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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE EASTERN DISTRICT OF CALIFORNIA
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8 UTHA HELLMANN-BLUMBERG,)
9 Plaintiff,) 2:12-cv-00286-GEB-DAD
10 v.) ORDER DISMISSING
11 UNIVERSITY OF THE PACIFIC, a) DISCRIMINATORY IMPACT CLAIM
12 California Corporation,) AND DENYING MOTION FOR
13 Defendant.) PARTIAL JUDGMENT ON THE
) PLEADINGS

14 Defendant moves under Federal Rule of Civil Procedure ("Rule")
15 12(c) for partial judgment on Plaintiff's discriminatory impact claim,
16 which is alleged under Title VII of the Civil Rights Act of 1974, 42
17 U.S.C. § 2000e et seq., and Plaintiff's state contract claims. Defendant
18 argues its motion should be granted because Plaintiff has not
19 administratively exhausted her disparate impact claim and state courts
20 have exclusive jurisdiction over her contract claims under California
21 law.

22 **I. LEGAL STANDARD AND REQUEST FOR JUDICIAL NOTICE**

23 "[A] motion for a judgment on the pleadings is a motion for a
24 judgment on the merits. Since [D]efendant alleges only jurisdictional
25 grounds for dismissal, the proper course is to consider the motion as
26 one to dismiss for lack of subject matter jurisdiction." Collins v.
27 Bolton, 287 F. Supp. 393, 396 (N.D. Ill. 1968) (citation omitted). Thus,
28 Defendant's "motion [is to be treated] as if it had been brought under

1 Rule 12(b)(1).” San Luis Unit Food Producers v. United States, 772 F.
2 Supp. 2d 1210, 1218 (E.D. Cal. 2011) (alteration in original) (internal
3 quotation marks omitted) (quoting 5C Charles Allen Wright & Arthur R.
4 Miller, Federal Practice and Procedure § 1367 (3d ed. 2004)). Rule
5 12(b)(1) challenges to a court’s subject matter jurisdiction “can be
6 either facial or factual.” White v. Lee, 227 F.3d 1214, 1242 (9th Cir.
7 2000). Facial challenges attack the pleadings as insufficient to invoke
8 federal jurisdiction; factual challenges contest the truth of the
9 jurisdictional pleadings. Safe Air for Everyone v. Meyer, 373 F.3d 1035,
10 1039 (9th Cir. 2004). In a factual attack on jurisdiction, a court “may
11 look beyond the complaint” to evaluate jurisdictional facts that are not
12 intertwined with the merits of the action without converting the motion
13 into a motion for summary judgment. White, 227 F.3d at 1242; Trentacosta
14 v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987)
15 (collecting cases).

16 Defendant’s motion includes its request that the Court take
17 judicial notice of the following two documents, which Defendant argues
18 support its argument that Plaintiff’s discriminatory impact claim should
19 be dismissed: Plaintiff’s EEOC “Charge of Discrimination” (“EEOC
20 Charge”), and Plaintiff’s supplement to her EEOC Charge (“Supplement”).
21 Plaintiff opposes this request arguing: “The documents are hearsay for
22 which no foundation for any exception to the hearsay rule has been
23 shown.” (Opp’n Req. Judicial Notice 1:21-25, ECF No. 20.)

24 Defendant counters the statements contained in the EEOC Charge
25 and Supplement are not hearsay since they are not being offered for
26 their truth, but for the limited purpose of showing that Plaintiff
27 failed to exhaust her administrative remedies. (Reply 6:10-13, ECF No.
28 22.)

1 Plaintiff's hearsay objection is overruled in light of the
2 response to the objection, and therefore, Defendant's request for
3 judicial notice for the limited purpose for which the documents are
4 offered is granted. Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th
5 Cir. 2012) ("[A court] may take judicial notice of records and reports
6 of administrative bodies." (internal quotation marks omitted)); Gallo v.
7 Bd. of Regents of Univ. of Cal., 916 F. Supp. 1005, 1007 (S.D. Cal.
8 1995) ("[T]he Court may consider both the EEOC right to sue letter and
9 the EEOC charge, either as referenced in the complaint or as public
10 records subject to judicial notice.").

