-JFM Eaglesmith et al v. Ray et al

Doc. 50

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERALD CLINTON (J.C.) EAGLESMITH, RAMONA EAGLESMITH, EILEEN COX, and BRUCE BARNES, Plaintiffs, v. JEFF RAY, as an individual, SUE SEGURA, as an individual, and BOARD OF TRUSTEES OF PLUMAS COUNTY OFFICE OF EDUCATION/PLUMAS COUNTY UNIFIED SCHOOL DISTRICT, Defendants.	Case No. 2:11-CV-00098 JAM-JFM ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

This matter is before the Court on Defendants' Jeff Ray ("Ray"), Sue Segura ("Segura") and Board of Trustees of Plumas County Office of Education/Plumas County Unified School District ("the District") Motion to Dismiss the Plaintiffs' Jerald Clinton Eaglesmith ("J.C."), Ramona Eaglesmith ("Ramona"), Eileen Cox ("Cox") and Bruce Barnes ("Barnes") First Amended Complaint ("FAC") (Doc. # 28) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs oppose the motion to

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dismiss.[1] For the reasons set forth below, Defendants' motion is GRANTED in part, and DENIED in part.

Defendants also bring a Motion to Strike (Doc. #31) certain allegations from the FAC, which Plaintiffs oppose (Doc. #42). For the reasons set forth below, the motion to strike is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

J.C. is an employee of the District, who works as a teacher and previously worked as the coach for the Quincy High School basketball team. J.C. alleges that he was subjected to discrimination, harassment and retaliation by Defendants in violation of Title VII, FEHA and Section 1983, based on his membership in a protected class. J.C. is Native American. His wife Ramona, who is Native American and African American, is not an employee of the District but alleges that Defendants violated her rights under sections 1981 and 1983, by interfering with her provision of dance lessons to members of the school cheerleading team. Cox and Barnes are employees of the District, who allege retaliation in violation of Title VII and FEHA, for communicating their support of J.C. and Ramona.

The FAC brings a number of allegations against Defendants. The FAC alleges that Defendants singled out J.C. for harassment after he and Ramona did a presentation in 2006 at the school, discussing the Native American perspective on Thanksgiving. J.C. alleges that Defendants interfered with his coaching, ostracized him, questioned his spiritual beliefs, referred to him in

[1] This matter was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). Oral argument was originally scheduled for August 3, 2011.

derogatory terms in front of his colleagues, gave him an "unsatisfactory" performance evaluation, and refused to rehire him as the basketball coach for the 2010-2011 school year. The FAC further alleges that Cox and Barnes were threatened with discipline and forced out of some of the positions they held at the school, for communicating support of J.C. and Ramona.

II. OPINION

A. Legal Standard

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 (1974), 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. Claims for Relief

1. Discriminatory Employment Practices

The first claim for relief alleges that J.C., Cox and Barnes were subject to adverse and discriminatory employment practices committed against them by the District, in violation of Title VII, 42 U.S.C. § 2000e and e(2), and FEHA, Cal. Gov. Code § 12940(a). JC alleges that he was discriminated against based on his race, national origin and religion, and his opposition to the District's alleged unlawful employment practices, under Title VII, 42 U.S.C. § 2000e(2). Cox and Barnes allege discrimination based on their protected status as non-minorities perceived to be assisting and associating with J.C., under Title VII, 42 U.S.C. § 2000(e) et seq. and Cal. Gov. Code § 12940. The Motion to Dismiss does not seek to dismiss J.C.'s allegations in the first claim for relief, but does seek to dismiss the allegations of discrimination by Cox and Barnes.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42

U.S.C. § 2000e-2(a)(1). Title VII claims follow a burden shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972). However, an employment discrimination complaint need not contain specific facts establishing a prima facie case, but instead must contain only a short and plain statement of the claim showing that the pleader is entitled to relief. Morgan v. Napolitano, 2010 WL 3749260, * 5 (E.D. Cal. Sept. 23, 2010) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002). Twombly explicitly did not overturn Swierkiewicz's holding. Id.,citing Twombly, 550 U.S. at 569-70.

