United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACULTY MEMBERS AT MIDDLE EASTERN SCHOOLS, et al.,

Plaintiffs,

v.

RICHARD DONOVAN, et al.,

Defendants.

Case No. 15-cv-03974-BLF

ORDER (1) GRANTING AFGE'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND AND (2) GRANTING RICHARD DONOVAN'S MOTION TO DISMISS WITH LEAVE TO AMEND

[Re: ECF 14, 26]

Plaintiffs, thirty-four faculty members at the Defense Language Institute Foreign Language Center, bring this action involving allegations of discriminatory practices and favoritism with respect to promotions. FAC 3:21-25, ECF 13. Before the Court are Defendant American Federation of Government Employees, AFL-CIO, Local 1263's ("AFGE") and Defendant Richard P. Donovan's motions to dismiss. For the reasons stated herein, the Court GRANTS AFGE's motion to dismiss without leave to amend and GRANTS Mr. Donovan's motion to dismiss with partial leave to amend.[1]

I. BACKGROUND

The following allegations are taken from Plaintiffs' First Amended Complaint. In April 2013, Defendant Richard Donovan, head of the Faculty Personnel System at the Defense Language Institute, held a meeting with faculty members to discuss promotions to the position of Associate Professor for 2013-2014. FAC 4:9-12, ECF 13. According to Mr. Donovan, a faculty

[1] Pursuant to Civ. L.R. 7-1(b), the Court found Defendants' motions to dismiss suitable for submission without oral argument and vacated the hearing scheduled for March 31, 2016. ECF 33.

member needed to have two areas of specialization to be promoted to the position of Associate Professor. FAC 4:20-21. At the April 2013 meeting, attendees allegedly asked Mr. Donovan whether serving as a Team Leader qualified as one area of specialization to which Mr. Donovan answered it did not. FAC 4:10-14. In a meeting held in 2011 about similar issues, Mr. Donovan also responded to a similar question with the same answer. FAC 4:17-19. In March 2014, promotions were announced and to the dissatisfaction of Plaintiffs, serving as Team Leader counted as an area of specialization. FAC 4:22-25. Moreover, Plaintiffs allege that less experienced teachers were promoted over more qualified teachers. FAC 4:25-28.

As a result Plaintiffs filed complaints with the "EEO, OSP, [their] Union, and direct grievances to FPS." FAC 5:5. In April 2014, six of the Plaintiffs sought the help of AFGE. FAC 7:15-16. They met with Mr. Philip White, where they gave him a copy of their EEO petition and requested to speak with AFGE's attorney regarding the possibility of arbitration if they could not resolve their dispute with Mr. Donovan. FAC 7:17-20. According to Plaintiffs, Mr. White refused to help them and told them to use Google to find an attorney. FAC 7:20-24.

Meanwhile, in response to Plaintiffs' complaints, Mr. Donovan met with dissatisfied faculty members in May 2014 and July 2014. FAC 5:6-16. At the second meeting, AFGE President Reuf Borovac and Provost Dr. Betty Leaver were also present. *Id.* According to Plaintiffs, at these meetings, Mr. Donovan denied telling them that serving as a Team Leader would not count as one area of specialization. *Id.* Dr. Leaver also claimed she researched this issue and did not hear Mr. Donovan tell faculty members that serving as a Team Leader would not qualify as an area of specialization. FAC 5:23-26. After the May 2014 meeting, Plaintiffs wrote a petition, that was signed by 11 of them, to Assistant Commander Colonel Ginger L. Wallace over Mr. Donovan's alleged misrepresentation of facts at the May 2014 meeting. FAC 5:20-23.

In late May 2014, Plaintiffs met and communicated with Mr. Borovac several times. FAC 7:25-8:3. Plaintiffs agreed with Mr. Borovac that they would not seek to arbitrate their grievances until the appeal process was finished. FAC 8:4-5. In August 2014, Plaintiffs also met with AFGE's regional attorney who promised to look into the case but never did. FAC 8:5-10.