11 II. BACKGROUND

12 The following factual background is drawn from allegations in
13 Plaintiff's complaint and the judicially noticed documents. Defendant,
14 "a California Corporation that owns and operates a university," employed
15 Plaintiff as a tenure-track Assistant Professor in its Department of
16 Chemistry until she was discharged. (Compl. ¶¶ 6-7, ECF No. 1.)
17 Plaintiff's "gender is female." (Id. at ¶ 11.) During the 2006-2007
18 academic year, Plaintiff "sought promotion and appointment with tenure
19 in the Department of Chemistry." (Id. at ¶ 12.)

20 "In a letter dated April 15, 2007, Donald De Rosa, President
21 of [Defendant], denied tenure and promotion to [Plaintiff]." (Id. at
22 ¶ 16.) "On August 31, 2008, [Defendant] terminated [Plaintiff]'s
23 employment." (Id. at ¶¶ 16-17.)

24 Following her termination, Plaintiff "filed a charge of sex
25 discrimination against [Defendant] with the United States Equal
26 Employment Opportunity Commission (EEOC)," and she received a right to
27 sue letter. (Id. ¶ 21-22.) Plaintiff's EEOC Charge of Discrimination
28 shows she checked the boxes for "discrimination based on" "sex" and

1 "age." (Req. Judicial Notice, Ex. A, ECF No. 15-1.) Plaintiff's EEOC

2 Charge states:

3 In mid-April 2007, I received a letter from
4 Provost Phillip Gilbertson stating that my tenure
5 and promotion had been denied, despite . . . my
6 positive evaluations and a unanimous recommendation
7 for tenure and promotion from the Evaluation
8 Committee. . . . I believe I have been
9 discriminated against because of my sex, Female, in
10 violation of Title VII

11 (Id. (emphasis added).) Further, Plaintiff later sent the EEOC a letter
12 updating the EEOC on "two new developments," which includes the
13 following:

14 1. In my original complaint I stated that I
15 had never received any reasons why I was denied
16 tenure (which is the same as termination of my
17 position in the summer of 2008) or promotion to
18 associate professor. The reasons were finally
19 delivered on December 21, 2007 together with a
20 letter citing an improbable cause for their 4-
21 months delay. Several of the reasons are not
22 admissible under university rules because they were
23 not backed by the evidence collected in the
24 official document binder. I believe they come from
25 secret conversations of certain university
26 officials with one or two individuals with personal
27 or professional animosity toward me. The last
28 paragraph of the letter dated August 23, 2007, and
delivered on December 21, 2007, cites "my response
to proffered guidance in research and scholarly
activities" as a major reason for denial of tenure
and promotion. I believe this stems from secret
complaints of a male professor loosely associated
with our department who insisted that (female)
assistant professors pay regular visits to his
office for "mentoring" even if he had no experience
in their research area (as in my case). I was also
reluctant to comply because this individual had
previously shown lack of integrity and made me
uncomfortable. I am attaching the letter dated
August 23, 2007, and a letter I sent to the
committees when I forwarded the provost's
correspondence. I believe that the provost's letter
reflects an arbitrary decision by individuals
(President and Provost with help from an interim
dean) which feel that they have the power to make
such decisions and which are neither qualified to
judge my accomplishments nor inclined to consider

1 the evidence, the committee reports, or favorable
2 recommendations from faculty committees.

3 2. On Tuesday, January 15, 2008, the hiring of
4 replacement professors for me and for the other
5 women from the chemistry department who was
6 terminated last April under similar circumstances
7 was announced. The fact that both candidates are
8 male seems to support my suspicion that
discrimination based on gender (as well as
discrimination based on age) played an important
role in the Provost's and President's decision to
terminate my position despite favorable
9 recommendations from faculty committees.

10 (Req. Judicial Notice, Ex. B, ECF No. 15-2 (emphasis added).)

11 After receiving a right-to-sue letter from the EEOC, Plaintiff
12 sued Defendant asserting, inter alia, breach of contract and implied
13 covenant claims, and discrimination claims under two different theories:
14 disparate treatment and disparate impact.

15 **III. DISCUSSION**

16 **A. Disparate Impact Claim**

17 Defendant argues the Court lacks subject matter jurisdiction
18 over Plaintiff's disparate impact claim since Plaintiff did not exhaust
19 applicable administrative remedies concerning this claim. Defendant
20 contends the "Charge of Discrimination" Plaintiff filed with the EEOC
21 failed to raise a disparate impact claim. Specifically, Defendant
22 argues: "[Plaintiff's EEOC] Charge . . . gave the EEOC notice to
23 investigate claims for intentional gender and age discrimination under
24 a disparate treatment theory, but the Charge did not give the EEOC
25 notice to investigate any facially neutral employment policy with a
26 disproportionately discriminatory impact on a protected class under an
27 impact theory." (Mot. Partial J. Pleadings 9:24-28, ECF No. 14.)