FEHA prohibits employers from discriminating against an employee because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. Cal. Gov. Code § 12940(a). Claims of discrimination under FEHA and Title VII may be assessed under the same standards, because Title VII and FEHA operate under the same guiding principles. Kohler v. Inter-Tel Technologies, 244 F.3d 1167, 1172-73 (9th Cir. 2001) (citations omitted). "Although the wording of Title VII differs in some particulars from the wording of FEHA, the antidiscriminatory objectives and overriding policy purposes of the two acts are identical." Id. "Because FEHA is modeled on Title VII, California courts often rely upon federal interpretations of Title VII when analyzing analogous provisions of FEHA." Solano v. Regents of University of CA, 2005 WL 1984473, *4 (E.D. Cal. Aug. 15, 2005) (citations omitted). Accordingly, federal courts may analyze a plaintiff's federal and state claims under federal law. See e.g. Id.; Nagar v. Foundation Health Systems, Inc., 57 Fed. Appx. 304,

306 (9th Cir. 2003).

FEHA expressly provides a cause of action for unlawful discrimination based on association with someone in a protected class. Kap-Cheong v. Korea Express, USA, Inc., 2003 WL 946103, *3 (N.D. Cal. Feb. 12, 2003) (citing Cal. Gov. Code 12926(m)). Title VII, unlike, FEHA, does not specifically delineate a cause of action for unlawful discrimination based on association. "Nonetheless, many federal courts have construed Title VII to protect individuals who are the victims of discriminatory animus towards third parties with whom the individual associates." Id. at *4.

The FAC alleges that the District discriminated against Cox and Barnes by taking adverse employment actions against them (including eliminating work space, disciplinary investigations, false accusations, forced resignation or removal from certain paid positions) and depriving them of rights under the Equal Protection Clause. Cox and Barnes allege that the District perceived them as "assisting and associating" with J.C. and that they "communicated their support of J.C." to defendant Segura. They do not allege that they are members of a protected class, but the Court may infer from the allegations that they are stating a discrimination claim based on association.

The District argues that Cox and Barnes have not stated a claim for discrimination under Title VII or FEHA because they fail to plead that they are members of a protected class, and fail to plead facts showing that they assisted or associated with J.C. Moreover, the District argues that the FAC does not allege any special relationship, or even acquaintance relationship, between

Cox and Barnes and J.C. that would form the basis of a claim for discrimination on the basis of association.

While courts have found that a plaintiff who is not a member of a protected class may state a claim for discrimination under FEHA or Title VII, "there must be some association, actual or perceived, in order to fall within the protection of Title VII or FEHA. In each of the above Title VII cases, there existed some type of relationship-personal, familial, or otherwise-between the plaintiff and the person whom the plaintiff claims was the target of the employer's discriminatory animus." Kap-Cheong, 2003 WL 946103 at *4 (citing cases, each of which involve relationships such as parent-child and husband-wife). However, even a friendship or acquaintance relationship is sufficient to state a claim for association discrimination under FEHA. See Setencich v. American Red Cross, 2008 WL 449862, *4-7 (N.D. Cal. Feb. 15, 2008).

Here, Cox and Barnes allege that they communicated their support for J.C., and were perceived as supporting him. Defendants are correct that the FAC lacks allegations of a special relationship to J.C. and lacks allegations of how Cox and Barnes communicated their support for J.C. However, taking the allegations of support for J.C. in the FAC as true, and drawing all reasonable inferences, as this Court is required to do at this stage in the pleadings, it can be inferred that as J.C.'s coworkers Cox and Barnes at a minimum had an acquaintance relationship with him. Accordingly, the motion to dismiss the first claim for relief is DENIED.

2. Retaliation

The second claim for relief alleges that the District

retaliated against J.C., Cox and Barns, in violation of FEHA and Title VII. Again, the District does not seek to dismiss the allegations of retaliation brought by J.C., but does seek to dismiss the allegations of retaliation brought by Cox and Barnes. The District raises the same arguments against the claim for retaliation as it does against the claim for discrimination discussed above. Likewise, Cox and Barnes also offer the same arguments in support of their claim for retaliation as in support of their claim for discrimination.

Cox and Barnes allege that the District's supervisory employees, including defendants Segura and Ray, unlawfully retaliated against them by taking actions that adversely and materially affected the terms and conditions of their employment. Cox and Barnes allege that they were retaliated against because they opposed the supervisors' unlawful employment practices and were perceived as assisting and associating with J.C. and Ramona. They argue that because J.C. was making complaints about discrimination, and communicating his opposition to what he alleged were adverse actions taken against him because of his race and religion, communication of their support for J.C. and the subsequent adverse consequences constitutes a plausible claim for retaliation.

