UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EKIN MITCHELL,

Plaintiff,

v.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,

Defendant.

/

NO. CIV. S-11-362 LKK/DAD

O R D E R

The plaintiff, a teacher, sued alleging employment discrimination by the Sacramento Unified School District. Plaintiff alleges wrongful termination: (1) in violation of Title VII of the Civil Rights Act of 1964; (2) in violation of her employment contract; (3) in violation of the covenant of good faith and fair dealing; and (4) on the basis of race--specifically, her Middle Eastern ancestry--in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Pl's Compl., ECF No. 1, at 6-8 (Feb. 9, 2011). Plaintiff seeks compensatory damages, tort damages, and punitive damages. Id. at 9. Pending before the court is Defendant's motion to dismiss and to strike, Def's Mot., ECF No. 24

(Aug. 25, 2011), which Plaintiff opposes, Pl's Opp'n, ECF No. 28 (Oct. 4, 2011).

I. FACTUAL BACKGROUND[1]

Plaintiff Ekin Mitchell is an accredited schoolteacher formerly employed at McClatchy High School by Defendant Sacramento County Unified School District. Pl's Compl., ECF No. 1, at 1. Plaintiff alleges that, while employed at the school, she consistently performed her duties with diligence, care, and professionalism, and that she had a "stellar record of excellent evaluations," which reflect her dedication to teaching and to her students. Id.

On January 27, 2010, a student, Shianne Griffin, requested permission to use the restroom because she felt nauseated. Id. at 2. Ms. Mitchell granted the student leave to use the restroom, with the proviso that she return to class within four minutes. Id. Shianne Griffin returned from the restroom within the allotted time-frame and took her seat in class. Id.

Later that same class period, Shianne Griffin again requested permission to use the restroom. Id. Again, Ms. Mitchell granted permission to use the restroom, with the proviso that the student return within four minutes. Id. Ms. Mitchell sent two students to accompany Shianne Griffin to the restroom. Id. at 3. Neither Ms. Griffin nor the other two students returned to the classroom. Id.

[1] These facts are taken from the allegations in the Plaintiffs' Complaint, ECF No. 1, unless otherwise specified. The allegations are taken as true for purposes of this motion only. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007).

After Ms. Mitchell sent a fourth student to inquire after the whereabouts of Shianne Griffin, the student returned and reported that Ms. Griffin and the two students that had accompanied her had gone into an alcove at the back of Ms. Joyce Stevens's classroom.[2] Id. Shianne Griffin remained in the alcove within Ms. Stevens's classroom until school concluded that day at 12:30 p.m. (due to a shortened day schedule). Id.

At the conclusion of the school day, Ms. Mitchell went to Ms. Stevens's classroom to inquire about Ms. Griffin's condition and Ms. Stevens stated that the student had rested comfortably and was discharged to her family member at the conclusion of the day. Id. Ms. Stevens also conveyed her belief that Ms. Griffin had been intoxicated on alcohol. Id. Ms. Stevens stated that the matter did not need to be reported to the school administration because the student was, by then, in the care of her family member, and because Ms. Stevens regarded Ms. Griffin as a "good student" who should not receive discipline for underage drinking. Id. Ms. Mitchell followed this suggested disposition because Ms. Stevens had twenty-eight years of seniority over Ms. Mitchell at the school. Id. Accordingly, Ms. Mitchell took no further action and considered the matter resolved. Id.

On Friday, January 29, 2010, Ms. Mitchell was interrogated at

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[2] Plaintiff's complaint spells the teacher's name as both "Stevens" and "Stephens." See, e.g., Pl's Compl., ECF No. 1, at 3. Because Plaintiff consistently uses the spelling, "Stevens," in her opposition to Defendant's motion to dismiss, the court uses that spelling for purposes of this order.

length by officers from the Sacramento Police Department, after which, she was placed on administrative leave. Id. at 3-4.