In November 2014, Plaintiffs' appeal process finished and disappointed by the results of

the appeal, Plaintiffs wanted to pursue arbitration led by AFGE. FAC 6:14-15; FAC 8:11-15. Mr. Borovac sought advice from Dr. Toth Ben, AFGE's national representative, who on January 20, 2015 suggested Plaintiffs attempt more negotiations with management. FAC 8:15-16. Plaintiffs informed Dr. Ben that management was no longer interested in negotiation and on January 26, 2015, Dr. Ben gave Mr. Borovac instructions on how to file a complaint with the Federal Labor Relations Authority ("FLRA"). FAC 8:17-18. Mr. Borovac delegated filing of the complaint to his Chief Steward, Mr. Mark Chitwood. FAC 8:18-21. According to Plaintiffs, Mr. Chitwood did not have the experience, knowledge, or training to file a FLRA complaint. *Id.*

On February 6, 2015, Mr. Borovac received a completed complaint that was ready for filing with the FLRA. FAC 8:22-23. Plaintiffs allege that they had an agreement with Mr. Borovac that he would have Mr. Chitwood file the complaint that same day in order to meet the statute of limitations. FAC 8:24-27. However, Plaintiffs claim that Mr. Chitwood apparently changed his mind and the complaint was never filed. FAC 9:1-7. Plaintiffs did not learn of Mr. Chitwood's inaction until more than a month later in March 2015. *Id.* On March 22, 2015, Plaintiffs filed a complaint with the FLRA but it was dismissed for being outside the statute of limitations. FAC 6:15-17. Plaintiffs appealed the FLRA decision and on July 31, 2015, Plaintiffs' appeal was denied. FAC 6:17-23. Plaintiffs have now filed the pending action alleging that their union failed to fulfill its duty and seeking a fair review of the facts. FAC 6:24-25; FAC 9:27-28.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction, and are "presumed to lack subject matter jurisdiction until the contrary affirmatively appears." *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1184 (N.D. Cal. 2011). As courts of limited jurisdiction, a federal district court is obligated to dismiss a case when it lacks subject matter jurisdiction over the claims alleged. Fed. R. Civ. P. 12(b)(1). On a motion to dismiss pursuant to Rule 12(b)(1), the burden is on the plaintiff to establish subject-matter jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A jurisdictional challenge may be either facial or factual. See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge asserts that the factual

allegations in a complaint, even if assumed true, "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, "a factual attack…disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*. The Court need not presume the truthfulness of the plaintiff's allegations. *See, e.g.*, *White*, 227 F.3d at 1242. Once the factual basis for jurisdiction is challenged, the plaintiff bears the burden of coming forward with "competent proof" to support his allegations of jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

B. Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) concerns what facts a plaintiff must plead on the face of the complaint. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Any complaint that does not meet this requirement can be dismissed pursuant to Rule 12(b)(6). A "short and plain statement" demands that a plaintiff plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), which requires that "the plaintiff plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

C. Leave to Amend

Under Rule 15(a), a court should grant leave to amend "when justice so requires," because "the purpose of Rule 15…[is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). A court may deny leave to amend for several reasons, including "undue delay, bad faith,…[and] futility of amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

III. DISCUSSION

A. AFGE's Motion to Dismiss

AFGE argues the Court lacks subject matter jurisdiction over Plaintiffs' First Amended

Complaint. Mot. 2-5, ECF 15. AFGE contends that the gravamen of Plaintiffs' First Amended Complaint is that it failed in its duty of fair representation and committed an unfair labor practice. *Id*. at 2. According to AFGE, such claims may only be brought before the Federal Labor Relations Authority ("FLRA"), with judicial review reserved for the Court of Appeals. *Id*. (citing Federal Service Labor Management Relations Statute, 5 U.S.C. § 7101, *et seq.* ("FSLMRS")).

Before describing Plaintiffs' allegations, the Court notes only three Plaintiffs, Ahmed Nuri, Abdul Khogali, and Omar Mohamed Ali, signed the opposition brief. Opp. at 6, ECF 23. As this Court has repeatedly indicated to Plaintiffs, the Federal Rules of Civil Procedure require each Plaintiff to sign each document filed. ECF 11 (citing Fed. R. Civ. P. 11); ECF 24. The Court cannot ascribe the arguments signed only by Messrs. Nuri, Khogali, and Ali to the remaining Plaintiffs. Moreover, as non-attorneys Messrs. Nuri, Khogali, and Ali may not submit arguments on behalf of the other Plaintiffs. Thus, "Plaintiffs" in this section refers only to Messrs. Nuri, Khogali, and Ali. The remaining Plaintiffs[2] did not submit an opposition to AFGE's motion to dismiss.

Plaintiffs oppose AFGE's motion and argue that the Court has subject matter jurisdiction for two reasons. First, Plaintiffs argue that their unfair labor practice claim includes allegations of a breach of an oral agreement. Opp. at 3-4, ECF 23. Plaintiffs claim a breach of an oral agreement or breach of contract is not governed by the FSLMRS. *Id*. Second, Plaintiffs, relying on *Karahalios v. Defense Language Institute*, 613 F. Supp. 440 (N.D. Cal. 1984), *rev'd* 821 F.2d 1389 (9th Cir. 1987), *aff'd* 489 U.S. 527 (1989), *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Foust v. Int'l Bhd. of Elec. Workers*, 572 F.2d 710 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979), argue that district courts have jurisdiction to hear unfair labor practice claims. *Id*. at 4-6.

The Court agrees with AFGE and finds that it does not have jurisdiction to hear Plaintiffs'

[2] Haythym Malak, AbdulSattar Allami, Fatima Fileefl, Ayman Hussein, Ali Abueisa, Amad Abraham, Hatim Mujawah, Abdulhafiz Abaker, Salah Mohamed, Nemat Hassan, Osama Helmy, Ruwyda Jajo, Osman Osman, Alfatih Ahmed, Elrayah Khlifa, Tajeldin Badawi, Malika Zakour, Ibrahim Musa, Tariq Ballal, Ahmad Osman, Wadad Paulis, Salaheldin Gasmels, Atheer Hanna, Bozo Dzakula, Susan Melehani, Yaser Rezk, Joseph Issac, Abdelmonim Mohamad, Elbashir Karrar, Abdelrahim Mohamad, and Medhat Fam

claims. Allegations that a union mishandled a federal employee's claims constitute a cause of action for breach of the union's duty of fair representation. *Steadman v. Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 966 (D.C. Cir. 1990). The FSLMRS governs such actions. *Karahalios v. National Fed'n of Fed. Emps., Local 1263*, 489 U.S. 521, 531 (1989). According to the FSLMRS, an action over a breach of the union's duty of fair representation is an unfair labor practice that is "adjudicated by the FLRA." 5 U.S.C. § 7118. The FSLMRS provides recourse to the courts in only three circumstances: (1) except for limited circumstances, "any person aggrieved by any final order of the [FLRA]…may…institute an action for judicial review of the [FLRA's] order in the *United States court of appeals* in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia" ; (2) the FLRA may petition the court of appeals for enforcement of any order; and (3) the FLRA may petition any district court for temporary relief. 5 U.S.C. § 7123 (emphasis added). As a result, the exclusive jurisdiction of Plaintiffs' claims is with the FLRA and to the extent Plaintiffs meet the statute's requirements, with the appropriate United States Court of Appeals. *See Karahalios*, 489 U.S. at 531.

As to Plaintiffs' argument that their allegations include a breach of an oral contract, Plaintiffs may not avoid the jurisdictional requirements imposed by the FSLMRS by attempting to restyle their action, which is based on AFGE's alleged breach of its duty of fair representation, as one for a breach of contract. *See, e.g., Dunn v. Fed'n of Indian Serv. Emps.*, Case No. 08-cv-378-RAW, 2008 WL 5061463, at *1 (E.D. Ok. Nov. 21, 2008). Allowing Plaintiffs to do that would render the FSLMRS meaningless. *Id*.

As to Plaintiffs' reliance on the district court's decision in *Karahalios*¸ Plaintiffs correctly note that the district court found jurisdiction existed over a federal employee's claim against his union. 613 F. Supp. at 450. However, the district court's decision regarding jurisdiction was reversed by the Ninth Circuit, 821 F.2d 1389 (9th Cir. 1987), and the Ninth Circuit's decision was affirmed by the Supreme Court, 489 U.S. 527 (1989). In affirming the Ninth Circuit's decision, the Supreme Court held the FLRA has exclusive jurisdiction over an action against a union by a federal employee involving a breach of the duty of fair representation. *Id*. at 532 ("There is no

express suggestion…that Congress intended to furnish a parallel remedy in a federal district court to enforce the duty of fair representation..”). This Court is bound by the Supreme Court’s holding.

As to Plaintiffs’ citation to *Vaca* and *Foust*, in *Vaca*, the Supreme Court held that a private cause of action exists outside the FLRA against a union under certain circumstances. 386 U.S. 171. However, the statute in *Vaca* was the National Labor Relations Act (NLRA), not the FSLMRS. 386 U.S. at 181. In *Karahalios*, the Supreme Court discussed its prior ruling in *Vaca* and explained the different outcomes dictated by the NLRA and FSLMRS:

> In the first place, [FSLMRS] is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB. The NLRA, like the [Railway Labor Act], did not expressly make a breach of the duty of fair representation an unfair labor practice and did not expressly provide for the enforcement of such a duty by the NLRB. That duty was implied by the Court because members of bargaining units were forced to accept unions as their exclusive bargaining agents. Because employees had no administrative remedy for a breach of the duty, we recognized a judicial cause of action on behalf of the employee. Very dissimilarly, [FSLMRS] not only expressly recognizes the fair representation duty but also provides for its administrative enforcement.