The District argues that the FAC is insufficient because it merely states that Cox and Barnes "communicated" their support for J.C., but does not plead facts showing that Cox and Barnes actively engaged in opposing alleged unlawful employment practices or otherwise put the District on notice of its alleged unlawful practices.

FEHA makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by FEHA or has filed a complaint, testified or assisted in any proceeding. See Cal. Gov. Code § 12940(h). 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).

In Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028 (2005) the court explained that FEHA protects an employee against unlawful discrimination with respect not only to ultimate employment actions such as termination or demotion, but also to the entire spectrum of employment actions that are reasonably likely to materially affect an employee's job performance or opportunity for advancement in his or her career. See Id. at 1053-54. Further, "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries." Id. at 1055. In determining whether a plaintiff has suffered an adverse employment action, "it is appropriate to consider plaintiff's allegations collectively under the totality-of-the circumstances approach." Id. at 1052 n. 11.

Here, the FAC has alleged that J.C. made complaints and actively opposed the District's actions against him, and suffered retaliation for his actions. The FAC further alleges that Cox and Barnes supported J.C. and communicated this support to Segura and Ray, resulting in retaliatory acts against them. Whether Cox' and

Barnes' particular manner of communicating support constituted a protected activity is a factual issue that the Court will not consider in ruling on a motion to dismiss. Taking the allegations of the FAC as true, as the Court must at this early stage in the pleadings, Cox and Barnes have brought sufficient allegations to state a claim for retaliation under FEHA and Title VII. Accordingly, the motion to dismiss the second claim for relief is DENIED.

3. Harassment and Hostile Work Environment

The third claim for relief brings a claim of harassment and hostile work environment under Title VII, 42 U.S.C. § 2000(e), and FEHA, Cal. Gov. Code § 12940(j). J.C. brings this claim against the District, for alleged harassment based on his race and religion.

The elements of a hostile work environment are: (1) plaintiff was subjected to verbal or physical conduct because of his race; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive working environment. Irish v. City of Sacramento, 2006 WL 224436, *3 (E.D. Cal. Jan. 30, 2006), (citing Manatt v. Bank of America, NA, 339 F.3d 792, 798 (9th Cir. 2003)).

The FAC alleges that J.C. was initially harassed by Ray during the period from 2004-2007, while J.C. served as Head Coach of the basketball team. The FAC alleges that Ray confronted J.C. following J.C.'s school presentation on the Native American perspective of Thanksgiving, questioned him about his religious belief, and expressed disapproval that J.C. followed Native

American spiritual traditions as opposed to believing in Jesus or the Christian god. The FAC also alleges that Ray encourage insubordination against J.C., and encouraged parents to complain about, among other things, J.C. telling “Indian stories” on or during team practice, and excluded J.C. from use of a facility used by the other athletic staff. The FAC further alleges that in 2009, despite knowing of Ray’s harassment, Segura hired him to be the athletic director and supervise J.C. Additionally, the FAC alleges numerous other incidences of racially motivated harassment of J.C., including allowing another employee to repeatedly park a truck adorned with a noose and racist bumper stickers containing threatening statements towards people of color, adjacent to J.C.’s classroom.

Defendants contend that the allegations in the FAC amount to merely personnel management actions, and do not show severe or pervasive harassment or a hostile work environment. Defendants further argue that the FAC does not show that harassment was motivated by J.C.’s race or religion. Lastly, Defendants argue that all allegations that fall outside the statute of limitations should be dismissed. This argument is further discussed in the motion to strike.

The cases cited by Defendants in support of the motion to dismiss are primarily summary judgment cases, which are subject to different standards of review than motions to dismiss. At this stage in the pleadings, the numerous allegations brought by J.C. are sufficient to state a claim of harassment and hostile work environment, taking the allegations as true and drawing all reasonable inferences in favor of the plaintiffs. Further, under

the continuing violations theory discussed below for the motion to strike, allegations that fall outside the statute of limitations may still be included in a claim. Accordingly, the Motion to Dismiss the third claim for relief is DENIED.