28 Plaintiff counters that she sufficiently exhausted her EEOC
administrative remedies on her disparate impact claim. Specifically,

1 Plaintiff argues her disparate impact claim is "'reasonably related to
2 her failure to promote [disparate treatment] claim'" contained in her
3 EEOC Charge and Supplement, such that her disparate impact claim was
4 also sufficiently exhausted. (Opp'n 5:27-6:2 (quoting Brown v. Coach
5 Stores, Inc., 163 F.2d 706, 712 (2d Cir. 1998)).)

6 "Liability in a disparate-treatment case depends on whether
7 the protected trait actually motivated the employer's decision."
8 Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (alteration and
9 internal quotation marks omitted). "By contrast, disparate-impact claims
10 involve employment practices that are facially neutral in their
11 treatment of different groups but that in fact fall more harshly on one
12 group than another and cannot be justified by business necessity." Id.
13 (internal quotation marks omitted).

14 "In order to establish subject matter jurisdiction over [a]
15 Title VII claim, [a] Plaintiff [is] required to exhaust her
16 administrative remedies. . . . by filing a timely charge with the EEOC
17 . . . thereby affording the agency an opportunity to investigate the
18 charge." B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1099 (9th Cir.
19 2002) (citing 42 U.S.C. § 2000e-5(b)). "Allegations of discrimination
20 not included in the plaintiff's administrative charge may not be
21 considered by a federal court unless the new claims are like or
22 reasonably related to the allegations contained in the EEOC charge." Id.
23 at 1100 (emphasis added) (internal quotation marks omitted). "Subject
24 matter jurisdiction extends over all allegations of discrimination that
25 [would fall within the scope of] an EEOC investigation which can
26 reasonably be expected to grow out of the charge of discrimination." Id.
27 (internal quotation marks omitted).

1 The issue here is whether Plaintiff's allegations contained
2 in her EEOC Charge and Supplement are "like or reasonably related to"
3 her discriminatory impact claim, such that the EEOC had an "opportunity
4 to investigate" her specific claim. Id. at 1099-1100. "[A]n
5 administrative charge that only alleges a discrimination claim based on
6 disparate treatment is insufficient to exhaust a claim for disparate
7 impact" De Los Santos v. Panda Express, Inc., No. C 10-01370
8 SBA, 2010 WL 4971761, at *4 (N.D. Cal. Dec. 3, 2010) (collecting cases);
9 accord Goethe v. Cal. Dep't of Motor Vehicles, No. 2:07-cv-01945-MCE-
10 GGH, 2008 WL 489554, at *6 (E.D. Cal. Feb. 20, 2008) ("Because Plaintiff
11 pled only facts that would reasonably have led to an investigation of
12 disparate treatment or retaliation, he failed to exhaust his
13 administrative remedies, and this Court lacks jurisdiction over
14 Plaintiff's . . . disparate impact claim."); cf. Brown v. Puget Sound
15 Elec. Apprenticeship & Training Trust, 732 F.2d 726, 730 (9th Cir. 1984)
16 (reasoning an EEOC "investigation of whether [plaintiff]'s application
17 was rejected as the result of disparate impact would not have
18 encompassed her subsequent claim that . . . she was subjected to
19 intentional sex discrimination," and holding plaintiff "fail[ed] to
20 exhaust her administrative remedies before the EEOC[,] preclud[ing] the
21 presentation of her dis[parate] treatment claim in federal court").

22 Here, Plaintiff checked boxes in her EEOC Charge that show she
23 believed that she had been subjected to discrimination based on "sex"
24 and "age." (Req. Judicial Notice, Ex. A.) In the factual-statement
25 section of her EEOC Charge she states: "I believe I have been
26 discriminated against because of my sex, Female, in violation of Title
27 VII." (Id. (emphasis added).) Plaintiff states in her EEOC Supplement
28 that she believed she was fired because of evidence that "come[s] from

1 secret conversations of university officials with one or two individuals
2 with personal or professional animosity toward me. . . . I believe this
3 stems from secret complaints of a male professor loosely associated with
4 our department" (Req. Judicial Notice, Ex. B (emphasis added).)