Karahalios, 489 U.S. at 534 (internal citations omitted). This also explains why *Foust* is inapposite to the facts of this action. In *Foust*, the statute at issue was the Railway Labor Act, which as the preceding quotation from the Supreme Court indicates is different in form from the FSLMRS. *Foust*, 572 F.2d at 714.[3]

Accordingly, the Court finds that it lacks subject matter jurisdiction to hear Plaintiffs’ complaint against AFGE and GRANTS AFGE’s motion to dismiss without leave to amend as to Plaintiffs Messrs. Nuri, Khogali, and Ali.[4]

As for the Plaintiffs that did not sign the opposition brief, the Court has received no

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[3] Plaintiffs also cite to *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56 (1981) without explanation. However, that case is inapposite because it did not involve the FSLMRS.

[4] Plaintiffs also argue, based on *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003), that “[i]f a jurisdictional challenge…implicate[s] the merits of the underlying claim…[t]he proper course of action for the district court…is to find jurisdiction exists…” Opp. at 6, ECF 23. Plaintiffs misunderstand *Morrison*. The *Morrison* did not hold that a court should allow a case involving a jurisdictional challenge to proceed, nor could it, as the federal courts are of limited jurisdiction. Rather, the *Morrison* court held that when a jurisdictional challenge involves the merits of Plaintiffs’ allegations, the Court should assess the jurisdictional challenge under the standard set forth by Fed. R. Civ. P. 56. *Morrison*, 323 F.3d at 930.

indication that these individuals oppose AFGE's motion. Moreover, based on the above analysis, the Court also has no indication that these individuals could cure the jurisdictional defect and oppose AFGE's motion on legally meritorious grounds. As a result, the Court GRANTS as unopposed and without leave to amend AFGE's motion to dismiss with respect to the Plaintiffs that did not sign the opposition brief.

B. Mr. Donovan's Motion to Dismiss

Mr. Donovan moves to dismiss Plaintiffs' First Amended Complaint for lack of jurisdiction. Since there are several claims involving Mr. Donovan, the Court discusses each in turn, starting with Plaintiffs' Title VII claims and then moving to Plaintiffs' non-Title VII claims. As with AFGE's motion to dismiss, not all the Plaintiffs signed the opposition brief to Mr. Donovan's motion to dismiss. Opp. at 28, ECF 28. Here, only five Plaintiffs, Messrs. Ibrahim Musa, Yaser Rezu, Ahmed Nuri, Khogali Abdul, and Elbashir Karrar, signed the opposition. As a result, "Plaintiffs" in this section only refers to Messrs. Musa, Rezu, Nuri, Abdul, and Karrar and the remaining Plaintiffs[5] did not file an opposition to Mr. Donovan's motion.

i. Title VII Claims

Title VII, 42 U.S.C. § 2000e–16, bars employment discrimination based on race, color, religion, sex, and national origin. Section 2000e-16(c) provides that when a Title VII action is filed, "the head of the department, agency, or unit, as appropriate, shall be the defendant." "In order to bring a Title VII claim in district court, a plaintiff must first exhaust [his or her] administrative remedies." *Sommatino v. United States*, 255 F.3d 704, 707 (9th Cir. 2001). In this circuit, establishing a prima facie case for violations of Title VII requires that the Plaintiffs plead sufficient facts to show four elements: (1) that they belonged to a protected class; (2) that they were qualified for the job(s) they sought; (3) that they were subjected to an adverse decision; and (4) that similarly situated employees not in their protected class received more favorable

[5] Haythym Malak, AbdulSattar Allami, Fatima Fileefl, Ayman Hussein, Ali Abueisa, Amad Abraham, Omar Mohammed Ali, Hatim Mujawah, Abdulhafiz Abaker, Salah Mohamed, Nemat Hassan, Osama Helmy, Ruwyda Jajo, Osman Osman, Alfatih Ahmed, Elrayah Khlifa, Tajeldin Badawi, Malika Zakour, Tariq Ballal, Ahmad Osman, Wadad Paulis, Salaheldin Gasmels, Atheer Hanna, Bozo Dzakula, Susan Melehani, Joseph Issac, Abdelmonim Mohamad, Abdelrahim Mohamad, and Medhat Fam.

treatment. *See Antione v. N. Cent. Counties Consortium*, 605 F.3d 740, 753–54 (9th Cir. 2010); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Mr. Donovan argues that he is not the proper defendant under Title VII, Plaintiffs did not exhaust their administrative remedies, and Plaintiffs have not sufficiently alleged facts to meet the elements of a Title VII claim. Mot. at 4-7, ECF 26. Plaintiffs argue that Mr. Donovan is the proper defendant under the pertinent EEO regulations and they exhausted their administrative remedies. Opp. at 6-9, ECF 28. Plaintiffs do not directly address the argument that they did not adequately allege facts to state a Title VII claim.

1. The Proper Defendant Under Title VII

The Court agrees with Mr. Donovan that he is not the proper defendant for Plaintiffs' Title VII claim. Under 2000e-16(c), "the head of the department, agency, or unit, as appropriate, shall be the defendant," which in this case is Patrick Murphy, Acting Secretary of the United States Army. *See Ardalan v. McHugh*, Case No. 13-cv-01138-LHK, 2013 WL 6212710, at *20 (N.D. Cal. Nov. 27, 2013) ("As DLI is a U.S. Army language school, the proper defendant in [Plaintiff's] Title VII claim is [the] Secretary of the Army."). As a result, the Court lacks subject matter jurisdiction to hear Plaintiffs' Title VII claim against Mr. Donovan, and these claims must be dismissed.

2. Administrative Exhaustion

Assuming Plaintiffs sued the proper defendant, "[f]ederal employees who believe they have been discriminated against on the basis of age have 'the option of pursuing administrative remedies, either through the agency's EEO procedures, or through the Merit Systems Protection Board.'" *Shelley v. Geren*, 666 F.3d 599, 605 (9th Cir.2012) (quoting *Bankston v. White*, 345 F.3d 768, 770 (9th Cir.2003)). "Equal Employment Opportunity Commission (EEOC) regulations provide that an aggrieved federal employee who pursues the EEO avenue must consult an EEO counselor within forty-five days of the effective date of the contested personnel action, prior to filing a complaint alleging age discrimination." *Shelley*, 666 F.3d at 605 (citing 29 C.F.R. §§ 1614.103, 1614.105(a)(1)). "Although failure to file an EEOC complaint is not a complete bar to district court jurisdiction, substantial compliance with the exhaustion requirement is a

jurisdictional prerequisite." *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir.2003).

Before the Court addresses Mr. Donovan's argument that Plaintiffs failed to exhaust their administrative remedies, the Court must discuss the admissibility of extra-pleading materials that have been submitted to the Court in support and opposition to the motion. Mr. Donovan has submitted a declaration and supplemental declaration from Trancey B. Williams, Acting Equal Employment Opportunity Director. ECF 27, 30. Plaintiffs have submitted (1) the "ME II complaint," (2) an e-mail exchange between Ahmed Nuri and Betty Leaver, (3) an e-mail exchange between Ibrahim Musa and Tammy Lowery, (4) an e-mail exchange between Yaser Rezk and Billy Johnson, (5) an e-mail from Betty Leaver, and (6) a letter from Ahmed Nuri to EEO Officers at the Defense Language Institute. ECF 28 at 11-19. In deciding a motion brought under Fed. R. Civ. P. 12(b)(1), a court may consider evidence outside the pleadings, including affidavits submitted by the parties. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."). Neither party has objected to the consideration of any of the materials submitted. Accordingly, the Court will consider all of the submitted extra-pleading material in deciding this issue.

That said, the Court cannot on the current record determine if Plaintiffs have exhausted their administrative remedies. Based on a declaration from Trancey Williams, Mr. Donovan argues that Plaintiffs did not timely and full exhaust their administrative remedies because they did not seek EEO counseling within 45 days of the alleged adverse employment action. Williams Decl. at 1-2, ECF 27.

Plaintiffs respond that they contacted the EEO on March 19, 2014 and submitted a three page complaint, signed by 22 faculty members ("ME II complaint") three days later. Opp. at 7, ECF 28; Opp. at 11-14 (copy of ME II complaint). Plaintiffs also argue that two additional groups submitted complaints to the EEO, but Plaintiffs did not submit an affidavit or copies of these complaints to the Court. *Id*. at 7. According to Plaintiffs, after reviewing their complaint, Dr. Donahue, the head of the EEO office retired and their documents disappeared. *Id*. at 8-9.

Plaintiffs argue that the EEO office subsequently closed and did not re-open until January 2015, with new staff led by Mr. Williams. *Id*. Plaintiffs also submitted a copy of an email from Dr. Leaver and Mr. Billy Johnson acknowledging an "EEO complaint." *Id*. at 14. Finally, Plaintiffs submitted a January 26, 2015 letter from Mr. Nuri following up on his March 2014 complaint. *Id*. at 19.

In reply, Mr. Donovan argues these documents fell outside the EEO process and submits a supplemental declaration from Mr. Williams which states (1) Plaintiffs' extra-pleading materials did not pertain to the EEO complaint process and were not kept by the EEO, (2) he believes after reviewing Plaintiffs' March 2014 complaint that "Dr. Donahue was trying to assist the individuals informally outside the EEO channels," and (3) the March 2014 complaint did not contain sufficient information to pursue an investigation. Williams Supp. Decl. at 1-3, ECF 30. Finally, Mr. Donovan argues that even if Plaintiffs' complaint was construed as an informal complaint, Plaintiffs did not diligently pursue their administrative complaint to exhaustion because Mr. Nuri waited 10 months, until January 2015, to inquire about the status of that complaint.

