

Angel R. Sevilla (State Bar No. 239072)  
Jessica C. Shafer (State Bar No. 297856)  
Julianna Bramwell (State Bar No. 238568)  
JACKSON LEWIS P.C.  
50 California Street, 9th Floor  
San Francisco, California 94111-4615  
Telephone: (415) 394-9400  
Facsimile: (415) 394-9401  
E-mail: [Angel.Sevilla@jacksonlewis.com](mailto:Angel.Sevilla@jacksonlewis.com)  
E-mail: [Jessica.Shafer@jacksonlewis.com](mailto:Jessica.Shafer@jacksonlewis.com)  
E-mail: [Julianna.Bramwell@jacksonlewis.com](mailto:Julianna.Bramwell@jacksonlewis.com)

Attorneys for Defendant  
CALIFORNIA COLLEGE OF THE ARTS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

KAREN FISS,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA COLLEGE OF THE ARTS,  
  
Defendant.

Case No. 4:24-cv-03415-HSG

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT PURSUANT TO RULE  
12(B)(6) OF THE FEDERAL RULES OF  
CIVIL PROCEDURE**

Date: December 5, 2024  
Time: 2:00 p.m.  
Ct. Room: 2 – 4th Floor  
Judge: Hon. Haywood S. Gilliam, Jr.,  
District Judge

Complaint Filed: 06/06/2024  
First Amended Complaint: 09/05/2024  
Trial Date: Not Set

1 TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on Thursday, December 5, 2024, at 2:00 p.m., or as soon  
 3 thereafter as the matter may be heard by the Honorable Haywood Gilliam in Courtroom 2, 4<sup>th</sup> Floor  
 4 of the above-referenced Court located at 1301 Clay Street, Oakland, California 94612, Defendant  
 5 California College of the Arts (“Defendant” or “CCA”) will and hereby does move for an order  
 6 dismissing Plaintiff Karen Fiss’s (“Plaintiff”) First Amended Complaint with prejudice and  
 7 without leave to amend, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This  
 8 Motion is based on this Notice of Motion and Motion, the below Memorandum of Points and  
 9 Authorities, all papers on file, and any authority or argument presented in the reply and at any  
 10 hearing.

11 **STATEMENT OF RELIEF SOUGHT**

12 Defendant seeks dismissal of all claims without leave to amend pursuant to Fed. R. Civ. P.  
 13 12(b)(6).

14 Dated: October 15, 2024

JACKSON LEWIS P.C.

16 By: /s/ Jessica C. Shafer

17 Angel R. Sevilla  
 18 Jessica C. Shafer  
 19 Julianna Bramwell  
 Attorneys for Defendant  
 CALIFORNIA COLLEGE OF THE ARTS

**TABLE OF CONTENTS**

|                                                                                             | <b>Page(s)</b> |
|---------------------------------------------------------------------------------------------|----------------|
| I. INTRODUCTION .....                                                                       | 1              |
| II. STATEMENT OF ALLEGED FACTS .....                                                        | 1              |
| A. CCA’s Commitment to Civil Rights .....                                                   | 1              |
| B. CCA’s Response to Plaintiff’s Complaint About the Content of an Instagram Post.<br>..... | 2              |
| C. CCA’s Response to Student Complaints of Harassment By Plaintiff.....                     | 3              |
| D. Plaintiff’s Other Vague Allegations of Antisemitism at CCA.....                          | 4              |
| III. LEGAL STANDARD .....                                                                   | 5              |
| IV. ARGUMENT .....                                                                          | 5              |
| A. Plaintiff Fails to State a Title VII Claim. ....                                         | 5              |
| 1. Disparate Treatment .....                                                                | 5              |
| 2. Hostile Work Environment .....                                                           | 7              |
| B. Plaintiff Fails to State a Title VI Claim. ....                                          | 9              |
| 1. Plaintiff Does Not Plead Essential Facts Relating to CCA’s Financial<br>Assistance.....  | 9              |
| 2. Plaintiff Fails to Plead Direct Discrimination.....                                      | 10             |
| 3. Plaintiff Fails to State a Hostile Environment Claim.....                                | 10             |
| C. Plaintiff Fails to State a Claim Under Education Code Section 66270.....                 | 12             |
| 1. Plaintiff Does Not Have Standing Under Education Code Section 66270.<br>.....            | 12             |
| 2. Plaintiff Does Not Sufficiently Plead Discrimination.....                                | 12             |
| D. Plaintiff Fails to State a Claim Under Government Code Section 12920.....                | 13             |
| E. Plaintiff Fails to State a Breach of Contract Claim.....                                 | 13             |
| V. CONCLUSION .....                                                                         | 14             |

