students he sought to protect.

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr, Inc. 473 U.S. 432, 439 (1985) (internal citations omitted). To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff "must show that the defendant acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." T.A. ex rel. Amador v. McSwain Union Elementary Sch. Dist., 2009 WL 1748793, at *8 (E.D. Cal. Jan. 18, 2009). A plaintiff may satisfy this showing by alleging four separate elements: (1) that the defendants treated plaintiff differently from others similarly situated; (2) this unequal treatment was based on an impermissible classification; (3) the defendants acted with discriminatory intent in applying this classification; and (4) plaintiff suffered injury as a result of the discriminatory classification. Id.

Defendants argue that Plaintiff was aware that Mooshagian's and Johnson's credentials were superior to Plaintiff's credentials. However, this is a factual dispute and in a motion to dismiss the court accepts Plaintiff's factual allegations as true.

Additionally, Defendants argue that Plaintiff has not pled facts showing that Johnson and Trueblood engaged in intentional acts of discrimination against the Plaintiff based on his race. Plaintiff contends that the FAC is replete with examples of race-based discrimination against Plaintiff, and includes allegations of retaliation for aligning himself with other African Americans. At this stage of the pleadings, Plaintiff has raised sufficient allegations for this Court to infer that Plaintiff was discriminated against on the basis of his race. Accordingly, the motion to dismiss Plaintiff's equal protection claim against Johnson and Trueblood is DENIED.

D. Motion to Strike

> Rule 12(f) provides in pertinent part that the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter . . . Motions to strike are disfavored an infrequently granted. A motion to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.

Bassett v. Ruggles et al., 2009 WL 2982895 at *24(E.D. Cal. Sept. 14, 2009) (internal citations omitted).

Defendants' motion to strike alleges that numerous allegations in the FAC should be stricken because they are redundant, immaterial, impertinent or scandalous (specifically, Defendants seek to strike allegations of discrimination against students, allegations applauding Plaintiff' s coaching qualifications, and allegations of discriminatory motives). Defendants also argue that allegations regarding Trueblood's communication with the California Community College Athletic Association ("CCAA") must be

stricken pursuant to the *Noerr-Pennington* doctrine. Lastly, Defendants assert allegations in the FAC relating to punitive damages should be stricken as insufficient, and allegations of discrimination outside of the Title VII statute of limitations should be stricken. Plaintiff opposes the motion to strike, arguing that the complaint to the CCAA was a sham complaint not protected by the *Noerr-Pennington* doctrine, and that allegations outside the statute of limitations are still relevant to the FAC, as are the other allegations that Defendants seek to strike.

As noted above, motions to strike are disfavored and infrequently granted. Defendants' challenge to the sufficiency of Plaintiff's allegations have been discussed and ruled on by the Court in addressing the motion to dismiss. While the FAC is very long and contains numerous allegations, at this stage of the pleadings the Court must take these allegations as true. Many of the allegations may later prove relevant to the claims and to damages. Accordingly, the Court denies Defendants' motion to strike any of the allegations pertaining to the treatment of- or discrimination against- African American student athletes, Plaintiff's descriptions of himself and his job qualifications, letters of recommendations and statements made to Plaintiff regarding his suitability to be a head coach, Defendants' possible intent or motivation, or the prayer for punitive damages. Likewise, the Court will not strike the allegations of events that occurred outside of the statute of limitations for Title VII, as these allegations may be relevant to assessing liability for later events within the statute of limitations. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002). Lastly, as

the Court takes the allegations of the FAC as true, at this stage of the pleadings the Court takes as true Plaintiff's allegations that the complaint to the CCAA was a sham complaint, and the Court will not strike the CCAA allegations as protected by the *Noerr-Penington* doctrine. See, e.g., Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 644 (9th Cir. 2009) (petitioning is not protected where the petitioning is merely a sham). Accordingly, Defendants' motion to strike is DENIED.

III. ORDER

Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The motion to dismiss claims one, two, three, four, five, six, and eight is DENIED. The motion to dismiss claim seven is GRANTED, with leave to amend.

The Motion to Strike is DENIED.

Plaintiff must file a Second Amended Complaint within twenty (20) days of the date of this ORDER.

IT IS SO ORDERED.

Dated: May 2, 2011

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE