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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEANNA MALAIVANH,

Plaintiff,

v.

HUMPHREYS COLLEGE; JESSE DE LA  
CRUZ; JDS CONSULTATION, INC.; and,  
DOES 1 through 100 inclusive,

Defendants.<sup>1</sup>

No. 2:16-cv-01081-KJM-GGH

ORDER

Plaintiff Leanne Malaivanh brings claims for sexual harassment, retaliation, sexual assault, and negligence against Humphreys College (“Humphreys”) and two other defendants. Humphreys now moves to dismiss the complaint and, in the alternative, moves for a more definite statement.<sup>2</sup> Humphreys Mot., ECF No. 8. Defendants Jesse De La Cruz (De La Cruz) and JDS Consultation, Inc. (JDS) also jointly move to dismiss. JDS Mot., ECF No. 20. Ms. Malaivanh opposes both motions. Opp’n Humphreys Mot., ECF No. 10; Opp’n JDS Mot., ECF No. 22. Humphreys replied, ECF No. 13, but JDS and De La Cruz did not.

<sup>1</sup> Plaintiff mistakenly sued JDS Consultation, Inc. as “JSD Consultation, Inc.” After clarifying the error at hearing, this caption now reflects the entity’s proper name.

<sup>2</sup> The court stayed the case on September 20, 2016, ECF No. 15, and dismissed Humphreys’ motions, subject to renewal, ECF No. 16. On November 4, 2016, Humphreys properly renewed its motions. Not. of Renewal, ECF No. 19.

1                   On January 13, 2017, the court held a hearing on both motions; Phillip Mastagni  
2 appeared for plaintiff; Loren Lunsford for defendants Jesse De La Cruz and JDS; and William  
3 Trinkle for defendant Humphreys. Mins, ECF No. 26. As explained below, the court GRANTS  
4 both motions to dismiss.

5 I.       BACKGROUND

6       A.    Parties' Employment Relationship

7                   Ms. Malaivanh studied criminal justice at Humphreys, a private college in  
8 Stockton, California. *See generally* Compl., ECF No. 1. Ms. Malaivanh does not allege that she  
9 ever worked directly for Humphreys. Rather, she alleges, on information and belief, she “was  
10 employed by all three defendants, *id.* ¶ 15, and the named defendants were “the agents,  
11 representatives, servants and/or employees of every other [d]efendant, who was a principal,  
12 master, and/or employer of each other [d]efendant, and every [d]efendant was acting within the  
13 course and scope of said agency, authority, and/or employment,” *id.* ¶ 9.

14                  While a student at Humphreys, Ms. Malaivanh briefly worked as an assistant to  
15 Jesse De La Cruz, who she alleges does business on defendant corporation JDS’s behalf. *Id.* ¶ 6.  
16 Ms. Malaivanh asserts the assistant position was “held out as both an internship for school credit  
17 and as a paid part time job” and as an “opportunity toward advancement in the study of [c]riminal  
18 [j]ustice.” *Id.* ¶ 16. The complaint does not state the length of employment, but describes it as  
19 “general clerical and reception duties such as appointment scheduling, photo copying, making  
20 travel arrangements, and answering phones.” *Id.* ¶ 6.

21       B.    Claims

22                  Ms. Malaivanh alleges that beginning in August 2015, De La Cruz repeatedly  
23 sexually harassed and assaulted her. *Id.* ¶ 18 A–G. She then alleges Humphreys retaliated  
24 against her after she complained about De La Cruz’s conduct. *Id.* ¶ 19. On May 20, 2016, she  
25 filed suit against Humphreys, De La Cruz and JDS, pleading ten claims:

- 26               • Harassment (First Claim) and retaliation (Second Claim) against all three defendants  
27               under Title VII of the federal Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000.

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- 1           • Harassment (Third Claim) and retaliation (Fourth Claim) against all three defendants  
2           under California’s Fair Employment and Housing Act (FEHA), Cal. Gov’t Code  
3           § 12940 et seq.  
4           • Intentional Infliction of Emotional Distress (Fifth Claim), Negligent Infliction of  
5           Emotional Distress (Sixth Claim), and Negligence (Seventh Claim) against all three  
6           defendants.  
7           • Sexual Battery (Eighth Claim) and False Imprisonment (Ninth Claim) against  
8           De LaCruz and JDS.  
9           • Aiding and abetting harassment under the FEHA (Tenth Claim) against Humphreys.  
10          Compl. ¶¶ 23–85.

11                         Humphreys and JDS/De La Cruz now move to dismiss Ms. Malaivanh’s federal  
12          claims under Rule 12(b)(6) because, they say, they are not her “employers” under Title VII.

13          II.       LEGAL STANDARD FOR 12(B)(6) DISMISSAL

14                         A party may move to dismiss for “failure to state a claim upon which relief can be  
15          granted.” Fed. R. Civ. P. 12(b)(6). The court may grant such a motion only if the complaint  
16          lacks a “cognizable legal theory” or if its factual allegations do not support a cognizable legal  
17          theory. *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The  
18          court assumes the allegations are true and draws reasonable inferences from them. *Ashcroft v.*  
19          *Iqbal*, 556 U.S. 662, 678 (2009).

20                         A complaint need contain only a “short and plain statement of the claim showing  
21          that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), not “detailed factual allegations,”  
22          *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than  
23          unadorned accusations; “sufficient factual matter” must make the claim at least plausible. *Iqbal*,  
24          556 U.S. at 678. Accordingly, conclusory or formulaic recitations of a claim’s elements do not  
25          alone suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555). Rule 12(b)(6) assessments are context-  
26          specific, requiring courts to draw on “judicial experience and common sense.” *Id.* at 679.

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1     III.     DISCUSSION

2             As noted, Ms. Malaivanh brings her first two claims against all three named  
3 defendants under Title VII of the Civil Rights Act of 1964. *See generally* Compl. ¶¶ 23–32.  
4 Title VII protects certain classes of plaintiffs against harassment and retaliation from their  
5 employers by making it unlawful for an employer “to discriminate against any individual with  
6 respect to . . . compensation, terms, conditions, or privileges of employment because of such  
7 individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).

8             To establish a prima facie case of retaliation or harassment under Title VII,  
9 Ms. Malaivanh must show she had an employment relationship with the party who carried out the  
10 discriminatory or retaliatory conduct. *See generally* 42 U.S.C. § 2000e-2(a). Also, she must  
11 show the defendant meets the statutory definition of an employer, which is “a person engaged in  
12 an industry affecting commerce who has fifteen or more employees for each working day in each  
13 of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such  
14 a person . . . .” 42 U.S.C § 2000e(b).

15             Here, all three named defendants contend the court should dismiss  
16 Ms. Malaivanh’s Title VII claims under Rule 12(b)(6), but each argues for slightly different  
17 reasons. JDS and De La Cruz claim they do not meet the Title VII definition of an employer,  
18 while Humphreys argues the complaint does not plead any employment relationship between it  
19 and Ms. Malaivanh.

20             A.     Whether JDS or De La Cruz Meet the Definition of an Employer

21             Ms. Malaivanh’s complaint does not allege that either De La Cruz or JDS meets  
22 Title VII’s definition of an employer, nor does her opposition brief explain why she has not made  
23 these necessary allegations. *See generally* Compl.; Opp’n JDS Mot. De La Cruz and JDS  
24 contend they do not meet the definition of employer independently or jointly because they did not  
25 employ fifteen employees on each working day for twenty calendar weeks of the current or  
26 preceding year. *See* 42 U.S.C § 2000e(b). At hearing, Ms. Malaivanh’s counsel conceded she  
27 does not know of any facts that she could plead to bring JDS or De La Cruz within this definition.

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1           Although the complaint lumps defendants together, alleging “Ms. Malaivanh was  
2 employed by all three defendants” and they were “the agents, representatives, servants and/or  
3 employees of every other [d]efendant,” Compl. ¶¶ 9, 15, Ms. Malaivanh cannot escape her  
4 pleading requirements through this unsupported legal conclusion. *See Iqbal*, 556 U.S. at 678  
5 (explaining the need for “sufficient factual matter” to make the claim at least plausible) (citing  
6 *Twombly*, 550 U.S. at 555).

7           Accordingly, the court GRANTS De La Cruz and JDS’s joint motion to dismiss  
8 Ms. Malaivanh’s Title VII claims (claims one and two).

9           B.     Whether Humphreys Ever Employed Ms. Malaivanh

10           Humphreys argues that, although it meets Title VII’s definition of an employer  
11 generally, it never formed an employment relationship with Ms. Malaivanh, so her Title VII  
12 claims against it cannot survive. Humphreys Mot. 7. Ms. Malaivanh contends her complaint  
13 includes sufficient facts to plead a “joint employment relationship” between Humphreys and  
14 De La Cruz/JDS such that Humphreys also qualifies as her employer. Opp’n Humphreys Mot. 6.

15           Two or more employers may be considered “joint employers” if both employers  
16 control the employee’s terms and conditions of employment. *Wynn v. NBC*, 234 F. Supp. 2d  
17 1067, 1093 (C.D. Cal. 2002); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993  
18 (6th Cir. 1997); *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1123  
19 (3d Cir. 1982); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964) (explaining whether  
20 employers are joint depends primarily on whether they exercised common control over the  
21 employees).

22           Ms. Malaivanh and Humphreys agree that to establish a “joint employment”  
23 relationship, the complaint must allege facts satisfying the following elements: (1) The nature  
24 and degree of control each employer had over the others’ employees; (2) day-to-day supervision  
25 and discipline over each other’s employees; (3) authority to hire and fire the employee and to set  
26 employment conditions; and (4) control over employment records and over methods and amounts  
27 of payment of the other’s employees. Humphreys Mot. 12 & Opp’n Humphreys Mot. 6 (both  
28 citing *Wynn*, 234 F. Supp. 2d at 1093); *see also Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir.

1 1997) (listing the same factors in the Migrant and Seasonal Agricultural Worker Protection Act  
2 context).

3 Here, the complaint details no allegations to support a “joint employer”  
4 relationship. As noted above, Ms. Malaivanh merely alleges that “on information and belief,  
5 [she] was employed by all three defendants,” Compl. ¶ 15, and the named defendants were “the  
6 agents, representatives, servants and/or employees of every other [d]efendant,” *id.* ¶ 9.  
7 Ms. Malaivanh argues the allegation that “[d]efendants – plural, meaning all of the defendants  
8 collectively – held out the position as a job for which Ms. Malaivanh would be paid,” sufficiently  
9 shows a “joint employer” relationship. Opp’n Humphreys Mot. 5 (citing Compl. ¶ 16).<sup>3</sup> These  
10 allegations do not establish a plausible “joint employer” relationship. *See Wynn*, 234 F. Supp. 2d  
11 at 1093; *Swallows*, 128 F.3d at 993; *N.L.R.B.*, 691 F.2d at 1123; *see also Boire*, 376 U.S. at 475.  
12 Ms. Malaivanh does not allege she was required to have daily contact with or report to  
13 Humphreys, that Humphreys had a prior relationship with De La Cruz/JDS, or that Humphreys  
14 had any involvement in the decision to hire her. The complaint does not include any allegations  
15 illustrating that Humphreys and JDS/De La Cruz had authority to control, supervise, hire and fire,  
16 discipline, pay, or keep employee records for each other’s employees. Ms. Malaivanh’s  
17 complaint likewise does not support her contention that Humphreys had an “agency relationship”  
18 with JDS/De La Cruz.

19 As it stands, Ms. Malaivanh’s complaint does not sufficiently plead any form of  
20 joint employment making Humphreys an appropriate defendant to a Title VII claim based on  
21 De La Cruz’s conduct. Plaintiff’s unsupported legal conclusions to the contrary cannot withstand  
22 dismissal. *Iqbal*, 556 U.S. at 678. Accordingly, the court GRANTS Humphreys’ motion to  
23 dismiss Ms. Malaivanh’s Title VII claims.

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26 <sup>3</sup> Over Ms. Malaivanh’s objection, Humphreys asks the court to judicially notice the flyer  
27 purporting to hold the job out as an internship opportunity. *See* RJN 3, ECF No. 8-3. The  
28 complaint does not withstand dismissal regardless of the flyer’s content. The court does not reach  
Humphrey’s request.

1 IV. LEAVE TO AMEND

2 At hearing, plaintiff requested leave to amend her complaint. Rule 15 of the  
3 Federal Rules of Civil Procedure mandates that leave to amend “be freely given when justice so  
4 requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with extreme liberality.” *Eminence*  
5 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In a Rule  
6 15 analysis, a court considers any potential bad faith, delay, or futility regarding the proposed  
7 amendment, and the potential prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178,  
8 182 (1962); *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th Cir. 2004). “The  
9 party opposing amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v.*  
10 *Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Absent prejudice, Rule 15(a) carries a strong  
11 presumption in favor of granting leave to amend. *Eminence Capital*, 316 F.3d at 1052.

12 Here, there is at least a possibility plaintiff could cure her pleading to allege the  
13 named defendants independently meet Title VII’s employer definition or that they have an agency  
14 employment relationship. Defendants have not shown any undue prejudice that allowing  
15 amendment may cause, and in its briefing Humphreys specifically requested in the alternative a  
16 more definite complaint. *See Humphreys Mot.* at 6.

17 Accordingly, the court GRANTS plaintiff’s request to amend her complaint.

18 V. CONCLUSION

19 The court GRANTS both motions to dismiss the complaint, with leave to amend.  
20 Any amended complaint shall be filed within fourteen (14) days of the filed date of this order.

21 This order resolves ECF Nos. 8, 20.

22 IT IS SO ORDERED.

23 DATED: April 11, 2017.

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26 UNITED STATES DISTRICT JUDGE  
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