**TABLE OF AUTHORITIES****Page(s)****Federal Cases**

|                                                                                                                                                                    |      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Ahern v. Bd. Of Educ. Of City of Chicago</i> ,<br>133 F.3d 975 (7th Cir. 1998).....                                                                             | 9    |
| <i>Anicama v. Oracle Am., Inc.</i> ,<br>No. 23-cv-04640-EMC, 2024 U.S. Dist. LEXIS 124323 (N.D. Cal. July 15,<br>2024) .....                                       | 13   |
| <i>Ashcroft v. Iqbal</i> ,<br>556 U.S. 662 (2009) .....                                                                                                            | 5    |
| <i>Borja-Valdes v. City and Cty. of San Francisco</i> ,<br>No. 3:14-cv-04168-CRB, 2015 U.S. Dist. LEXIS 125252, 2015 WL 5522287<br>(N.D. Cal. Sept. 18, 2015)..... | 5    |
| <i>Campbell v. State Dep't of Educ.</i> ,<br>892 F.3d 1005 (9th Cir. 2018).....                                                                                    | 6, 7 |
| <i>Carbonnel v. Cty. Of San Diego</i> ,<br>2017 U.S. Dist. LEXIS 185487, *14-15 .....                                                                              | 9    |
| <i>Chuang v. Univ. of Cal. Davis, Bd. of Trs.</i> ,<br>225 F.3d 1115 (9th Cir. 2000).....                                                                          | 6    |
| <i>Davis v. Monroe County Bd. of Educ.</i> ,<br>526 U.S. 629 (1999) .....                                                                                          | 11   |
| <i>Davis v. Team Elec. Co.</i> ,<br>520 F.3d 1080 (9th Cir. 2008) .....                                                                                            | 6    |
| <i>Doe v. Willits Unified School Dist.</i> ,<br>473 Fed. Appx. 775 (9th Cir. 2012) .....                                                                           | 11   |
| <i>Dominquez-Curry v. Nev. Transp. Dep't</i> ,<br>424 F.3d 1027 (9th Cir. 2005).....                                                                               | 8    |
| <i>Faragher v City of Boca Raton</i> ,<br>524 U.S. 775 (1998).....                                                                                                 | 8    |
| <i>Farmearl v. Storopack, Inc.</i> ,<br>No. C-04-02633 RMW, 2005 U.S. Dist. LEXIS 34293 (N.D. Cal. Sep. 12,<br>2005) .....                                         | 14   |
| <i>Fobbs v. Holy Cross Health Sys. Corp.</i> ,<br>29 F.3d 1439 (9th Cir. 1994).....                                                                                | 9    |

|    |                                                                        |            |
|----|------------------------------------------------------------------------|------------|
| 1  | <i>Harris v. Forklift Sys., Inc.</i> ,                                 |            |
| 2  | 510 U.S. 17 (1993).....                                                | 8          |
| 3  | <i>Hashimoto v. Dalton</i> ,                                           |            |
| 4  | 118 F.3d 671 (9th Cir. 1997).....                                      | 6          |
| 5  | <i>Ivey v. Board of Regents</i> ,                                      |            |
| 6  | 673 F.2d 266 (9th Cir. 1982).....                                      | 7          |
| 7  | <i>James v. C-Tran</i> ,                                               |            |
| 8  | 130 Fed. Appx. 156 (9th Cir. 2005).....                                | 7          |
| 9  | <i>Lee v. Foothill-De Anza Cmty. Coll. Dist.</i> ,                     |            |
| 10 | No. 23-cv-03418-PCP, 2024 U.S. Dist. LEXIS 83240 (N.D. Cal. May 7,     |            |
| 11 | 2024) .....                                                            | 8          |
| 12 | <i>Lelaind v. City &amp; Cnty. of San Francisco</i> ,                  |            |
| 13 | 576 F. Supp. 2d 1079 (N.D. Cal. 2008) .....                            | 13         |
| 14 | <i>Lyons v. England</i> ,                                              |            |
| 15 | 307 F.3d 1092 (9th Cir. 2002).....                                     | 5          |
| 16 | <i>Mandel v. Bd. of Trs. of Cal. State Univ.</i> ,                     |            |
| 17 | No. 17-cv-03511-WHO, 2018 U.S. Dist. LEXIS 185871 (N.D. Cal. Mar. 9,   |            |
| 18 | 2018) .....                                                            | 10, 11, 12 |
| 19 | <i>McDonnell Douglas Corp. v. Green</i> ,                              |            |
| 20 | 411 U.S. 792 (1973).....                                               | 5, 6, 10   |
| 21 | <i>Monteiro v. Tempe Union High Sch. Dist.</i> ,                       |            |
| 22 | 158 F.3d 1022 (9th Cir. 1998) .....                                    | 11         |
| 23 | <i>Nava v. VirtualBank</i> ,                                           |            |
| 24 | No. 2:08-CV-00069-FCD-KJM, 2008 U.S. Dist. LEXIS 72819 (E.D. Cal. July |            |
| 25 | 16, 2008) .....                                                        | 13         |
| 26 | <i>Nicholson v. Hyannis Air Serv., Inc.</i> ,                          |            |
| 27 | 580 F.3d 1116 (9th Cir. 2009) .....                                    | 7          |
| 28 | <i>O'Brien v. XPO CNW, Inc.</i> ,                                      |            |
|    | 362 F.Supp.3d 778 (N.D. Cal. 2018) .....                               | 14         |
|    | <i>Rashdan v. Giessberger</i> ,                                        |            |
|    | 764 F.3d 1179 (9th Cir. 2014).....                                     | 10         |
|    | <i>Ray v. Henderson</i> ,                                              |            |
|    | 217 F.3d 1234 (9th Cir. 2000).....                                     | 6          |
|    | <i>Sharp v. S&amp;S Activewear, L.L.C.</i> ,                           |            |
|    | 69 F.4th 974 (9th Cir. 2023) .....                                     | 8          |

|    |                                                                      |    |
|----|----------------------------------------------------------------------|----|
| 1  | <i>Small v. Feather River College,</i>                               |    |
| 2  | No. 2:10-cv-3026-JAM-GGH, 2011 U.S. Dist. LEXIS 51579 (E.D. Cal. May |    |
| 3  | 2, 2011) .....                                                       | 10 |
| 4  | <i>Stallcop v. Kaiser Foundation Hospitals,</i>                      |    |
| 5  | 820 F.2d 1044 (9th Cir. 1987).....                                   | 6  |
| 6  | <i>Starr v. Baca,</i>                                                |    |
| 7  | 653 F.3d 1202 (9th Cir. 2011).....                                   | 13 |
| 8  | <i>Strothers v. S. Cal. Permanente Med. Group,</i>                   |    |
| 9  | 79 F.3d 859 (9th Cir. 1996).....                                     | 6  |
| 10 | <i>Temengil v. Trust Territory of the Pacific Islands,</i>           |    |
| 11 | 881 F.2d 647 (9th Cir. 1989).....                                    | 10 |
| 12 | <i>Yartzoff v. Thomas,</i>                                           |    |
| 13 | 809 F.2d 1371 (9th Cir. 1987).....                                   | 6  |
| 14 | <b>California Cases</b>                                              |    |
| 15 | <i>A.J. Industries, Inc. v. Ver Halen,</i>                           |    |
| 16 | 75 Cal.App.3d 751 (1977) .....                                       | 14 |
| 17 | <i>Burgess v. Superior Ct.,</i>                                      |    |
| 18 | 2 Cal.4th 1064 (1992) .....                                          | 14 |
| 19 | <i>Chelini v. Nieri,</i>                                             |    |
| 20 | 32 Cal.2d 480 (1948) .....                                           | 14 |
| 21 | <i>Erlich v. Menezes,</i>                                            |    |
| 22 | 21 Cal.4th 543 (1999) .....                                          | 14 |
| 23 | <i>Foroudi v. Aerospace Corp.,</i>                                   |    |
| 24 | 57 Cal. App. 922 (2000).....                                         | 13 |
| 25 | <i>Gao v. Hawaii Dep't of the Attorney General,</i>                  |    |
| 26 | No. 09-00478 DAE-BMK, 2010 U.S. Dist. LEXIS 2073 (D. Hawaii Jan. 12, |    |
| 27 | 2010) .....                                                          | 10 |
| 28 | <i>Guz v. Bechtel Nat. Inc.,</i>                                     |    |
|    | 24 Cal.4th 317 (2000) .....                                          | 13 |
|    | <i>Kately v. Wilkinson,</i>                                          |    |
|    | 148 Cal.App.3d 576 (1983).....                                       | 14 |
|    | <i>Lyle v. Warner Bros. Television Prods.,</i>                       |    |
|    | 38 Cal. 4th 264 (2006) .....                                         | 13 |

**Federal Statutes**

42 U.S.C.

§ 2000d-3 ..... 10

§ 2000e-2(a) ..... 5

Fed. R. Civ. P.

rule 12(e) ..... 13

rule 12(b)(6) ..... 5

The Civil Rights Act of 1964

Title VI ..... 9, 10, 12

Title VII ..... *passim***California Statutes**

Cal. Civ. Code

§ 1550 ..... 14

Cal. Educ. Code

§ 66252 ..... 12

§ 66252(g) ..... 12

§ 66270 ..... 12

Cal. Gov't Code

§ 12920 ..... 13

California Fair Employment and Housing Act (FEHA) ..... 13, 14

California Labor Code ..... 13

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The core mission of higher education is to cultivate an environment where members of the academic community discuss diverse perspectives on myriad topics. In line with this mission, California College of the Arts (“CCA”), a private arts college located in San Francisco, California, encourages its students and faculty to engage in open and respectful dialogue about current geopolitical events and their effects. CCA empowers all individuals to partake in such discourse without fear of discrimination or harassment.

Especially regarding complex and controversial issues, CCA expects that faculty members will facilitate the free expression of its students in a respectful and inclusive manner. Plaintiff, however, sought to stifle this expression and to use her position to impose her views on others in direct violation of CCA’s reasonable policies. Under the pretense of anti-discrimination laws, Plaintiff’s lawsuit attempts to curtail the free speech of CCA’s academic community, a slippery slope the Court should elect not to tread.

CCA filed a Motion to Dismiss Plaintiff’s Complaint on August 8, 2024. Doc. No. 19. Plaintiff had the opportunity to address those deficiencies in the First Amended Complaint (“FAC”) she filed on September 5, 2024. Doc. No. 30. But, as set forth herein, Plaintiff’s FAC has failed to cure the numerous fatal deficiencies in Plaintiff’s claims. For these reasons and those discussed below, the Court should dismiss Plaintiff’s First Amended Complaint without leave to amend.

**II. STATEMENT OF ALLEGED FACTS<sup>1</sup>**

**A. CCA’s Commitment to Civil Rights**

CCA stands firmly against antisemitism and has long been committed to the equal treatment of all persons regardless of race, color, national origin, ancestry, and religion. *See* FAC ¶¶ 204-205. CCA’s written policy prohibits harassment and discrimination on the basis of these and other protected characteristics. *Id.* CCA provides a reporting procedure for alleged violations

---

<sup>1</sup> Defendant repeats certain allegations from Plaintiff’s First Amended Complaint (“FAC”). Although the allegations are materially false, incomplete, or misleading in numerous respects, Defendant treats these allegations as true solely for the purpose of this Motion to Dismiss.

1 of this policy to its employees. *Id.* ¶ 206. CCA investigates and attempts to resolve any and all  
2 such employee complaints. *Id.* ¶¶ 65-69.

3 CCA also maintains that free expression is indispensable to the transmission of knowledge  
4 and to the fulfillment of its academic enterprise. *Id.* Ex. H. CCA promotes, through policy and  
5 practice, productive and respectful discourse within its diverse community composed of students,  
6 staff, and faculty. *Id.* CCA strives, in all contexts, to balance these rights in an equitable and  
7 nondiscriminatory manner. *Id.*

8 **B. CCA’s Response to Plaintiff’s Complaint About the Content of an Instagram**  
9 **Post.**

10 Plaintiff alleges that on October 7, 2023, members of Hamas perpetrated a brutal terrorist  
11 attack on Israel and its citizens. *Id.* ¶¶ 57-58. Shortly thereafter, on October 10, 2023, CCA’s  
12 president issued a “[s]tatement of support and resources” about the “horrific and devastating events  
13 that unfolded over the weekend in Israel and Gaza.” *Id.* ¶ 64, Ex. E. The statement recognized  
14 that “[f]aculty may be struggling with how to address this moment in their classrooms and studios”  
15 and that “[s]tudents may be experiencing anxiety in a violent and uncertain world.” *Id.* Ex. E. It  
16 also presented community support resources for students and faculty alike. *Id.*

17 On October 11, 2023, an Instagram account known as “cca\_critical\_ethnic\_studies” posted  
18 a photo of a protest in which a protestor holds a sign stating that “Decolonization Is Not a Dinner  
19 Party.” *Id.* ¶ 60, Ex. F. The accompanying caption stated, “[o]ur program has a stellar record of  
20 teaching the historical and contemporary context of Israel’s colonial legacy in Palestine.” *Id.*  
21 Ex. F. It stated further, “[w]e stand in solidarity with all of our community members who strive  
22 for a peaceful world and mourn for all of the lives lost.” *Id.* The post was “liked” by at least 52  
23 Instagram account holders, many of whom were not affiliated with CCA. *Id.*

24 Ten days later, on October 20, 2023, Plaintiff complained to CCA about the Instagram  
25 post. *Id.* ¶ 65. In her First Amended Complaint (“FAC”), Plaintiff stated that she “was not aware  
26 of [the Instagram post] at first” until a non-Jewish colleague brought it to her attention. *Id.* Ex. G.  
27 Maira Lazdins, CCA’s Vice President of Human Resources, responded to Plaintiff that CCA  
28 rejects “hate speech, antisemitism, and Islamophobia,” but recognizes that “diverging opinions on

substantive issues can coexist.” *Id.* ¶ 66, Ex. H. Lazdins also thanked Plaintiff for sharing her perspective. *Id.*, Ex. H.

CCA thereafter commenced an investigation of Plaintiff’s complaint by way of an outside investigator. *Id.* ¶ 68. CCA removed the Instagram post at the start of the investigation, a decision that became permanent. *Id.* ¶ 68; *see also id.* Ex. J. Plaintiff spoke with the investigator on January 2, 2024. *Id.* On February 1, 2024, CCA notified Plaintiff that it had concluded its investigation, finding that the Instagram post did not violate any of CCA’s policies. *Id.* ¶ 69. CCA assured Plaintiff that it would take “additional proactive steps to promote dialogue, and to offer additional support, to ensure that the CCA community can continue to engage in open, respectful discourse.” *Id.* Ex. J.

### C. CCA’s Response to Student Complaints of Harassment By Plaintiff

On November 16, 2023, CCA’s Director of Human Resources, Suzanne Guevarra, contacted Plaintiff to inform her that CCA had received two student complaints about her. *Id.* ¶¶ 91-92, Ex. M. The first student complaint alleged that Plaintiff sent “inappropriate” emails to the “google group” of Havurah, a Jewish organization. *Id.* Ex. M. The second student complaint alleged that Plaintiff had acted in a harassing and discriminatory manner. *Id.*

Regarding the latter incident, Plaintiff alleges that she encountered students affiliated with a group known as Students for Justice in Palestine (“SJP”) in the nave on CCA’s campus. *Id.* ¶ 79. Plaintiff observed that the students were standing at a table, behind which a handmade poster was hung. *Id.* ¶ 81. Plaintiff alleges that the poster “called for the ‘liberation of Palestine’ ‘From the River to the Sea’” and displayed “a map of Israel with the colors of the Palestinian flag over the entire country”. *Id.* Plaintiff admits that she took a photo of the students in front of the sign. *Id.* Plaintiff thereafter engaged in a conversation with the students. *Id.* ¶¶ 84-85. One of the students informed Plaintiff that she was from Kuwait. *Id.* ¶ 86. In response, Plaintiff “brought up the challenges Palestinians faced in Kuwait, citing the deportation of over 300,000 Palestinians from Kuwait in 1991.” *Id.* Plaintiff also asked the students “where they got their news from” and stated that she “tries to read news and academic articles from a wide range of political viewpoints to ensure that she doesn’t end up in an echo-chamber”. *Id.* ¶¶ 86-87. A student allegedly responded

1 that she “liked her echo chamber.” *Id.* ¶ 88. Plaintiff then walked away from the conversation.  
 2 *Id.* at 88.

3 CCA investigated these student complaints, which investigation included interviews of  
 4 Plaintiff, the student that lodged the complaint regarding inappropriate emails, and the two student  
 5 witnesses to the incident in the nave. *Id.* ¶¶ 96-97. As to the first student complaint, CCA’s Human  
 6 Resources department found that Plaintiff had not violated any policies in sending emails to the  
 7 Havurah group. *Id.* Ex. N. As to the second student complaint, CCA’s investigation yielded the  
 8 following findings regarding Plaintiff’s conduct:

- 9 • Plaintiff “took photographs of the students and of their table and made the students  
 10 feel threatened” (*id.* Ex. N);
- 11 • “The nature and tone of the statements” by Plaintiff “caused the students to  
 12 reasonably believe” that Plaintiff had used her “positional power as a Professor” to  
 gain the agreement of the students (*id.*);
- 13 • When Plaintiff learned that one of the students with whom she spoke was from  
 14 Kuwait, Plaintiff “began explaining the history of [the student’s] country to her”  
 (*id.* ¶ 104);
- 15 • Plaintiff “told the students that they ‘live in an echo chamber’” (*id.* Ex. N); and
- 16 • The students reported that the interaction was “aggressive, inappropriate,  
 combative, heated and disrespectful” (*id.* Ex. N).

17 CCA ultimately concluded that some of Plaintiff’s conduct violated CCA’s policies,  
 18 including its antiharassment and professional ethics policies. *Id.* ¶ 102, Ex. N. CCA therefore  
 19 required Plaintiff to delete any photos she took of the students, to take trainings titled “Supporting  
 20 Diversity, Equity, Inclusion, and Belonging” and “Preventing Harassment & Discrimination,” and  
 21 to review and sign copies of the policies she was found to have violated. *Id.* ¶ 105, Ex. N.

#### 22 **D. Plaintiff’s Other Vague Allegations of Antisemitism at CCA.**

23 Plaintiff points to a handful of other events to support her claims of discrimination and  
 24 hostile work environment by CCA. Those events include vague and undated incidents of alleged  
 25 harassment of Jewish students “for not supporting [the] dominant ideology” (*id.* ¶¶ 9); vague and  
 26 undated Jewish and non-Jewish student complaints regarding “antisemitic experiences” (*id.* ¶¶ 13-  
 27 15, 76); an undated and unattributed comment during a meeting (*id.* at ¶ 50); and a student  
 28 complaint against another Jewish teacher, the outcome of which is not pleaded (*id.* at ¶¶ 94-95).

1 They also include alleged inaction by CCA, including allegedly failing to issue public statements  
 2 regarding “violence done to Jews” (*id.* at ¶ 38) (despite the fact that CCA issued a statement  
 3 regarding the October 7, 2023, terrorist attack only days later (*id.* ¶ 41)) and failing to assist  
 4 Plaintiff with a “Muslim student in her class” who “ignored the assignment” and sought to focus  
 5 on Al-Aqsa Mosque for her final project (*id.* ¶ 120).

### 6 **III. LEGAL STANDARD**

7 This Court should grant a Rule 12(b)(6) motion when the complaint does not “contain  
 8 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
 9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court should disregard conclusory factual  
 10 allegations and “draw on its judicial experience and common sense” to determine whether a claim  
 11 is plausible. *Id.* at 678-79.

### 12 **IV. ARGUMENT**

#### 13 **A. Plaintiff Fails to State a Title VII Claim.**

14 Title VII makes it unlawful for an employer to “discriminate against any individual with  
 15 respect to [her] compensation, terms, conditions, or privileges” or “to limit, segregate, or classify  
 16 [] employees . . . in any way which would deprive or tend to deprive any individual of employment  
 17 opportunities or otherwise adversely affect [her] status as an employee” because of employment  
 18 because of her religion or national origin. 42 U.S.C. § 2000e-2(a). Plaintiff alleges that, in  
 19 violation of Title VII, CCA subjected her to intentional discrimination and a hostile work  
 20 environment on the basis of her religion and ethnic origin. FAC ¶¶ 148, 150.

#### 21 **1. Disparate Treatment**

22 Although Plaintiff’s Title VII claim is titled “Hostile Work Environment,” a disparate  
 23 treatment claim is implied. To establish a *prima facie* case of disparate treatment, a plaintiff must  
 24 provide evidence giving rise to an inference of unlawful discrimination. *Lyons v. England*, 307  
 25 F.3d 1092, 1112 (9th Cir. 2002). A plaintiff may provide direct or circumstantial evidence to  
 26 establish a *prima facie* case for unlawful discrimination, but if direct evidence is not available, a  
 27 plaintiff may rely on the burden-shifting test established in *McDonnell Douglas Corp. v. Green*,  
 28 411 U.S. 792 (1973). See *Borja-Valdes v. City and Cty. of San Francisco*, No. 3:14-cv-04168-

1 CRB, 2015 U.S. Dist. LEXIS 125252, 2015 WL 5522287, at \*3 (N.D. Cal. Sept. 18, 2015). To  
 2 establish a prima facie case of discrimination per *McDonnell Douglas*, a plaintiff must show that  
 3 (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subject to  
 4 an adverse employment action; and (4) similarly situated individuals outside her protected class  
 5 were treated more favorably.” *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123  
 6 (9th Cir. 2000).

7 Plaintiff’s FAC still fails to sufficiently plead the final two elements of her *prima facie* case  
 8 of discrimination. An adverse employment action is one that “materially affects the compensation,  
 9 terms, conditions, or privileges of employment.” *Campbell v. State Dep’t of Educ.*, 892 F.3d 1005,  
 10 1015 (9th Cir. 2018) (quoting *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008).  
 11 Adverse employment actions typically include transfers of job duties, negative performance  
 12 evaluations, unfavorable job references, denial of salary increases, or a more burdensome work  
 13 schedule. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (transfer of duties and  
 14 negative performance evaluations); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997)  
 15 (unfavorable job reference); *Strothers v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th  
 16 Cir. 1996) (more burdensome work schedules); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.  
 17 2000) (elimination of a flexible start-time policy).

18 Plaintiff specifically alleges two instances forming the basis of her Title VII claim: (1) the  
 19 Instagram Post and the outcome of Plaintiff’s resulting complaint; and (2) the investigation of  
 20 complaints of harassment against Plaintiff and the consequent finding of policy violations. Neither  
 21 of these amount to an adverse employment action because they did not have a material effect on  
 22 Plaintiff’s employment. Plaintiff remains a tenured professor with all of the rights and privileges  
 23 of her position. FAC ¶ 26.

24 Specifically, the Instagram post was not derogatory and, even if it was, it was neither  
 25 excessive nor opprobrious. *See Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051  
 26 (9th Cir. 1987) (“[D]erogatory ethnic statements, unless excessive and opprobrious, are  
 27 insufficient to establish a cause of national origin discrimination.”). Moreover, CCA investigated  
 28 Plaintiff’s complaint and removed the post. Neither the post itself nor CCA’s response to it can

1 serve as an adverse employment action. Likewise, the requirement that Plaintiff retake Diversity,  
 2 Equity, and Inclusion trainings was not an adverse employment action because it had no material  
 3 effect on Plaintiff's employment. *See James v. C-Tran*, 130 Fed. Appx. 156, 157 (9th Cir. 2005)  
 4 (holding that a performance improvement plan is not an adverse employment action).

5 Plaintiff's remaining allegations (*i.e.*, alleged discriminatory actions against "students" as  
 6 stated in Section II.D., *supra*) also fail as adverse employment actions because, even if the Court  
 7 assumes them to be true, they were not actions taken by CCA against Plaintiff, or they lack basic  
 8 and essential facts, such as when alleged events occurred and whether CCA was aware of them.  
 9 These vague and conclusory allegations are insufficient to withstand a motion to dismiss. *See Ivey*  
 10 *v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiff has no standing to raise these  
 11 alleged claims.

