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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOY RICE, f/k/a JOY CHAPMAN,)	CASE NO. C09-482 RSM
)	
Plaintiff,)	
)	ORDER GRANTING IN PART
v.)	DEFENDANT'S MOTION TO DISMISS
)	
PROVIDENCE REGIONAL MEDICAL)	
CENTER EVERETT,)	
)	
Defendant.)	
_____)	

I. INTRODUCTION

This matter comes before the Court on ‘Defendant’s Motion to Dismiss for Failure to State a Claim and for Lack of Jurisdiction Pursuant to FRCP 12(b)(1) and (6).’ (Dkt. #6). Defendant argues that the Court lacks subject matter jurisdiction over a portion of Plaintiff’s claims because they are preempted by the National Labor Relations Act. Defendant argues that Plaintiff’s remaining claims must be dismissed because Plaintiff has failed to exhaust the grievance procedure contained in the Collective Bargaining Agreement. In her response, Plaintiff concedes that some of her claims are preempted, but argues that her remaining claims survive because the grievance procedure is not mandatory.

For the reasons set forth below, the Court GRANTS IN PART Defendant’s motion.

1 **II. DISCUSSION**

2 **A. Background**

3 Plaintiff Joy Rice, formerly known as Joy Chapman, brought the instant lawsuit against
4 Defendant Providence Regional Medical Center Everett on March 4, 2009. Plaintiff—who was
5 employed with Defendant from February 12, 1999 through May 26, 2007 as an Admitting
6 Representative—alleges that that she was subject to unjustified and unlawful disciplinary
7 actions by her immediate supervisor, John Barnings. Plaintiff specifically claims that after
8 Mr. Barnings was hired by Defendant in 2004, Mr. Barnings consistently intimidated her on a
9 daily basis, made negative statements about her Native American heritage, and falsely
10 accused Plaintiff of wrongdoings. (Pl.’s Compl., ¶ 16). As a result of Mr. Barnings’ ongoing
11 abusive treatment, Plaintiff contends that she has “suffered severe emotional distress, including
12 depression, anxiety, and physical illness, which she also reported to Defendant[,] and for
13 which she sought significant professional medical treatment and took several ameliorative
14 medications.” (*Id.*, ¶ 20). Plaintiff additionally notes that she suffers from ADHD, an
15 impairment that Defendant was or should have been fully aware of due to Plaintiff’s written
16 and oral reports to Defendant of this condition. (*Id.*, ¶ 8).

17 Eventually, Defendant terminated Plaintiff’s employment. Todd Fast, a human
18 resources manager with Defendant, informed Plaintiff in writing that:

19 [W]e have terminated your employment, effective 5/26/2007, for violations of the
20 Amazing Service Standards that were discussed with you at termination—specifically: 1)
21 insubordinate behavior with your supervisor 2) insufficient call in notification per
22 Union contract and 3) leaving your position vacant during your work shift.

(Dkt. #9, Decl. of Rice, Ex. 3).

23 Significantly, Plaintiff’s employment with Defendant was governed by a Collective
24 Bargaining Agreement (CBA) entered into between Defendant and Professional Employees
25 International Union Local No. 8, AFL-CIO, Plaintiff’s labor union. During Plaintiff’s eight-
26 plus years as an employee with Defendant, the original CBA was replaced by a subsequent
27 CBA in December of 2006. (Dkt. #7, Decl. of Fast, ¶ 4). However, neither differs in any
28 material respect. The relevant portions of the CBA provide as follows:

1 **Section 6.1** No full-time or part-time employee shall be disciplined or discharged
2 except for just cause. “Just cause” shall be defined to include the concept of a progressive
3 discipline (such as verbal and written reprimands and the possibility of suspension).

4 ***

5 **Section 17.1** The Employer and the Union agree not to discriminate or condone
6 harassment in any manner, in conformance with applicable federal and state laws,
7 against any employee by reason of race, color, religion, creed, sex, national origin, age,
8 marital status, sexual orientation, mental or physical handicap, subject to occupational
9 requirements and ability to perform within those requirements or because of any Union-
10 related activity.

11 ***

12 **Section 18.1** The Employer will maintain a safe and healthful workplace in accordance
13 with state, local and federal safety regulations and laws.

14 ***

15 **Section 18.2** The Employer will address any on-the-job health and safety issues(s)
16 brought forward by employees. The Employer shall fully comply with employment
17 accommodations and all other employee related provisions required by the Americans
18 with Disabilities Act (ADA).

19 (Decl. of Fast, Ex. 1 at 11, 36; Ex 2 at 62, 87).

20 The CBA also outlined procedures that a union member had to follow in order to file a
21 grievance or dispute with Defendant. Plaintiff claims that she followed these grievance
22 procedures contained in § 8 of the CBA to no avail.

23 Plaintiff's complaint, originally filed in Snohomish County Superior Court, alleges six
24 causes of action: (1) breach of the CBA's non-discrimination clause; (2) wrongful/retaliatory
25 discharge in violation of public policy; (3) negligent retention; (4) negligent supervision; (5)
26 negligent infliction of emotional distress; and (6) violation of the American with Disability
27 Act (“ADA”), 42 U.S.C. § 12101, *et seq.* (Pl.’s Compl., ¶¶ 23-58). Plaintiff also claims that her
28 *Weingarten* rights were violated, although she does not specifically enumerate this cause of
29 action.¹ Defendant properly removed the case to this Court on April 10, 2009, and brought
30 the instant motion to dismiss pursuant to FRCP 12(b)(1) and 12(b)(6) shortly thereafter.

31 **B. Standard of Review**

32 ¹ Under the National Labor Relations Act, employees under a union contract have the right to
33 request a union representative to be present at an investigatory interview when the employee
34 reasonably believes the interview will result in disciplinary action. The Supreme Court has
35 identified these rights as *Weingarten* rights. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251,
36 252-53 (1975).

1 A motion to dismiss under FRCP 12(b)(1) addresses the court's subject matter
2 jurisdiction. *See id.* The burden of establishing the subject matter jurisdiction rests upon the
3 party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).
4 When considering a motion to dismiss pursuant to FRCP 12(b)(1), the Court is not restricted
5 to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to
6 resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*,
7 850 F.2d 558, 560 (9th Cir. 1988).

8 Meanwhile, under FRCP 12(b)(6), a court must dismiss a complaint if a plaintiff can
9 prove no set of facts to support a claim which would entitle him to relief. *Sprewell v. Golden*
10 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The facts must be construed in the light
11 most favorable to the plaintiff, and the court should "accept as true all material allegations in
12 the complaint [and] any reasonable inferences to be drawn from them." *Broam v. Bogan*, 320
13 F.3d 1023, 1028 (9th Cir. 2003). A complaint need not include detailed allegations, but must
14 have "more than labels and conclusions, and a formulaic recitation of the elements of a cause
15 of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007).

16 **C. Plaintiff's Concessions**

17 As an initial matter, the Court notes that Plaintiff did not respond to the majority of
18 Defendant's arguments. These include Defendant's contentions that (1) sections 7 and 8 of the
19 National Labor Relations Act ("NLRA") preempt Plaintiff's wrongful discharge claims and her
20 *Weingarten* claims, and (2) Plaintiff's remaining claims are all covered by the CBA between
21 Defendant and Plaintiff's union, and should therefore be consolidated into one § 301 claim
22 under the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Plaintiff's only
23 argument in her eight-page response is that she has exhausted the grievance procedure
24 contained in the CBA at-issue. Thus, Plaintiff claims she has standing to bring a § 301 claim
25 under the LMRA. Plaintiff specifically claims that step 5 in the grievance procedure is
26 permissive rather than mandatory based on a plain-language reading of the CBA.

27 Plaintiff's failure to respond to these portions of Defendant's brief is an admission that
28 those arguments have merit. *See* Local Rule CR 7(b)(2); *Manning v. Washington*, 463

1 F.Supp.2d 1229, 1239 (W.D. Wash. 2006). Accordingly, the Court finds that all of Plaintiff's
2 claims are preempted under either the NLRB or the LMRA. Plaintiff's six causes of action are
3 in reality one § 301 claim under the LMRA. Moreover, the only issue for the Court to resolve
4 is whether the step 5, of the 5 step grievance procedure, is permissive or mandatory.

5 **D. Exhaustion**

6 Section 301 of the LMRA generally allows an individual employee to bring suit in a
7 district court for violations of contracts between an employer and a labor organization. *See* 29
8 U.S.C. § 185(a). However, an employee must “attempt to exhaust any grievance or arbitration
9 remedies provided in the collective bargaining agreement.” *Delcostello v. Int’l Broth. of*
10 *Teamsters*, 462 U.S. 151, 163 (1983) (citations omitted). “Federal labor policy requires that
11 individual employees wishing to assert contract grievances must attempt use of the contract
12 grievance procedure agreed by employer and union as the mode of redress.” *Republic Steel*
13 *Corp. v. Maddox*, 379 U.S. 650, 652 (1965). “[U]nless an employee can show that he was not
14 fairly represented by the union, grievance and arbitration is the employee’s *exclusive remedy*
15 *for a breach of the agreement*.” *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468,
16 1472 (9th Cir. 1984) (emphasis added). Failure to state a claim under § 301 of the LMRA is a
17 defect in subject-matter jurisdiction and requires dismissal under FRCP 12(b)(1) rather than
18 FRCP 12(b)(6). *See Granite Rock Co. v. Int’l Broth. of Teamsters*, 546 F.3d 1169, 1176 n.3
19 (2008).

20 Here, and as mentioned previously, § 8 of the CBA indicates that whenever a “grievance”
21 occurs—defined in the CBA as any alleged violation of the terms and conditions of the CBA—
22 the employee must follow a five-step procedure. These steps include: (1) an attempt to
23 resolve the problem with the employee’s immediate manager; (2) if step 1 fails, an attempt to
24 resolve the problem with a union representative and a department director; (3) if step 2 fails,
25 an attempt to resolve the matter with a union representative and an administrative director of
26 human resources; (4) if step 3 fails, an optional step to submit an unresolved grievance to
27 mediation; and (5) arbitration. (*See* Decl. of Fast, Ex. 1 at 17-19; Ex. 2 at 68-70).