In *Sommatino*, the Ninth Circuit faced the issue of whether plaintiff substantially complied with the administrative exhaustion requirement. 255 F.3d at 705. There, plaintiff spoke with her EEO counselor about the hostile work environment she was facing at work. *Id*. at 706. Plaintiff claimed her EEO counselor discouraged her from filing an EEO complaint while the EEO counselor submitted a declaration stating that she never discouraged plaintiff from filing a complaint. *Id*. Approximately two weeks later, plaintiff sent an e-mail to her supervisor stating that while she had not formally filed any complaint, she may file one the next day if necessary. *Id*. On these facts, the Ninth Circuit affirmed the district court's judgment that it lacked subject matter jurisdiction over plaintiff's Title VII claims. *Id*. at 711. According to the Ninth Circuit, plaintiff's verbal complaints to her EEO counsel and e-mails show that she never formally filed any complaint. *Id*. at 709-710.

Based on the evidence submitted so far, the Court finds the circumstances in this case are potentially distinguishable from the facts in *Sommatino*. For example, in *Offield v. Holder*, Case No. 12-cv-03053-JST, 2014 WL 1892433,a t *6 (N.D. Cal. May 12, 2014), the Court considered

whether plaintiff demonstrated substantial compliance with the administrative exhaustion requirement. When the plaintiff contacted his EEO counselor, he was advised that there was not enough evidence to file an EEO complaint and he should return to work. *Id*. at *7. The plaintiff's EEO counselor took no further action on his behalf. *Id*. at *8. The Court found that plaintiff substantially complied with the exhaustion requirement. *Id*. at *9. In doing so, the Court distinguished *Sommatino* on two grounds. First, the text of plaintiff's e-mails in *Sommatino* indicated that she did not believe she formally filed any complaint and second, the EEO counselor testified she never discouraged Sommatino from filing a complaint. *Id*. at *9-10.

Here, the March 2014 letter and subsequent conduct might be sufficient to show substantial compliance with the administrative exhaustion requirement. The subject of the letter is "[v]iolation…of Title VII that prohibits discriminatory practices" and other people at the Defense Language Institute referred to this document as an "EEO complaint." Opp. at 11-14, ECF 28. However, on the record before it, the Court cannot find the Plaintiffs substantially complied with the exhaustion requirement. The March 2014 letter was signed by 22 faculty members, and only two – Mr. Nuri and Mr. Abdul – signed the letter and the opposition to Mr. Donovan's motion to dismiss. Thus, the Court has no information about whether Messrs. Musa, Rezu, and Karrar attempted to pursue administrative remedies. Despite being individuals, Plaintiffs have blurred the lines between them and fail to distinguish how *each* Plaintiff satisfied the exhaustion requirement.

As for Mr. Donovan's argument that Plaintiffs failed to diligently pursue their complaint, Plaintiffs argued that they had communications on March 22, 2014, March 25, 2015, March 31, 2014, April 24, 2014, May 7, 2014, and July 24, 2014 about their complaint. Opp. 6-9, ECF 28. Plaintiffs also claim argue that the EEO requested that they wait for the results of their review before doing anything further. *Id*. However, Dr. Donahue then retired and the EEO closed until January 2015, when Plaintiffs wrote the EEO a letter. *Id*. Contrary to Mr. Donovan's argument, at least some Plaintiffs appeared to diligently pursue their complaint and Mr. Donovan's argument fails to address any of the intervening events between the filing of the complaint and the January 2015 letter. But Plaintiffs' arguments, such as the closure of the EEO office, are simply argument

and do not appear in any affidavits and are not alleged in the First Amended Complaint. Moreover, it is not clear which individual Plaintiffs took which actions. Since Plaintiffs have not sufficiently provided evidence to show how each Plaintiff has administratively exhausted his or her Title VII claims, these claims must be dismissed for this reason as well.