On or about February 19, 2010, Ms. Mitchell received a letter from the Sacramento City Unified School District titled, "Notice of Unprofessional Conduct," and setting forth a statement of the incident. Id. at 4. Ms. Mitchell was placed on forty-five days' probation and, on March 5, 2010, Ms. Mitchell was terminated. Id. The termination letter did not specify why she was being terminated, but did refer to Education Code section 44954 as the statutory basis for termination.[3] Id.

Ms. Stevens did not receive a similar "Notice of Unprofessional Conduct", nor from all that appears, was she in any way disciplined for her central role in the incident. See id. at 4-5. Nor, for that matter, did Ms. Stevens suffer any adverse employment action for her role in failing to report the student's alcohol consumption. Id. at 6. Ms. Stevens is Caucasian; Ms. Mitchell is Middle Eastern, and of Turkish ancestry. Id. at 5, 6.

In an October 2008 performance review, signed and dated by the school principal on March 24, 2009, Ms. Mitchell received consistently high marks across the evaluation criteria, and was

[3] California Education Code Section 44954 provides: "Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances: (a) At the pleasure of the board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained. (b) After serving during one school year the number of days set forth in subdivision (a), if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year. CAL. EDUC. CODE § 44954 (2011).

specifically commended for volunteering and leading the school's extracurricular activities and in implementing the expansion of a program called "World Curious," in which students are encouraged to take an active interest in world affairs. Id. at 5.

II. STANDARD FOR MOTION TO DISMISS

A dismissal motion under Fed. R. Civ. P. 12(b)(6) challenges a complaint's compliance with the federal pleading requirements. Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must give the defendant "'fair notice of what the ... claim is and the grounds upon which it rests.'" Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007), quoting Conley v. Gibson, 355 U.S. 41, 47 (1957).

To meet this requirement, the complaint must be supported by factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, ___, 129 S. Ct. 1937 (2009). Moreover, this court "must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007).[4]

"While legal conclusions can provide the framework of a complaint," neither legal conclusions nor conclusory statements are themselves sufficient, and such statements are not entitled to a

[4] Citing Twombly, 556 U.S. at 555-56, Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations"), and Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test" under Rule 12(b)(6)).

presumption of truth. Iqbal, 556 U.S. at ___, 129 S. Ct. at 1949-50. Iqbal and Twombly therefore prescribe a two step process for evaluation of motions to dismiss. The court first identifies the non-conclusory factual allegations, and then determines whether these allegations, taken as true and construed in the light most favorable to the plaintiff, "plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at ___, 129 S. Ct. at 1949-50.

"Plausibility," as it is used in Twombly and Iqbal, does not refer to the likelihood that a pleader will succeed in proving the allegations. Instead, it refers to whether the non-conclusory factual allegations, when assumed to be true, "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at ___, 129 S. Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557).[5] A complaint may fail to show a right to relief either by

[5] Twombly imposed an apparently new "plausibility" gloss on the previously well-known Rule 8(a) standard, and retired the long-established "no set of facts" standard of Conley v. Gibson, 355 U.S. 41 (1957), although it did not overrule that case outright. See Moss v. U.S. Secret Service, 572 F.3d 962, 968 (9th Cir. 2009) (the Twombly Court "cautioned that it was not outright overruling Conley ...," although it was retiring the "no set of facts" language from Conley). The Ninth Circuit has acknowledged the difficulty of applying the resulting standard, given the "perplexing" mix of standards the Supreme Court has applied in recent cases. See Starr v. Baca, 652 F.3d 1202, 1215 (9th Cir. 2011) (comparing the Court's application of the "original, more lenient version of Rule 8(a)" in Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) and Erickson v. Pardus, 551 U.S. 89 (2007) (per curiam), with the seemingly "higher pleading standard" in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), Twombly and

lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

III. ANALYSIS

In its motion to dismiss and to strike, Defendant argues that: (1) Plaintiff's first cause of action for violation of Title VII should be dismissed because there are insufficient facts alleged to support a claim pursuant to Title VII; (2) Plaintiff's second cause of action for breach of her employment contract should be dismissed on the grounds of Eleventh Amendment immunity, failure to timely file a government tort claim, and because there are insufficient facts alleged to support such a theory of alleged violation; (3) Plaintiff's third cause of action for breach of the covenant of good faith and fair dealing should be dismissed on the grounds of Eleventh Amendment immunity, failure to timely file a government tort claim, and because there are insufficient facts alleged to support such theory of alleged violations; (4) Plaintiff's fourth claim for a violation of 42 U.S.C. § 1981 should be dismissed on the grounds of Eleventh Amendment immunity and because there are insufficient facts alleged to support such theory of alleged violations; and (5) Plaintiff's claims for punitive damages are barred by the Eleventh Amendment and should be stricken. Def's Mot., ECF No. 24, at 1-2.

Iqbal), rehearing *en banc* denied, ___F.3d ___, 2011 WL 4582500 (October 5, 2011). See also Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (applying the "no set of facts" standard to a Section 1983 case).

In her opposition to Defendant's motion, Plaintiff "concedes the FRCP Rule 12(b)(6) motion as to the second, third, and fourth causes of action, as well as the claim for punitive damages." Pl's Opp'n, ECF No. 28, at 1.

The only remaining issue before the court therefore is Defendant's motion to dismiss Plaintiff's first cause of action; that is, whether or not Ekin Mitchell has pled sufficient facts to support a cause of action under Title VII of the Civil Rights Act of 1964. Defendant's motions to dismiss Plaintiff's second, third, and fourth cause of action will be granted, without leave to amend. Defendant's motion to strike Plaintiff's claims for punitive damages is granted, without leave to amend.

A. TITLE VII CLAIM

In order to establish a prima facie case of racial discrimination under Title VII of the Civil Rights Act, a plaintiff must show that "(1) [s]he is a member of a protected class; (2) [s]he was qualified for [her] position; (3) [s]he experienced adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004); cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Ninth Circuit has held that a plaintiff's burden in establishing a prima facie case is "minimal." Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1094 (9th Cir. 2005). Once a

plaintiff establishes a prima facie case, the burden shifts to the defendant to produce a legitimate non-discriminatory reason for the adverse employment action--in this case, termination. McDonnell Douglas Corp., 411 U.S. at 802; Sisson v. Helms, 751 F.2d 991 (9th Cir. 1985). The plaintiff then must "be afforded a fair opportunity to show that [defendant's] stated reason for respondent's rejection was in fact pretext." McDonnell Douglas Corp., 411 U.S. at 803.

Because the Defendant does not raise arguments that Plaintiff has failed to allege sufficient facts to support the first three elements of the prima facie case, those elements are not at issue. The parties are, however, in dispute regarding whether or not Ms. Mitchell can establish the fourth element of the prima facie case.

Plaintiff provides that she is Middle Eastern and of Turkish ancestry, while Ms. Stevens is Caucasian. Pl's Compl., ECF No. 1, at 6. This fact is sufficient to establish that Ms. Stevens is an individual outside of Plaintiff's racial group, and therefore, outside of Plaintiff's protected class. Cf. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002) ("It is well-established that Title VII applies to any racial group, whether minority or majority.").

Plaintiff further provides that she received a "Notice of Unprofessional Conduct" and was eventually terminated, while Ms. Stevens received "no adverse employment action." See Pl's Compl., at 4-6. This fact is sufficient to establish that Ms. Stevens was treated more favorably than Ms. Mitchell.

The remaining issue is whether or not Ms. Mitchell and Ms. Stevens were "similarly situated" or whether Plaintiff Mitchell has alleged sufficient facts to show that "other circumstances surrounding the adverse employment action give rise to an inference of discrimination."

As evidence of disparate treatment, Plaintiff points only to the fact that Ms. Stevens--a Caucasian teacher who assertedly suggested the non-response and who similarly failed to report the student's intoxication--received no adverse employment action, whereas Ms. Mitchell was terminated. Even if the court were to conclude that the two teachers were not similarly situated, the circumstances suggest other evidence of discrimination.

Turning then to the issue of similarly situated, it is not at all clear to the court that there were pertinent distinctions.

"Whether two employees are similarly situated is ordinarily a question of fact." Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874, 885 n.5 (9th Cir. 2007). In general, "individuals are similarly situated when they have similar jobs and display similar conduct." Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003). The employees' roles need not be identical, but they must be similar "in all material respects." Moran v. Selig, 447 F.3d 748, 755 (9th Cir. 2006) (citing Aragon v. Republic Silver State Disposal, 292 F.3d 654, 660 (9th Cir. 2002)).

In the instant case, Plaintiff has alleged that she and Ms. Stevens were both teachers at the same school, and that both of them had been involved in knowingly failing to report a student's

intoxication to the school administration. See Pl's Compl., at 2-3. Thus, it would appear that the two teachers were similarly situated.

Defendant argues, however, that the fact that Ms. Stevens has twenty-eight years seniority over Ms. Mitchell at the school, coupled with Ms. Mitchell's status as a "temporary employee" (as demonstrated by California Education Code § 44954), is sufficient to show that the two teachers were not "similarly situated." Defendant reasons that "this 28-plus year tenure gave Ms. Stevens permanent status with the District, entitling her to a valid property interest in her position of a constitutional stature. . . . she was unable to be terminated from her position without 'good cause.'" Def's Mot., ECF No. 24, at 8. Defendant's argument is puzzling. They may be arguing that they did not have good cause--if so, they hardly have defeated plaintiff's prima facie showing.

More probably, they are saying they did not have good cause sufficient to fire a tenured teacher. It appears to the court, however, that a legitimate, nondiscriminatory reason to impose the ultimate sanction of discharge against Ms. Mitchell must be sufficient to give rise to some sanction against Ms. Stevens. The court thus disagrees that this difference between the two teachers is enough to defeat the plausibility of Plaintiff's Title VII prima facie case.

In Title VII cases, a number of courts outside the Ninth Circuit have determined that the distinction between temporary and permanent employees has been significant enough to defeat

plaintiffs' arguments that people in each of the two groups were "similarly situated." See, e.g., Jones v. Yonkers Pub. Schs., 326 F. Supp. 2d 536, 545 (S.D.N.Y. 2004) ("[A] probationary civil service employee generally is not situated similarly to a non-probationary employee as a matter of law."); Steinhauer v. DeGolier, 359 F.3d 481, 484-85 (7th Cir. 2004) ("Purifoy and Steinhauer were not similarly situated because Steinhauer was still on probation while Purifoy was not."); Bogren v. Minnesota, 236 F.3d 399, 405 (8th Cir. 2000) ("We agree with the premise underlying the district court's conclusion; troopers beyond the probationary period are not similarly situated to a probationary trooper. Consequently, assuming nonprobationary troopers were treated more favorably than [plaintiff], we do not find that fact probative of whether the state's explanation is pretextual.") (citations omitted), cert. denied, 534 U.S. 816, 122 S.Ct. 44 (2001); McKenna v. Weinberger, 729 F.2d 783, 789-90 (D.C. Cir. 1984) (holding that a probationary employee was not similarly situated to a permanent employee and noting that "agency regulations mandated that probationary employees with serious performance problems were to be terminated, even if those problems would not have been good cause for terminating a permanent employee.").

It is axiomatic, however, that what was a material factual distinction in one Title VII case will not necessarily be a material factual distinction in another. Prior cases in which courts found that probationary versus permanent employees were not

similarly situated do not, by virtue of their specific factual determinations, create a rigid requirement that every Title VII plaintiff prove that employees were congruent in their probationary or permanent statuses in order to establish that they were similarly situated. Indeed, the Ninth Circuit has provided that the question of whether or not employees are similarly situated is a fact-intensive inquiry, and the materiality of any differences between employees' roles will vary depending on the context and the facts of each case. Hawn v. Executive Jet Management, Inc., 615 F.3d 1151, 1157 (9th Cir. 2010).