12 Plaintiff also fails to plead that there are any similarly situated non-Jewish employees who  
 13 were treated more favorably than Plaintiff. To satisfy this element, Plaintiff "must identify  
 14 employees outside her [religion] and [ethnicity] who were similarly situated to her 'in all material  
 15 respects' but who were given preferential treatment; they must 'have similar jobs and display  
 16 similar conduct.'" *Campbell v. State Dep't of Educ.*, 892 F.3d 1005, 1015 (9th Cir. 2018) (quoting  
 17 *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1125 (9th Cir. 2009)). Plaintiff has not  
 18 identified even a single CCA employee for comparison. Although Plaintiff seems to suggest that  
 19 the non-Jewish students who lodged a harassment complaint against her were treated more  
 20 favorably, those students are not employees of CCA. Moreover, the complaints they lodged were  
 21 substantively different from Plaintiff's: Plaintiff complained about the *content* of an Instagram  
 22 post, whereas the students complained about the *manner* in which Plaintiff spoke to them. (*See*  
 23 *FAC* ¶ 92.) For these reasons, Plaintiff's Title VII disparate treatment claim must be dismissed  
 24 without leave to amend.

## 25 2. Hostile Work Environment

26 To state a claim of hostile work environment under Title VII, Plaintiff must allege (1) that  
 27 she was subjected to verbal or physical conduct of a religious or ethnic nature; (2) the conduct was  
 28 unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of

1 her employment and create an abusive working environment. *Lee v. Foothill-De Anza Cmty. Coll.*  
 2 *Dist.*, No. 23-cv-03418-PCP, 2024 U.S. Dist. LEXIS 83240, at \*26-27 (N.D. Cal. May 7, 2024)  
 3 (citing *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 978-79 (9th Cir. 2023)). The third factor  
 4 requires Plaintiff to plead that “her work environment was both subjectively and objectively  
 5 hostile.” *Dominquez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1034 (9th Cir. 2005).

6 In determining whether a plaintiff’s allegations articulate a claim of hostile work  
 7 environment, courts evaluate the totality of the circumstances, including the frequency and severity  
 8 of the conduct, whether it was physically threatening or humiliating, as well as the level of  
 9 interference with the plaintiff’s work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23  
 10 (1993). “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)  
 11 will not amount to discriminat[ion].” *Faragher v City of Boca Raton*, 524 U.S. 775, 788 (1998).

12 Plaintiff specifically alleges four instances forming the basis of her hostile work  
 13 environment claim: (1) the Instagram Post and the outcome of Plaintiff’s resulting complaint;  
 14 (2) the investigation of complaints of harassment against Plaintiff and the consequent finding of  
 15 policy violations; (3) an alleged disparity in university responses to news events; and (4) a failure  
 16 by CCA to assist Plaintiff with a Muslim student. (FAC ¶¶ 120, 149.) Plaintiff has failed to plead  
 17 that she was subjected to verbal conduct of a religious or ethnic nature in any of these  
 18 circumstances. The Instagram post does not address Judaism or Zionism. Although it addresses  
 19 Israel, Plaintiff does not plead that all Jews are Israeli or that she is Israeli. It therefore cannot be  
 20 concluded from the pleadings that the Instagram post addressed Plaintiff’s religion, ancestry, or  
 21 national origin. Moreover, there is no dispute that CCA removed the Instagram post immediately  
 22 after Plaintiff complained, a decision that became permanent. *Id.* ¶ 68; Ex. J.

23 Likewise, CCA’s investigation of the students’ complaints and consequent finding of  
 24 policy violations was not “verbal conduct of a religious or ethnic nature.” There are no allegations  
 25 that CCA representatives used religious or ethnic terms when undertaking the investigation or in  
 26 issuing its findings to Plaintiff. *See* FAC Ex. N. Finally, the alleged failure of CCA to respond to  
 27 news events or to Plaintiff’s alleged request for assistance with a Muslim student cannot form the  
 28 basis of a claim requiring that Plaintiff be “subject to” verbal or physical conduct.

Plaintiff's other allegations are too vague to support her hostile work environment claim. As noted above, she includes vague and undated incidents of alleged harassment of Jewish students "for not supporting [the] dominant ideology" (*id.* ¶¶ 9); vague and undated Jewish and non-Jewish student complaints regarding "antisemitic experiences" (*id.* ¶¶ 13-15, 76); an undated and unattributed comment during a meeting for which Plaintiff may not have been present (*id.* at ¶ 50); and a student complaint against another Jewish teacher, the outcome of which is not pleaded (*id.* at ¶¶ 94-95). Based on these allegations, it is impossible to evaluate whether the alleged acts involved "verbal or physical conduct of a religious or ethnic nature," whether they were temporally proximate, or whether they created an abusive working environment. And, as with Plaintiff's discrimination claim, Plaintiff has no standing to assert these alleged acts of "harassment" towards CCA's students.

Finally, Plaintiff has failed to plead that the alleged conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The alleged events are not temporally proximate and appear to be isolated and unrelated incidents. Further, Plaintiff merely alleges that the "hostile environment makes it impossible even for a fully tenured professor such as Dr. Fiss to be able to function as a scholar within CCA as a community of scholars." (FAC ¶ 53.) She does not state with specificity how the alleged events have impacted her work performance. This vague statement necessitates the dismissal of Plaintiff's Title VII claim without leave to amend.