3. Title VII Allegations

Assuming Plaintiffs can name a proper defendant and can show they exhausted their administrative remedies, the Court finds Plaintiffs have not adequately alleged a Title VII claim. As a threshold issue, Plaintiffs do not even allege each Plaintiff applied for a promotion to Associate Professor. To plead a Title VII claim, Plaintiffs must allege they belong to a protected class, they were qualified for the jobs they sought, they were subjected to an adverse decision, and that similarly situation employees not in their protected class received more favorable treatment. *See Antione*, 605 F.3d 740. Plaintiffs have not stated a Title VII claim because they have not alleged that they belong to a protected class. *See generally* FAC. Moreover, Plaintiffs have not alleged that *they* were qualified for the promotions they sought; instead Plaintiffs only allege that "a number of teachers who are more qualified in terms of the number of areas they served in and the number of years they served and their clear record of contributions to the institution were not promoted." FAC at 4, ECF 13. Plaintiffs also do not actually state they, as opposed to other faculty members, were subject to an adverse employment decision. *See generally* FAC. Finally, Plaintiffs do not allege that other similarly situated employees, not in their protected class, received more favorable treatment. *Id*. Accordingly, Plaintiffs' Title VII claim is not adequately alleged and this serves as another reason why Plaintiffs' claim must be dismissed.

ii. Non-Title VII Claims

Mr. Donovan argues that Plaintiffs' non-Title VII claims should be dismissed because (1) Title VII provides the exclusive judicial remedy for discrimination claims by federal employees, (2) Plaintiffs' claims under the Civil Service Reform Act are governed by the FSLMRS which only provides for judicial review by the Court of Appeals, (3) Plaintiffs' may only seek judicial review of their claims under 5 U.S.C. §§ 2301(b)(1), 2302(b)(6) and (12) in the Federal Circuit Court of Appeals, and (4) there is no private right of action for claims under Title 18. Donovan

Mot. at 7-11. Plaintiffs respond that their claims are proper under Title 18 and 5 U.S.C. § 2302(b)(12). Opp. at 3-6.

The Ninth Circuit has held that a federal employee's allegations of discrimination are treated as a Title VII claim. *Nolan v. Cleland*, 686 F.2d 806, 814 (9th Cir. 1982). It has also recognized two exceptions to this rule: (1) the employee has suffered "highly personal" wrongs, such as defamation, harassing phone calls, and physical abuse, *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995); and (2) a constitutional claim may be based on the same set of facts that support a Title VII claim as long as the alleged unconstitutional action is not employment discrimination, *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 2015). None of the allegations in Plaintiffs' First Amended Complaint appear to satisfy either exception but the Court does not need to dwell on this issue as all of Plaintiffs' non-Title VII claims fail for other reasons.

The Court finds that to the extent Plaintiffs are alleging a prohibited personnel practice under the Civil Service Reform Act, these claims are governed by the FSLMRS. *See* 5 U.S.C. §§ 7101 *et seq*. (Chapter 71 of the Civil Service Reform Act, also known as the FSLMRS, governs federal labor-management relations). As explained in the discussion of AFGE's motion to dismiss, the FSLMRS provides the FLRA with enforcement authority and federal circuits have exclusive jurisdiction to review final orders of the FLRA. *See supra* section III.A. Thus, this Court lacks jurisdiction over Plaintiffs' Civil Service Reform Act claims.

The Court also does not have jurisdiction over Plaintiffs' claims under 5 U.S.C. §§ 2301(b)(1), 2302(b)(6) and (12). These statutes forbid agencies from engaging in "prohibited personnel practices." 5 U.S.C. § 2302. The CSRA is the exclusive remedy for all prohibited personnel actions. *Veit v. Heckler*, 746 F.2d 508, 510 (9th Cir. 1984). According to the CSRA, an employee wishing to challenge a prohibited personnel practice must file a complaint with the Office of Special Counsel. 5 U.S.C. §§ 1214(a)(1) and (3). The Office of Special Counsel may seek remedial action view the Merit Systems Protection Board. 5 U.S.C. § 1214 (b)(2). An employee may only seek judicial review of an adverse decision of the Merit Systems Protection Board in the Federal Circuit Court of Appeals. 5 U.S.C. § 1214(c)(1). Thus, this Court lacks jurisdiction over Plaintiffs' claims.

Plaintiffs do not directly contest this but rather cite to cases from the Merit Systems Protection Board. Opp. at 5-6 (citing *Wells v. Harris*, 1 M.S.P.R. 208 (1979) and *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993)). These citations to MSPB decisions only confirm this Court's lack of jurisdiction over Plaintiffs' claims. Plaintiffs also cite to *Ferry v. Hayden*, 954 F.2d 658, 662 (11th Cir. 1992), which also undermines their position. In that case, the Eleventh Circuit held that an employee was barred from seeking judicial review under the CSRA because he failed to properly exhaust his administrative remedies by not filing his complaint with the Official of Special Counsel. Accordingly, Court lacks jurisdiction to hear Plaintiffs' claims under 5 U.S.C. §§ 2301(b)(1), 2302(b)(6) and (12).