5 Further, Plaintiff states in her Supplement:

6 [T]he hiring of replacement professors for me and
7 for the other women from the chemistry department
8 who was terminated last April under similar
9 circumstances was announced. The fact that both
10 candidates are male seems to support my suspicion
11 that discrimination based on gender . . . played an
12 important role in the Provost's and President's
13 decision to terminate my position despite favorable
14 recommendations from faculty committees.

15 (Id. ¶ 2.) These allegations fail "to identify any neutral employment
16 policy that would form the basis of a disparate-impact claim." Pacheco
17 v. Mineta, 448 F.3d 783, 792 (5th Cir. 2006). Plaintiff did not allege
18 or even allude to "any specific policy or procedure" that adversely
19 affected her gender as a group. Goethe, 2008 WL 489554, at *6. Instead
20 of a facially neutral institutional policy or procedure, Plaintiff
21 alleges her firing was the result of "secret conversations of certain
22 university officials with one or two individuals with personal or
23 professional animosity toward me." (Req. Judicial Notice, Ex. B.)
24 Plaintiff's allegations of "personal or professional animosity" are
25 consistent with intentional discrimination motivated by gender, rather
26 than a "neutral employment policy[, which] is the cornerstone of any
27 EEO[C] disparate-impact investigation, since the EEO[C] must evaluate
28 the policy's effects on protected classes and any business
justifications for the policy." Pacheco, 448 F.3d at 792. Therefore,
Plaintiff has not shown that she exhausted her administrative remedies
as to her disparate impact claim. For the stated reasons, Plaintiff's

1 disparate impact claim is dismissed for lack of subject matter
2 jurisdiction.

3 **B. Contract and Implied Covenant Claims**

4 Defendant argues partial judgment in its favor should be
5 entered on Plaintiff's claims for breach of contract and breach of the
6 implied covenant of good faith and fair dealing because California Code
7 of Civil Procedure § 1094.5 deprives federal courts of jurisdiction over
8 these claims. Defendant argues: "Plaintiff's contract and implied
9 covenant damage claims are barred by her failure to exhaust her
10 exclusive judicial remedy of a [state court] mandamus action." (Mot. J.
11 Pleadings 14:9-11 (emphasis added) (citing various state cases).)

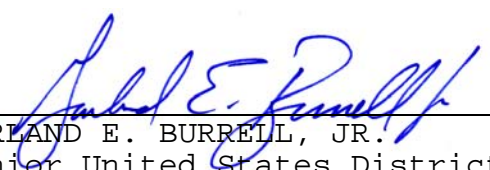
12 California state courts have interpreted section 1094.5 to
13 prescribe that "mandamus review" in California Superior Court "is the
14 exclusive remedy" for judicial review of university decisions denying
15 "academic tenure [to] a college professor." Pomona Coll. v. Superior
16 Court, 45 Cal. App. 4th 1716, 1720 (1996). However, "[b]arring only
17 exceptional circumstances, or explicit [federal] statutory requirements,
18 resort to a federal court may be had without first exhausting the
19 judicial remedies of state courts." Lane v. Wilson, 307 U.S. 268, 274-75
20 (1939) (internal citations omitted); accord BNSF Ry. Co. v. O'Dea, 572
21 F.3d 785, 788 (9th Cir. 2009) ("A state cannot confer rights upon
22 private parties and require that litigation between those parties must
23 be confined to the courts of the state itself."); 17A Charles Alan
24 Wright et al., Federal Practice and Procedure § 4233 Exhaustion of State
25 Remedies (3d ed. 2001) ("A litigant must normally exhaust state
26 'legislative' or 'administrative' remedies before challenging the state
27 action in federal court. He need not normally exhaust state 'judicial'

1 remedies." (footnote omitted)). Since Defendant has not shown this
2 portion of its motion should be granted, it is denied.

3 **IV. CONCLUSION**

4 For the stated reasons, Plaintiff's disparate impact claim is
5 dismissed, and the remainder of Defendant's motion (ECF No. 14) is
6 denied.

7 Dated: March 29, 2013

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11 GARLAND E. BURRELL, JR.
12 Senior United States District Judge
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