**B. Plaintiff Fails to State a Title VI Claim.**

**1. Plaintiff Does Not Plead Essential Facts Relating to CCA's Financial Assistance.**

To state a claim under Title VI, Plaintiff must allege that "the entity involved is receiving federal financial assistance." *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994). However, Title VI has limited applicability in the employment sector. *Carbonnel v. Cty. Of San Diego*, 2017 U.S. Dist. LEXIS 185487, \*14-15, citing *Ahern v. Bd. Of Educ. Of City of Chicago*, 133 F.3d 975, 978 (7th Cir. 1998). Plaintiff must also allege that the primary objective of the Federal financial assistance is to provide employment and that the funds went to

discriminatory programs or activities. 42 U.S.C. § 2000d-3 (“Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment”); *see also Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 653 (9th Cir. 1989); *Gao v. Hawaii Dep’t of the Attorney General*, No. 09-00478 DAE-BMK, 2010 U.S. Dist. LEXIS 2073 (D. Hawaii Jan. 12, 2010), *aff’d* 424 Fed. Appx 641, 2011 U.S. App. LEXIS 6271 (9th Cir. 2011) (granting motion to dismiss on grounds that the allegation that federal funds impacted the plaintiff’s area of work was insufficient to state a claim); *Small v. Feather River College*, No. 2:10-cv-3026-JAM-GGH, 2011 U.S. Dist. LEXIS 51579, at \*25 (E.D. Cal. May 2, 2011) (granting motion to dismiss for failure to state a Title VI claim due to the plaintiff’s failure to allege that the primary objective of the federal assistance was to provide employment).

Although Plaintiff alleges that CCA receives financial assistance (FAC ¶ 187), she does not allege the primary objective of that assistance is to provide employment or that the funds went to discriminatory programs or activities. Indeed, Plaintiff only alleges that CCA “receives, or benefits from, state financial assistance and/or enrolls students who receive state student financial aid.” (*id.*) Plaintiff fails to allege the primary objective of those funds. Accordingly, the claim must be dismissed.

## 2. Plaintiff Fails to Plead Direct Discrimination.

Plaintiff’s Title VI claim also fails because she has not alleged that CCA intentionally discriminated against her. *McDonnell Douglas* applies to Title VI disparate treatment claims. *See Rashdan v. Giessberger*, 764 F.3d 1179, 1182 (9th Cir. 2014); *see also Mandel v. Bd. of Trs. of Cal. State Univ.*, No. 17-cv-03511-WHO, 2018 U.S. Dist. LEXIS 185871, at \* 154 (N.D. Cal. Mar. 9, 2018). As such, Plaintiff’s Title VI claim fails for the same reasons as her Title VII disparate treatment claim.

## 3. Plaintiff Fails to State a Hostile Environment Claim.

To establish a hostile work environment under Title VI, Plaintiff must plead that (1) there is a hostile environment based on her protected class; (2) that CCA had notice of the hostile

environment; and (3) that it failed to respond adequately to redress the hostile environment. *See Mandel*, No. 17-cv-03511-WHO, 2018 U.S. Dist. LEXIS 185871, at \*48 (citing *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998)). A hostile environment is one that is “so severe, pervasive, and objectively offensive, and that so detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.” *Id.* (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999)).

Here, Plaintiff fails to plead a hostile environment for the same reasons noted with respect to her Title VII claim. She has also failed to plead “deliberate indifference” by CCA. The test for deliberate indifference is “whether a reasonable fact-finder could conclude that [CCA’s] response was clearly unreasonable in light of the known circumstances.” *Id.* To meet this high standard, there must, in essence, be an official decision not to remedy the violation and this decision must be clearly unreasonable.” *Id.* (quoting *Doe v. Willits Unified School Dist.*, 473 Fed. Appx. 775, 775-76 (9th Cir. 2012)).

By Plaintiff’s own admissions, CCA has not been deliberately indifferent. CCA issued a statement to its students and faculty on October 11, 2023, only four days after the attack by Hamas. Within its statement, CCA offered sincere sympathy for those affected, and recognized the impact the attack and ensuing political crisis would have on its students. (FAC Ex. E.) It affirmed CCA’s values as a diverse and interconnected learning community and offered resources for its students. Additionally, to address Plaintiff’s concerns, Defendant removed the Instagram post and investigated the matter thoroughly. CCA took Plaintiff’s concerns to heart and completed its due diligence. Similarly, Defendant investigated complaints of harassment brought against Plaintiff. Notably, CCA’s investigation concluded that Plaintiff had not violated any policies in sending emails to the Havurah group, but CCA also found that Plaintiff’s actions in confronting students, taking their photos, and using her inherent authority as a faculty member in imposing her views violated Defendant’s harassment policy. As such, Defendant exacted reasonable and appropriate remedies in the form of additional DEI training. Plaintiff now finds herself in the position of arguing that CCA’s decision in her favor in one claim was fair, but its decision that she found unfavorable was somehow discriminatory or harassing. The remaining allegations are either too

1 vague and conclusory to support the claim, or they were not “clearly unreasonable in light of the  
2 known circumstances.”

3 Finally, Plaintiff has failed to allege facts showing that she was denied “educational  
4 benefits.” *See Mandel*, No. 17-cv-03511-WHO, 2018 U.S. Dist. LEXIS 185871, at \*57. Such  
5 facts should include a “disparately hostile educational environment relative to a peer,” being forced  
6 to alter teaching arrangements, or other material, psychological, or physical impacts of the alleged  
7 hostile environment. *Id.* Plaintiff has offered no such allegations and, as a result, her Title VI  
8 claim must be dismissed without leave to amend.

9 **C. Plaintiff Fails to State a Claim Under Education Code Section 66270**

10 **1. Plaintiff Does Not Have Standing Under Education Code Section**  
11 **66270.**

12 Education Code section 66252(g) states that the Legislature intends for this chapter, which  
13 would encompass Education Section 66270, to be “interpreted as consistent with . . . Title VI of  
14 the federal Civil Rights Act of 1964. . . .” However, Education section 66252 also makes it evident  
15 that the Legislature’s intent of the chapter is to protect students. Specifically, subsection (a),  
16 outlining the intent of the section states that: “All *students* have the right to participate fully in the  
17 educational process, free from discrimination and harassment.” (*Id.*, emphasis added.) Plaintiff is  
18 a professor. Accordingly, she is not covered by this chapter of the Education Code and she has no  
19 standing under Education Code section 66252. Her claim must therefore be dismissed.