4. Harassment and Hostile Work Environment

In the fourth claim for relief, J.C. brings a claim of harassment and hostile work environment under Title VII, 42 U.S.C. § 2000e, and FEHA, Cal. Gov. Code § 12940, against Ray and Segura. In his opposition, he concedes that he cannot bring a claim against Ray and Segura under Title VII. Accordingly, the portion of the fourth claim for relief alleging a violation of Title VII is DISMISSED, WITH PREJUDICE.

Defendants argue that the FEHA claim should also be dismissed against Ray and Segura because the FAC fails to plead sufficient facts showing "severe or pervasive" harassment. Defendants argue that the FAC alleges only actions that amount to personnel management decisions, not acts of harassment. As discussed above, the FAC contains numerous allegations regarding Ray's harassment and hostility towards J.C. The FAC further alleges that, among other things, Segura supported and encouraged Ray's acts of discrimination, assigned J.C. alone to use a custodian's storage closet and a small toilet room instead of the Coaches Commons, barred J.C.'s son from the athletic areas, and singled out J.C. for a performance evaluation.

As discussed above, the allegations in the FAC are sufficient to state a claim for harassment and hostile work environment against Ray and Segura, in violation of FEHA. Accordingly, the motion to dismiss the FEHA allegations of the fourth claim for

relief is DENIED.

5. Failure To Prevent Discrimination, Retaliation, Harassment and Hostile Work Environment

The fifth claim for relief alleges that the District failed to prevent discrimination, retaliation or harassment against J.C., Cox and Barnes, in violation of FEHA, section 12940(k). Section 12940(k) requires employers to take all reasonable steps necessary to prevent discrimination and harassment from occurring. To state a claim for failure to prevent under 12940(k), a plaintiff must allege that (1) plaintiff was subjected to discrimination, harassment or retaliation, (2) defendant failed to take all reasonable steps necessary to prevent discrimination, harassment or retaliation, and (3) this failure caused plaintiff to suffer injury, damage, loss or harm. Lelaind v. City and County of San Francisco, 576 F.Supp.2d 1079, 1103 (N.D. Cal. 2008).

The FAC alleges that the District failed to take all reasonable steps necessary to prevent discrimination, retaliation and harassment. The District argues that the FAC is devoid of allegations pertaining to what investigatory steps the District did or did not take, or what anti-discrimination policies were or were not in place. The District contends that the FAC only alleges that J.C. filed grievances, which were denied. Plaintiffs argue that the FAC contains allegations that the District ignored the discrimination that was occurring towards J.C., Cox and Barnes, ignored complaints brought by J.C. and his union representative concerning conduct by Segura and Ray, encouraged and authorized Segura and Ray's conduct, and refused to reverse disciplinary

actions taken against J.C. regarding dress, despite acknowledging that there was no dress code in effect.

The District relies on California Fair Employment and Housing Com'n v. Gemini, 122 Cal.App.4th 1003 (2004) to argue that in order to show failure to prevent, Plaintiffs must allege failure to investigate and lack of a nondiscrimination policy. However, Gemini is not persuasive as it dealt with a petition for mandate and assessed whether sufficient evidence existed to support a decision reached by the Fair Housing and Employment Commission. While it gave examples of what an employer might do to prevent workplace discrimination, it did not address pleading requirements to state a claim for failure to prevent discrimination and harassment. Here, the allegations in the FAC are sufficient to state a claim at this early stage that the District failed to prevent discrimination, harassment and retaliation against J.C., Cox and Barnes. Accordingly, the motion to dismiss the fifth claim for relief is DENIED.

6. 42 U.S.C. § 1983, Violation of Equal Protection and First Amendment Rights

The sixth claim for relief alleges that Ray and Segura violated J.C.'s equal protection and First Amendment rights, in violation 42 U.S.C. § 1983 by discriminating against him through their conduct during the 2009-2010 school year, due to his race, color, national origin, religion and public expressions concerning matters of public concern. The FAC alleges that this conduct was directed at J.C. while he was Head Coach of the basketball program, and materially and adversely affected the terms and condition of his employment.

To prevail in a §1983 civil action against state actors for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws, a plaintiff must show that (1) acts by the defendants (2) under color of state law (3) deprived him of federal rights, privileges or immunities and (4) caused him damage. Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Accordingly, the conduct complained of must have deprived the plaintiff of some right, privilege or immunity protected by the Constitution or laws of the United States." Thornton v. City of St. Helens, 425 F.3d 1158, 1163-64 (9th Cir. 2005) (internal citations omitted).