Plaintiffs also may not pursue claims under 18 U.S.C. § 1001(c) because Title 18 does not provide a private right of action. *See, e.g., Murphy v. Bank of New York Mellon*, 2014 WL 4222188 (N.D. Cal. Aug. 25, 2014) ("Section 1001 is a criminal statute pertaining to the falsification of documents and the making of false statements in matters within the jurisdiction of the federal government. The statute contains no private right of action.") (internal citations omitted). Accordingly, Plaintiffs may not pursue claims under 18 U.S.C. § 1001(c).

To the extent Plaintiffs are pursuing breach of contract claims against Mr. Donovan, this Court lack subject matter jurisdiction over those claims. The Tucker Act provides that the Court of Federal Claims has exclusive jurisdiction over breach of contract claims against the government. *McGuire v. United States*, 550 F.3d 903, 910-11 (9th Cir. 2008).

Finally, the Court addresses Mr. Donovan's argument that the AFGE's arguments are dispositive. Relying on *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983), Mr. Donovan contends that Plaintiffs must prove both their claims against AFGE and Mr. Donovan in order to prevail against either defendant. Mot. 11, ECF 26. Since Plaintiffs cannot prevail against AFGE, Mr. Donovan argues their claims should be dismissed against him.

Mr. Donovan's argument overlooks the fact that Supreme Court in *DelCostello* went on to state that an "employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." Here, the Court has not reached the merits of Plaintiffs' claims against AFGE because it lacks jurisdiction. As a result, the

outcome of AFGE's motion is not determinative as to the outcome of Mr. Donovan's motion.

iii. Summary

As discussed, none of Plaintiffs' claims are properly pled but Plaintiffs may be able to allege sufficient facts to state a Title VII claim. *See* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2015) ("When the pleader's affidavits or other evidence show… that the nonmoving party might be able to amend to allege jurisdiction, the district court may… may dismiss [the FAC] with leave to amend within a prescribed period of time."). Since Plaintiffs' non-Title VII claims fail on jurisdictional grounds, allowing leave to amend would be futile. Thus, the Court GRANTS Mr. Donovan's motion with leave to amend as to Plaintiffs' Title VII claims and without leave to amend as to Plaintiffs' non-Title VII claims.

As for the Plaintiffs that did not sign the opposition brief to Mr. Donovan's motion to dismiss, the Court has received no indication that these individuals oppose his motion. However, based on the March 2014 letter sent to the EEOC, Opp. at 11-14, ECF 28, some of these individuals may be able to allege sufficient facts for viable Title VII claim. As a result, with respect to the Plaintiffs who did not sign the opposition brief, the Court GRANTS as unopposed Mr. Donovan's motion to dismiss but with leave to amend as to the Title VII claim. With respect to the non-Title VII claims, the Court has no indication that the Plaintiffs who did not sign the opposition could cure the jurisdictional defect and oppose Mr. Donovan's motion on legally meritorious grounds. Thus, with respect to the Plaintiffs who did not sign the opposition brief, the Court GRANTS as unopposed and without leave to amend Mr. Donovan's motion to dismiss the non-Title VII claims.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that with respect to all Plaintiffs:

1. AFGE's motion to dismiss is GRANTED without leave to amend with respect to all claims.
2. Mr. Donovan's motion to dismiss is GRANTED without leave to amend as to all claims against him. Plaintiffs are given leave to substitute a proper

defendant and amend their allegations with respect to their Title VII claim. Plaintiffs are not given leave to amend to substitute a defendant with respect to their non-Title VII claim.

Any amended complaint must be filed **on or before May 16, 2016.** The Court reminds Plaintiffs that any pleading or filing must be signed by all Plaintiffs. *See* Fed. R. Civ. P. 11.

Plaintiffs may wish to contact the Federal Pro Se Program, a free program that offers limited legal services and advice to parties who are representing themselves. The Federal Pro Se Program has offices in two locations, listed below. Help is provided by appointment and on a drop-in basis. Parties may make appointments by calling the program's staff attorney, Mr. Kevin Knestrick, at 408-297-1480. Additional information regarding the Federal Pro Se Program is available at http://cand.uscourts.gov/helpcentersj.

Federal Pro Se Program
United States Courthouse
280 South 1st Street
2nd Floor, Room 2070
San Jose, CA 95113
Monday to Thursday 1:00 pm – 4:00 pm
Fridays by appointment only

Federal Pro Se Program
The Law Foundation of Silicon Valley
152 North 3rd Street
3rd Floor
San Jose, CA 95112
Monday to Thursday 9:00 am – 12:00 pm
Fridays by appointment only

IT IS SO ORDERED.

Dated: April 15, 2016

BETH LABSON FREEMAN
United States District Judge