1 There is no dispute that Plaintiff has followed steps one through three of the grievance
2 procedure, but has not followed step five. Nevertheless, Plaintiff argues that her lawsuit
3 should not be dismissed because only steps one through three are mandatory, and steps four
4 and five are permissive. In support of this argument, Plaintiff highlights that steps one
5 through three use the words “shall,” while steps four and five employ the word “may.”

6 The precise language of step 5 provides as follows:

7 If the grievance is not settled on the basis of the foregoing procedures, and if the
8 grievant and the Union have complied with the specific procedures, requirements and
9 time limitations, the Union *may* request in writing to submit the issue to arbitration
10 within ten (10) calendar days following the written reply of the Assistant Administrator
11 of Human Resources.

12 (See Decl. of Fast, Ex. 2 at 69) (emphasis added).²

13 At first blush, the presence of the word “may” supports Plaintiff’s position. However, the
14 Supreme Court has stated that in the context of a § 301 claim under the NLRA, “[u]se of the
15 permissive ‘may’ [in a collective bargaining agreement] *does not itself reveal a clear*
16 *understanding* between the contracting parties that individual employees, unlike either the
17 union or the employer, are free to avoid the contract procedure and its time limitations in
18 favor of a judicial suit.” *Maddox*, 379 U.S. at 659-60 (emphasis added). Instead, “[a]ny doubts
19 must be resolved against such an interpretation.” *Id.* at 660 (citations omitted). As such, the
20 mere presence of the word “may” does not provide Plaintiff with standing to bring suit under §
21 301 of the LMRA.

22 Furthermore, a plain-language review of the CBA reveals that step 5 is not permissive
23 as Plaintiff suggests. The portion of the CBA that precedes the five-step grievance procedure
24 indicates that “a formal grievance *shall* be submitted to the following grievance procedure.”
25 (Decl. of Fast, Ex. 2 at 68) (emphasis added). In addition, step 4 of the grievance procedure is
26 expressly titled “Mediation (Optional)” while step 5 is simply titled “Arbitration.” (*Id.*, Ex. 2 at

27 ² As mentioned previously, the original CBA was replaced by a subsequent CBA in December
28 of 2006. In the first CBA, “either party” had the ability to request arbitration (Decl. of Fast, Ex.
1 at 18), whereas the second CBA indicates that only “the Union” has the ability to request
arbitration. The Court notes that this difference is immaterial as Plaintiff acknowledges that
the second CBA applies.

1 69). Indeed, step 4 is the only step of the five-step procedure in the CBA that indicates that
2 the step is optional. If the parties had intended to make step 5 optional, a parenthetical
3 modifying its title would certainly be present as it is in step 4.

4 As a result, there is no clear directive in the CBA that the Court should defer from the
5 long-standing rule in favor of arbitration. Ultimately, “[a]n order to arbitrate the particular
6 grievance should not be denied unless it may be said with positive assurance that the
7 arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”
8 *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83
9 (1960). Plaintiff has not exhausted the grievance procedure contained in the CBA, and
10 Plaintiff’s § 301 claim under the LMRA shall be dismissed pursuant to FRCP 12(b)(1).

11 **E. Dismissal Without Prejudice**

12 Defendant requests dismissal with prejudice of Plaintiff’s claims. (Dkt. #10 at 7).
13 However, Defendant fails to explain why the Court should deviate from the general rule that
14 an individual’s failure to exhaust her administrative remedies results in dismissal without
15 prejudice. *See O’Guinn v. Lovelock Correctional Ctr.*, 502 F.3d 1056, 1063 (9th Cir. 2007);
16 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003).

17 In addition, it is not lost upon the Court that the time frame in which Plaintiff’s union
18 had the ability to bring an arbitration claim on behalf of Plaintiff has elapsed. Thus,
19 dismissing Plaintiff’s claims with prejudice would preclude Plaintiff from having any
20 meaningful mode of redress should Defendant reject Plaintiff’s arbitration demand as
21 untimely. Plaintiff will have effectively exhausted the grievance procedure contained in the
22 CBA if Defendant rejects her arbitration demand. Under such circumstances, dismissal
23 without prejudice is proper.

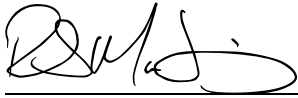
24 **III. CONCLUSION**

25 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
26 and the remainder of the record, the Court hereby finds and ORDERS:

1 (1) ‘Defendant’s Motion to Dismiss for Failure to State a Claim and for Lack of
2 Jurisdiction Pursuant to FRCP 12(b)(1) and (6)’ (Dkt. #6) is GRANTED IN PART. Plaintiff’s
3 claims are dismissed without prejudice, and this case is now CLOSED.

4 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

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6 DATED this 28 day of July, 2009.

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10 RICARDO S. MARTINEZ
11 UNITED STATES DISTRICT JUDGE
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