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.

The FAC alleges that J.C. was treated differently by Ray and Segura from other similarly situated non-minority coaches and teaching staff, due to his race, color and religious beliefs. The FAC alleges that Ray and Segura's conduct was intentionally discriminatory, and that J.C. suffered injury from the discrimination.

Taking the allegations of the FAC as true, as the Court must at this stage of the litigation, J.C. has stated a claim under Section 1983 for violation of his equal protection rights.

Defendants further argue that Ray and Segura cannot be held liable under Section 1983 for violating Title VII. However, the section 1983 claim is based not on Title VII, but on violation of the Equal Protection clause and the First Amendment. The motion to dismiss and reply brief contain only a cursory argument in opposition to the equal protection and first amendment allegations, arguing that the FAC fails to state a claim and that Ray and Segura are entitled to qualified immunity.

The doctrine of qualified immunity shields public officials sued in their individual capacity from monetary damages, unless their conduct violates "clearly established" law of which a reasonable public officer would have known. Saucier v. Katz, 533 U.S. 194, 199 (2001).

The court must make a two-step inquiry in deciding the issue of qualified immunity. Saucier, 533 U.S. at 200. First, the court must determine whether, under the facts alleged, taken in the light

most favorable to the plaintiff, a violation of a constitutional right occurred. Id. If so, the court must then ask whether the constitutional right was clearly established at the time of the violation. Id.

Initially, the Supreme Court in Saucier held that these two inquiries must be decided in rigid order. Saucier, 533 U.S. at 200. That is, a district court had to resolve whether a violation of a constitutional right occurred before it could evaluate whether the right was clearly established. Recognizing, however, that "there are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right," the Supreme Court recently relaxed the order of analysis. Pearson v. Callahan, 555 U.S. 223, 237 (2009). In Pearson, the Court held that the Saucier analysis may be addressed in either order if the second step is clearly dispositive and can address the matter efficiently. Id. at 241-42. "Immunities and other affirmative defenses may be upheld on a motion to dismiss only when they are established on the face of the complaint." T.A. ex rel. Amador, 2009 WL 1748793 at *5.

It is not clearly established on the face of the FAC that Ray and Segura are entitled to qualified immunity. J.C. has stated a claim for violation of his equal protection rights, and a reasonable school official would have known that it is a constitutional violation to treat the employees he or she supervises differently on the basis of race. Thus with the limited facts before it at this time, the Court does not find Ray and Segura are entitled to qualified immunity, and the motion to dismiss the equal protection allegations of the sixth claim for

relief is DENIED.

Both parties analyze the sixth claim for relief (discrimination in violation of the First Amendment) and the eighth claim for relief (retaliation in violation of the First Amendment) together, without distinguishing between the two claims. Reviewing the allegations of the FAC, and the parties arguments (all of which cite cases dealing addressing First Amendment retaliation) the Court finds that the claims are redundant. The sixth claim alleges that Ray and Segura discriminated against J.C. in retaliation for exercising his First Amendment rights, and the eighth claim alleges that Ray and Segura directed retaliatory actions (the aforementioned discrimination) towards J.C. after he exercised his First Amendment rights. The eighth claim also contains additional allegations that Ray and Segura directed actions towards J.C.'s wife and son to further retaliate against J.C. for exercising his First Amendment rights. Accordingly, the First Amendment allegations in the sixth claim for relief are dismissed, with prejudice.

7. 42 U.S.C. § 1983, 42 U.S.C. § 1981, Denial of Equal Protection, First Amendment and Contract Rights

The seventh claim for relief alleges that Ramona was denied her Equal Protection rights and her First Amendment right of association under 42 U.S.C. § 1983, and denied her right to make and enforce contracts under 42 U.S.C. § 1981. Ramona brings this claim against Segura, alleging that Segura intentionally and recklessly discriminated against her because of her race, color, national origin, and relationship with J.C., with the purpose and effect of causing her emotional and economic injury.

The FAC alleges that Ramona was a choreographer and coach of the high school dance team, and the student cheerleaders were taking and intending to take private dance lessons from Ramona. Segura is alleged to have discontinued Ramona's participation as a choreographer and coach of the dance team, and threatened to disqualify any cheerleader who took private lessons from Ramona.

Defendants argue that the FAC does not allege that Ramona was an employee of the District, nor that any cheerleaders actually refrained from taking private lessons from Ramona. Accordingly, Defendants contend that Ramona has failed to show any injury, and without injury, she lacks standing and fails to state a claim. Defendants argue that Ramona cannot assert the rights of a third party (the cheerleaders) without alleging that the cheerleaders are unable to assert their own rights. Defendants further contend that the FAC fails to allege the existence of any contractual relationship between Ramona and anyone else, fails to show how Segura was acting under color of law in any of her alleged conduct towards Ramona.

Ramona argues that she is not attempting to assert third party standing, rather she herself suffered from discrimination and is the only who can bring this claim. Article III standing is present only when (1) a plaintiff suffers a concrete, particularized injury which actual or imminent; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision. Falcon v. Richmond Police Dept., 1998 WL 774630, *3 (N.D. Cal. Oct. 30, 1998) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). Here, Ramona has pled that she was emotionally and economically injured by

Segura's actions in discontinuing Ramona's participation as a dance team choreographer and coach, and Segura's threats to the cheerleaders. Accordingly, she has made sufficient allegations to have standing.

However, while Ramona's allegations are sufficient for standing purposes, the Court finds that she has failed to state a claim under Section 1983. There are insufficient allegations in the FAC concerning Segura's treatment of Ramona as compared to her treatment of other similarly situated dance team coaches/choreographers or cheerleader dance instructors, to bring a claim under the equal protection clause. Ramona's claim of violation of her First Amendment right of association is also insufficient.

The First Amendment does not expressly contain a "right of association" but it does protect certain intimate human relationships as well as the right to associate for the purposes of engaging in those expressive activities otherwise protected by the Constitution. Wittman v. Saenz, 108 Fed. Appx. 548, 549 (9th Cir. 2004). "The First Amendment right of association protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of beliefs but also distinctly personal aspects of one's life." Id. at 549-550 (internal citations omitted). There are simply no allegations in the FAC that Segura interfered with Ramona's right to associate with any person. Accordingly, the FAC does not state a claim for violation of Ramona's First Amendment right of association.

1 The Court turns next to Ramona's allegations that her right to
2 make and enforce contracts was violated.

3 42 U.S.C. § 1981 provides that all persons
4 shall have the same right . . . to make and
enforce contracts . . . as is enjoyed by white
5 citizens. The statute defines, make and
enforce contracts to include the making,
6 performance, modification and termination of
contract, and the enjoyment of all benefits,
7 privileges, terms and conditions of the
contractual relationship.

8 Flores v. Von Kleist, 739 F.Supp.2d 1236, 1256 (E.D. Cal. 2010)
9 (internal citations omitted). To state a claim under Section 1981
10 a plaintiff must identify an "impaired contractual relation," by
11 showing that intentional racial discrimination prevented the
12 creation of a contractual relationship or impaired an existing
13 contractual relationship. Schiff v. Barrett, 2010 WL 2803037, *4
14 (E.D. Cal. July 14, 2010) (internal citations omitted).

15 Here, the FAC fails to allege the existence of any contractual
16 relationship, whether between Ramona and the District or Ramona and
17 the cheerleaders. Without the necessary allegations of an impaired
18 contractual allegation, Ramona has failed to state a claim under
19 Section 1981. The seventh claim for relief is dismissed with leave
20 to amend.

21 8. 42 U.S.C. § 1983, Retaliation in Violation of First
22 Amendment Rights

23 The eighth claim for relief is brought by J.C. against Ray and
24 Segura, and alleges that they retaliated against J.C. for
25 exercising his First Amendment rights by taking adverse actions
26 against him, and taking adverse actions against his wife and son.
27 Claims against a government official for First Amendment
28 retaliation require that an employee demonstrate: "(1) that he or

she engaged in protected speech; (2) that the employer took adverse employment action" and (3) that his or her speech was a substantial or motivating factor for the adverse employment action." Grosz v. Lassen Community College Dist., 360 Fed.Appx. 795, 797 (9th Cir. 2009) (citing Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003)). In evaluating the First Amendment rights of a public employee, the threshold inquiry is whether the statements at issue substantially address a matter of public concern. Brewster v. Board of Educ. of Lynwood Unified School Dist., 149 F.3d 971, 978 (9th Cir. 1998) (citing Roe v. City & County of San Francisco, 109 F.3d 578, 584 (9th Cir. 1997). If employee expression relates to an issue of political, social, or other concern to the community, it may fairly be said to be of public concern. Id. Adverse employment actions are actions taken by the defendants that were reasonably likely to deter the plaintiff from engaging in protected activity under the First Amendment. Grosz, 360 Fed.Appx. at 798. One may show that the protected activity was a substantial or motivating factor for the retaliatory actions due by alleging temporal proximity between the protected activity and the adverse actions. Id.

Here, the FAC alleges that J.C. exercised his First Amendment rights when he made school presentations about the Native American perspective of Thanksgiving. The FAC also alleges that J.C. exercised his First Amendment rights when he spoke out in opposition to alleged unlawful discrimination occurring at the high school. J.C. alleges that the adverse actions of Ray and Segura that have been discussed above were taken against him in retaliation for exercising his First Amendment rights. The eighth

claim also alleges that Ray and Segura took actions against his son and his wife, to further retaliate and dissuade J.C. from exercising his First Amendment rights.

Defendants argue that J.C. fails to state a claim for retaliation in violation of the First Amendment, because the FAC does not allege he made a "statement" for which was retaliated against. Further, Defendants contend that Ray and Segura are accused only of personnel management actions. Lastly, Defendants assert that even if J.C. has successfully pled a claim, Ray and Segura are entitled to qualified immunity.

The issues alleged in the FAC that J.C. spoke out about (Native American issues and discrimination in the school) may be considered matters of public concern. Likewise, the FAC alleges numerous actions taken against J.C. by Ray and Segura that may be considered adverse actions. However, while the FAC alleges that the majority of J.C.'s protected activities and Ray and Segura's adverse actions took place during the 2009-2010 school year, the FAC is lacking allegations of temporal proximity that would allow the Court to infer that the adverse actions were indeed connected to the protected activity. With the exception of J.C.'s 2006 speech on Native American perspectives, the FAC does not allege the dates on which J.C. engaged in his other protected activity nor the dates on which Ray and Segura took alleged adverse actions. Accordingly, the Court dismisses the claim for violation of the First Amendment, with leave to amend. As to Ray and Segura's assertion that they are entitled to qualified immunity, the Court does not find that it is clear on the face of the FAC that they are entitled to qualified immunity, and thus will not grant qualified

immunity on this claim at this time.

C. Motion to Strike

Lastly, the Court will address Defendants' Motion to Strike, brought pursuant to Federal Rule of Civil Procedure 12(f). Defendants ask the Court to strike paragraphs 16, 17 and 18 of the FAC. Paragraph 16 alleges that during the 2004-2007 period, J.C. served as Head Coach of the basketball team and Ray was involved in selecting a volunteer coach named Howard Hughes. Hughes refused to accept J.C. as his supervisor and engaged in insubordinate acts. Paragraph 17 alleges that on November 21, 2006, J.C., Ramona and their son gave presentations on the Native American perspective about Thanksgiving at school wide assemblies. These presentations were the subject of an editorial and opinion piece in the local newspaper on November 29, 2006. It is alleged that soon after the presentation Ray confronted J.C. about his Native American spiritual beliefs, expressed disapproval, and thereafter exhibited hostility. Paragraph 18 alleges that Ray engaged in conduct during J.C.'s 2004-2007 tenure as Head Coach that included supporting parental opposition to the presence of J.C.'s son, condoning Hughes' insubordination, encouraging parental complaints about J.C. telling "Indian stories" and urging officials to cite J.C. for a technical foul when he went to assist an injured player.

Defendants argue that these paragraphs should be stricken because they are outside the statute of limitations. J.C. received right-to-sue notifications from California's Department of Fair Employment and Housing on October 18, 2010 and December 29, 2010, and right-to-sue letters from the U.S. Department of Justice on behalf of the Equal Employment Opportunity Commission on November

3, 2010 and February 28, 2011.

> 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).