In determining the materiality of any differences between Ms. Mitchell and Ms. Stevens, it is important to remember that the ultimate issue presented by Plaintiff's complaint is not whether it was easy or hard for the school district to terminate Ms. Mitchell as compared with Ms. Stevens but, instead, whether the school district was, in fact, motivated by a discriminatory animus in its termination of Ms. Mitchell. Ms. Mitchell's status as a temporary employee did not give the school district an open license to terminate her employment for reasons violative of federal law. Put another way, a given category of workers might be easy to fire, but that does not make all firings of workers within that category necessarily non-discriminatory. Cf. Dawson v. Entek Intern, 630 F.3d 928, 936 (9th Cir. 2011) (determining that a district court erred in resolving by summary judgment an employee's Title VII retaliation claim and providing that "there is no legal precedent to support Entek's suggestion that a probationary or temporary

employee is subject to a different or lower standard for purposes of proving discriminatory treatment than a permanent employee."). The fact that it was easier for the school district to fire Ms. Mitchell than it would have been for them to fire Ms. Stevens does not prove or disprove Plaintiff's allegations that she was fired due to a racially discriminatory animus on the part of the district, and therefore, that fact does not diminish the sufficiency of Ms. Mitchell's complaint.

To resolve the "elusive factual question of intentional discrimination," the court is bound to adhere to the burden-shifting analysis established in McDonnell Douglas. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 n.8 (1981).

Based on the evidence at hand, the court presumes that, after the pleading stage of this case, the Defendant's proffered rationale for its termination of Ms. Mitchell would be that, as a temporary employee, Ms. Mitchell could be fired "[a]t the pleasure" of the governing board of the school district, see CAL. EDUC. § 44954(a), and Ms. Mitchell's failure to report a student's intoxication was a legitimate, non-discriminatory reason for Ms. Mitchell's termination. But if this court were to use the employer's rationale as the basis for defining who was similarly situated, the court's reasoning will have unfairly short-circuited the burden-shifting analysis established in McDonnell Douglas at the prima facie stage, and will have frustrated the plaintiff's opportunity to prove that the employer's proffered rationale was

pretextual. Cf. McDonnell Douglas Corp., 411 U.S. at 802; see also EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193 (10th Cir. 2000) ("a defendant cannot defeat a plaintiff's prima facie case by articulating the reasons for the adverse employment action because the plaintiff in such a situation would be denied the opportunity to show that the reasons advanced by the defendant were pretextual") (internal citation omitted).

For these reasons, the court determines that the allegations that Ms. Mitchell and Ms. Stevens were both teachers at McClatchy High School, and that they were both involved in the incident precipitating Ms. Mitchell's dismissal, is sufficient to plausibly establish that Ms. Mitchell and Ms. Stevens had "similar jobs and display[ed] similar conduct." Vasquez, 349 F.3d at 641. Thus, Plaintiff's complaint contains factual allegations to plausibly establish that a similarly situated individual outside of Ms. Mitchell's protected racial class was treated more favorably than her. Plaintiff has therefore pled sufficient facts to support a cause of action under Title VII of the Civil Rights Act of 1964, and Defendant's motion to dismiss Plaintiff's first cause of action is DENIED.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Defendant's motion to dismiss Plaintiff's first cause of action for violation of Title VII.

The court GRANTS Defendants' motions to dismiss Plaintiff's second, third, and fourth cause of action, WITHOUT LEAVE TO AMEND.

The court GRANTS Defendant's motion to strike Plaintiff's claims for punitive damages, WITHOUT LEAVE TO AMEND.

IT IS SO ORDERED.

DATED: November 2, 2011.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT