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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VERONICA OLLIER, *et al.*,

Plaintiffs,

v.

SWEETWATER UNION HIGH
SCHOOL DISTRICT, *et al.*,

Defendants.

Civil No. 07cv714-L(WMc)

**ORDER DENYING MOTION TO
STRIKE PLAINTIFFS'
RETALIATION CLAIM
[doc. # 125]**

Currently pending is defendants' motion to strike plaintiffs' retaliation claim based on mootness and lack of standing. The motion was fully briefed and heard on April 26, 2010. For the reasons set forth below, defendants' motion will be denied.

1. Legal Standards

Rather than file a timely and procedurally appropriate motion under the Federal Rules of Civil Procedure, defendants chose to wait until the time had long passed to file a dispositive motion under the Case Management Order and only as the final Pretrial Order was being prepared. At no time prior to the final pretrial conference did defendants seek leave to file a dispositive motion, which is an appropriate means of dismissing a cause of action on the grounds mootness and standing. Instead, defendants filed a motion to strike under Federal Rule of Civil Procedure 12(f).

Rule 12(f) provides that a court "may order stricken from any pleading any insufficient

1 defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f).
2 Motions to strike are generally disfavored because they are often used as delaying tactics and
3 because of the limited importance of pleadings in federal practice. *See Rosales v. Citibank*, 133
4 F. Supp.2d 1177, 1180 (N.D. Cal. 2001); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D.
5 Cal. 1996). A federal court will not exercise its discretion under Rule 12(f) to strike a pleading
6 unless the matters sought to be omitted have no possible relationship to the controversy, may
7 confuse the issues, or otherwise prejudice a party. *Id.* Ordinarily a motion to strike will not be
8 granted unless "the matter to be stricken clearly could have no possible bearing on the subject of
9 the litigation." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp.2d 1048, 1057 (N.D. Cal.
10 2004). "Motions to strike are rarely granted in the absence of a showing of prejudice to the
11 moving party." *Freeman v. Alta Bates Summit Med. Ctr. Campus*, 2004 WL 2326369, at *2
12 (N.D. Cal. 2004)(citing 61 AM. JUR. 2D PLEADING § 505 (West 1999)). Matters may be stricken
13 to reduce trial complication or if challenged allegations are so unrelated to plaintiff's claims to be
14 unworthy of consideration as a defense and their presence in the pleading will prejudice the
15 party seeking to strike matters. *Fantasy, Inc.*, 984 F.2d at 1527. When considering a motion to
16 strike, the court "must view the pleading in a light most favorable to the pleading party." *In re*
17 *2TheMart.com, Inc.*, 114 F.Supp. at 965.

18 Under established law discussed above, none of the circumstances for striking a pleading
19 are relevant here. Defendants' attempt to assert lack of standing and mootness do not fall within
20 the purpose of a Rule 12(f) motion. Alternatively, defendants seek *in limine* to preclude all
21 evidence relating to retaliation. A motion *in limine* should not be used for disposition of a claim
22 or to eviscerate a viable claim. The Court could properly deny defendants' motion on a
23 procedural basis alone. Because retaliation is at issue for purposes of the upcoming trial; the
24 Court will construe the motion as one to dismiss the third cause of action. After trial, the Court
25 will consider whether sanctions should be imposed upon defendants for failure to comply with
26 the Case Management Order.

27 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Novarro*
28 *v. Black*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where

1 the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal
2 theory yet fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds,*
3 *Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

4 A motion to dismiss should be granted “if plaintiffs have not pleaded ‘enough facts to
5 state a claim to relief that is plausible on its face.’” *Williams ex rel. Tabiu v. Gerber Products*
6 *Co.*, 523 F.3d 934, 938 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.
7 1955, 1974 (2007)). “Factual allegations must be enough to raise a right to relief above the
8 speculative level.” *Id.* “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does
9 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
10 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the
11 elements of a cause of action will not do.” *Twombly*, 127 S. Ct. at 1964-1965. The court does
12 not have to accept as true any legal conclusions within a complaint, although conclusions can
13 help frame a complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

14 2. Discussion

15 Defendants contend the third cause of action – retaliation – must be dismissed because
16 plaintiffs do not have standing to raise a claim of retaliation for a non-party to the action,¹
17 retaliation is specific to a person or small group rather than to an entire class of present and
18 future students, and the claim is moot.

19 “Title IX’s private right of action encompasses suits for retaliation because retaliation falls
20 within the statute’s prohibition of intentional discrimination on the basis of sex.” *Jackson v.*
21 *Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). To prevail on the merits of a retaliation
22 claim, a plaintiff must prove that she was retaliated against because she complained of sex
23 discrimination. *Id.* at 184.

24 a. Mootness

25 “Generally, once a student graduates, [she] no longer has a live case or controversy
26 justifying declaratory and injunctive relief against a school’s action or policy, and [her] case is
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28 ¹ It appears defendants have abandoned this theory.

1 therefore moot.” *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2002) (noting exception to
2 general rule of mootness where former student seeks to expunge evidence of disciplinary
3 violations from school record); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-98 (9th
4 Cir. 1999) (*en banc*) (concluding that high school student's claims for injunctive and declaratory
5 relief became moot when he graduated).

6 Defendants contend the named plaintiffs in this action are no longer students at the school
7 and there is “not a single athlete in the class of plaintiffs who played under Coach Martinez nor
8 could they now play for him . . . [s]o the [retaliation] claim is moot.” (Reply memo at 2.)
9 Coach Martinez, who was terminated from CRHS in 2006, for complaining to the administration
10 about the state of women’s softball, was replaced and the women’s softball team remains at the
11 school. According to defendants, the Complaint does not set forth how the class plaintiffs have
12 been or could be retaliated against with respect to the softball coaching termination of Coach
13 Martinez.

14 Although two named plaintiffs, Veronica Ollier and Naudia Rangel, no longer attend
15 CPHS and their claims for injunctive relief are moot, plaintiffs contend that this class action is
16 not moot because two class plaintiffs are currently playing softball at CPHS and the certified
17 class continues to be exposed to the effects of defendants’ previous retaliatory actions and the
18 possibility of future retaliation. Amanda Hernandez practiced with the Varsity softball team
19 under Coach Martinez even before she became a student at CPHS. Arianna Hernandez also
20 worked with Coach Martinez when she was in junior high school and was recruited by him for
21 the high school softball team. It is undisputed that both Amanda and Arianna are current
22 students at CPHS and play softball. Even though students do not have the right to choose their
23 teachers or coaches, both girls assert that defendants retaliated against the plaintiff class by
24 terminating a seven-plus year coach who successfully trained, nurtured and developed young
25 athletes and the effects of that termination continue to be felt.

26 Additionally, plaintiffs’ claim for retaliation is not limited to the termination of Coach
27 Martinez. Other forms of retaliation against the class are alleged in the Complaint that are not
28 moot. Specifically, plaintiffs note the chilling effect on students who would complain about

1 continuing gender inequality in athletic programs at the school, the barring of parents from
2 assisting the team, and the lack of lockers that Coach Martinez had provided to the girls' softball
3 team but that were removed at the direction of the school and not replaced. Finally, the class
4 representatives and class members have a continuing interest in ensuring defendants' compliance
5 with federal nondiscrimination laws.

6 Having reviewed the allegations in their complaint, plaintiffs have stated a cause of action
7 for retaliation that is not moot.

8 **b. Standing**

9 Defendants argue that plaintiffs fail to meet the standing requirements of case and
10 controversy.

11 The test for standing appears in the familiar language of *Lujan v. Defenders of*
12 *Wildlife*, requiring a party to show three things: "First, [it] must have suffered an
13 injury in fact -- an invasion of a legally protected interest which is (a) concrete and
14 particularized, and (b) actual or imminent, not conjectural or hypothetical.
Second, there must be a causal connection between the injury and the conduct
complained of Third, it must be likely, as opposed to merely speculative, that
the injury will be redressed by a favorable decision."

15 *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1036 (9th Cir. 2010), (quoting *Lujan v. Defenders*
16 *of Wildlife*, 504 U.S. 555, 560-61 (1992) (all brackets and ellipses in *Coto*). Standing is a
17 jurisdictional requirement under Article III of the United States Constitution and cannot be
18 assumed. *Coto*, 593 F.3d at 1036; *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 n.6.

19 Plaintiffs have standing to bring a claim for retaliation. They have set forth actions taken
20 against the plaintiff class members after they complained of sex discrimination that are concrete
21 and particularized. The causal connection is conceded. Finally, a favorable decision would
22 result in an injunction which would redress the plaintiff class members' injuries.

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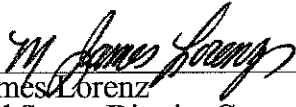
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1 **3. Conclusion**

2 Based on the foregoing, **IT IS ORDERED** defendants' motion to strike plaintiffs' third
3 cause of action for retaliation or alternatively to exclude evidence of retaliation is **DENIED**.

4 **IT IS SO ORDERED.**

5 DATED: August 23, 2010

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7 
8 M. James Lorenz
9 United States District Court Judge

10 COPY TO:

11 HON. WILLIAM McCURINE, JR.
12 UNITED STATES MAGISTRATE JUDGE

13 ALL PARTIES/COUNSEL
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