20 **2. Plaintiff Does Not Sufficiently Plead Discrimination.**

21 Even if Plaintiff has standing to assert this claim, she still fails to sufficiently plead her  
22 case. Education Section 66270 states that: “No person shall be subjected to discrimination on the  
23 basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity,  
24 religion...in any program or activity conducted by any postsecondary educational institution that  
25 receives, or benefits from, state financial assistance or enrolls students who received state student  
26 aid.” However, as discussed above Education Code Section 66270 must be read consistently with  
27 Title VI. As mentioned under Section III.B., *supra*, Plaintiff failed to sufficiently plead her Title  
28 VI claim. As such, this claim must be dismissed.

**D. Plaintiff Fails to State a Claim Under Government Code Section 12920.**

Plaintiff also brings claims of disparate treatment and hostile work environment under California’s Fair Employment and Housing Act (“FEHA”). FAC ¶ 200. As an initial matter, Plaintiff’s claim must be dismissed because she failed to exhaust her administrative remedies with the California Civil Rights Department. *Lelaind v. City & Cnty. of San Francisco*, 576 F. Supp. 2d 1079, 1090 (N.D. Cal. 2008); *Foroudi v. Aerospace Corp.* (2000) 57 Cal. App. 922, 1002 (finding that “[b]efore pursuing a civil action asserting a violation of the FEHA, an employee must file an administrative complaint with the DFEH and obtain a right-to-sure letter from the agency”); *Anicama v. Oracle Am., Inc.*, No. 23-cv-04640-EMC, 2024 U.S. Dist. LEXIS 124323 (N.D. Cal. July 15, 2024), at \*12 (“A right to sue letter from the EEOC satisfied the exhaustion requirement only for the purposes of an action based on federal law such as Title VII, not for a state law action under FEHA.”).

Plaintiff’s claim also fails for substantive reasons. The elements of disparate treatment and hostile work environment claims are the same under FEHA as Title VII. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 354 (2000) (disparate treatment); *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 278 (2006) (hostile work environment). As a result, Plaintiff’s FEHA claims fail for the same reasons Plaintiff’s Title VII claims fail.

Finally, Plaintiff’s FAC purports to bring this claim under the “California Labor Code.” FAC ¶ 200. A complaint must give “fair notice” and “enable” the defendant “to defend itself effectively.” *Starr v. Baca*, 653 F.3d 1202, 1216 (9th Cir. 2011). A pleading cannot be “so vague and ambiguous” that a defendant “cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). Given that the FAC fails to allege specific sections of the Labor Code, the claim must be dismissed.

**E. Plaintiff Fails to State a Breach of Contract Claim.**

In order to establish a prima facie claim for breach of contract, a plaintiff must establish (1) the existence of a contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) resulting damages to the plaintiff. *Nava v. VirtualBank*, No. 2:08-CV-00069-FCD-KJM, 2008 U.S. Dist. LEXIS 72819, at \*28 (E.D. Cal. July 16, 2008) (applying California law). To establish the existence of a contract, a plaintiff must prove that there are

(1) parties capable of contracting, (2) consent, (3) a lawful object, and (4) consideration. Cal. Civ. Code § 1550. “Consideration consists of a benefit bestowed or a detriment suffered as bargained for by the parties.” *O’Brien v. XPO CNW, Inc.*, 362 F.Supp.3d 778, 784 (N.D. Cal. 2018) (quoting *A.J. Industries, Inc. v. Ver Halen*, 75 Cal.App.3d 751, 761 (1977)).

Here, Plaintiff’s breach of contract claim is deficient because she failed to plead adequate facts regarding the existence of a contract. The alleged contract pleaded by Plaintiff consists of nothing more than Defendant’s policy on Discrimination and Unlawful Harassment. However, “[a] promise to conform to the law [FEHA] lacks consideration and is therefore unenforceable.” *Farmearl v. Storopack, Inc.*, No. C-04-02633 RMW, 2005 U.S. Dist. LEXIS 34293, at \*30 (N.D. Cal. Sep. 12, 2005).

Plaintiff’s claim also fails because she failed to plead any compensable damages resulting from the alleged breach. Generally, emotional distress damages are not recoverable in a breach of contract claim, except for in extreme and traumatic circumstances. *Erlich v. Menezes*, 21 Cal.4th 543, 559 (1999); *see also Kately v. Wilkinson*, 148 Cal.App.3d 576 (1983) (awarding emotional distress in a fatal waterskiing accident); *Chelini v. Nieri*, 32 Cal. 2d 480 (1948) (awarding emotional distress for failure to adequately preserve a corpse); *Burgess v. Superior Ct.*, 2 Cal.4th 1064 (1992) (finding emotional distress was warranted when an infant was injured during childbirth). Here, Plaintiff has not pleaded any economic damages because she remains employed by Defendant at her same salary, and she has not been denied any raises or promotions. Although she alleges she suffered emotional distress damages, the events alleged do not amount to extreme and traumatic circumstances. Accordingly, Plaintiff’s breach of contract claim is subject to dismissal without leave to amend.

## V. CONCLUSION

For these reasons, the Court should dismiss Plaintiff’s claims.

Dated: October 15, 2024

JACKSON LEWIS P.C.

By: /s/ Jessica C. Shafer

Angel R. Sevilla | Jessica C. Shafer

Julianna Bramwell

Attorneys for Defendant

CALIFORNIA COLLEGE OF THE ARTS

4856-4700-1582, v. 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28