Under federal law, an aggrieved person must file charges within either 180 or 300 (if complaint also filed with a State agency) days of the alleged unlawful employment practice. See 42 U.S.C. § 2000e-5(e)(1) and (f)(1). Under the California Fair Employment and Housing Act ("FEHA"), "no complaint may be filed after the expiration of one year from the date upon which the alleged [discriminatory] practice or refusal to cooperate occurred." Cucuzza v. City of Santa Clara, 104 Cal.App.4th 1031, 1040 (2002). Failure to file a timely administrative complaint bars bringing a civil action. See e.g. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113-114 (2002) (holding that under 42 U.S.C. § 2000e-5 discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges); Morgan v. Regents of University of California, 88 Cal.App.4th 52, 63 (2000) (holding that under FEHA, the timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages).

Under California law, the continuing violations doctrine "allows liability for unlawful employer conduct occurring outside

the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." Richards v. CH2M Hill, Inc., 26 Cal. 4th 798, 802 (Cal. 2001). The employee must prove three prongs in order to invoke the continuing violation doctrine under FEHA. Id. at 823. First, the conduct that occurred within the limitations period must be "sufficiently similar in kind to the conduct that falls outside the period." Harris v. City of Fresno, 625 F.Supp.2d 983, 1023 (E.D. Cal. 2009). Second, the conduct must have occurred with "reasonable frequency." Id. Third, the conduct must not have acquired "a degree of permanence such that the employee was on notice that further efforts at informal conciliation to obtain reasonable accommodation or end harassment [would] be futile." Id.

Defendants argue that Ray's conduct was not a continuing violation, and thus J.C. should not be able to include allegations that occurred during the 2004-2007 period. Defendants argue that these allegations are irrelevant, immaterial and/or impertinent under Rule 12(f). Plaintiffs argue that the allegations should not be stricken, as they constitute a continuing violation.

Motions to strike are disfavored, and must meet a high standard before the Court will strike allegations from a complaint. See Rule 12(f), *supra*. Here, following further discovery of the facts and circumstances surrounding the alleged events and conduct that took place from 2004-2207, and later from 2009-2011, Plaintiffs may be able to prove that Ray's conduct is a continuing violation. This case is not at the summary judgment stage, unlike the cited cases, in which the courts engaged in a fact intensive analysis under the continuing violations test (see eg. Cucuzza,

supra; Harris, *supra*). While J.C. may be unable to use the allegations from the 2004-2007 period to support a Title VII claim, given the different rules surrounding the statute of limitations for federal and state claims, the Court will not strike these paragraphs at this time, as they may prove relevant to the state claims. Accordingly, Defendants' motion to strike is DENIED.

III. ORDER

Defendants Motion to Dismiss is GRANTED in part and DENIED in part, as set forth below:

1. The motion to dismiss the first claim for relief is DENIED.

2. The motion to dismiss the second claim for relief is DENIED.

3. The motion to dismiss the third claim for relief is DENIED.

4. The motion to dismiss the Title VII claim within the fourth claim for relief is GRANTED. The Title VII claim within the fourth claim for relief is DISMISSED WITH PREJUDICE. The motion to dismiss the FEHA claim within the fourth claim for relief is DENIED.

5. The motion to dismiss the fifth claim for relief is DENIED.

6. The motion to dismiss the Equal Protection claim within the sixth claim for relief is DENIED. The motion to dismiss the First Amendment claim within the sixth claim for relief is GRANTED. The First Amendment discrimination claim within the sixth claim for relief is DISMISSED, WITH PREJUDICE.

7. The motion to dismiss the seventh claim for relief is GRANTED. The seventh claim for relief is DISMISSED, WITH LEAVE TO AMEND.

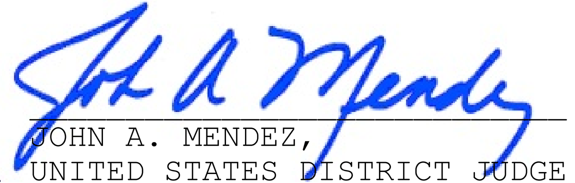
8. The motion to dismiss the eighth claim for relief is GRANTED. The eighth claim for relief is DISMISSED, WITH LEAVE TO AMEND.

9. The motion to strike is DENIED.

Plaintiffs are ordered to file a Second Amended Complaint within twenty-one (21) days of the date of this order. It is further ordered that the allegations regarding J.C.'s alleged "medical condition" should not be included in the Second Amended Complaint, as Plaintiffs' opposition brief did not oppose their dismissal and did not respond to any of Defendants' arguments concerning the dismissal of these allegations.

IT IS SO ORDERED.

Dated: October 5, 2011



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE