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Superior Court of California

County of Los Angeles

Department 24

Omicron Chapter of Kappa Alpha Theta Sorority, et al., Plaintiff(s), v. University of Southern California, Defendant(s).	Case No.: BC711155 Hearing Date: 11/5/18 **[~~TENTATIVE~~] RULING RE:** Demurrer to the Complaint by Defendant University of Southern California

Defendant's Demurrer to the Complaint is SUSTAINED without leave to amend.

Background:

On June 22, 2018, Omicron Chapter of Kapa Alpha Theta Sorority and several other sororities and fraternities (collectively, "Plaintiffs") on the campus of the University of Southern California ("USC") sued USC alleging its new policy prohibiting all incoming first-year students from joining sororities and fraternities until they had completed 12 academic units with a grade point average of 2.5 or higher ("Policy"), which USC announced on September 29, 2017, violates California's Leonard Law. The Policy is set to take effect in the Fall of 2018.

On July 6, 2018, Plaintiffs filed an Ex Parte Application for Order to Show Cause Re Preliminary Injunction and Order Setting Hearing and Briefing Schedule. The Court in department 86 denied the application on the grounds that Plaintiffs failed to establish urgency or emergency by delaying in seeking ex parte relief. On July 10, 2018, Plaintiffs filed a Motion for a Preliminary Injunction and filed an ex parte application the following day for an order shortening time, which the Court in this department denied. Thereafter, on August 23, 2018, after hearing oral arguments, the Court denied Plaintiffs' Motion for a Preliminary Injunction. The Court found that Plaintiffs failed to show a likelihood of success on the merits because, while Plaintiffs' have standing to assert claims on behalf of their members, they have not stated a claim under the Leonard Law.

Two days before the hearing on Plaintiffs' Motion for a Preliminary Injunction, USC filed the instant demurrer. Plaintiffs filed an opposition on September 1, 2018. USC filed a reply on September 17, 2018. Many of the parties arguments are the same as those raised in Plaintiffs' Motion for a Preliminary Injunction. The Court has not changed its review of the sufficiency of Plaintiffs' complaint since ruling on the Motion for a Preliminary Injunction.

USC demurrers to the single cause of action for violation of Leonard Law. It should be noted that USC cites a nonexistent statute (Code of Civil Procedure section 430.310(a)) as the statutory

ground for bringing this demurrer. (See USC's Not. of Dem., 3:2.) The Court presumes, based on other statements in the demurrer and the arguments raised in the supporting memorandum of points and authorities, USC's statutory ground for the demurrer is section 430.10(e) – failure to state facts sufficient to constitute a cause of action.

Analysis

1. Legal Standard

A general demurrer may lie where the pleading fails to state sufficient facts to constitute a cause of action. (Code of Civil Procedure ("CCP") § 430.10(e).) A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) "In reviewing the sufficiency of a complaint against a general demurrer, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43. Courts also accept as true the contents of a written contract set out in full as well as any pleaded meaning to which the contract is reasonably susceptible. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Extrinsic evidence may not be considered. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.)

2. Meet and Confer

Before filing a demurrer or a motion to strike, the demurrer or moving party is required to meet and confer with the party who filed the pleading demurred to or the pleading that is subject to the motion to strike for purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the demurrer. CCP §§ 430.41, 435.5. The moving party must file declaration with the demurrer or motion to strike regarding the results of the meet and confer process. (CCP §§ 430.41(a)(3), 435.5(a)(3).)

The Court notes that the parties have complied with the meet and confer requirement. (See Decl. of Elizabeth Minoofar ¶ 2.)

3. Discussion

Plaintiffs have standing to assert a Leonard Law claim on behalf of their members.

USC argues that Plaintiffs do not have standing to assert a claim under the Leonard Law because the plain language of the statute grants standing only to currently enrolled students of the university. Plaintiffs argue that currently enrolled students suing in the name of their organizations does not deprive them of the right to seek redress because an organization and its members are in every practical sense identical and California law recognizes that organizations can seek redress for violations of individual rights held by their members. USC does not respond to the standing argument in its reply.

"A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. Standing goes to the existence of a cause of action, and the lack of standing may be raised *at any time* in the proceedings. An association has standing to bring suit on behalf of its

members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 472 [internal citations and quotation marks omitted; emphasis in original].) The associational standing requirements are identical under federal law. (See *Hunt v. Washington State Apple Advertising Comm'n* (1977) 432 U.S. 333, 343.)

USC challenges Plaintiffs' standing on the grounds that the language of the statute and the holding in *Antebi v. Occidental College* (2006) 141 Cal.App.4th 1542 grants standing only to students of the university. However, as Plaintiffs' correctly point out, California law has recognized associational standing for organizations seeking to protect the individual rights of its members even where the language of the statute explicitly provided those rights to the members. (See, e.g. *San Francisco Apartment Assn.*, supra, 3 Cal.App.5th at 470 [holding association had standing to allege violation of statute providing rights to "the owner of any residential real property"]; *Airline Pilots Ass'n Int'l v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706 [holding union had standing to pursue relief under statute granting cause of action to "[a]ny employee aggrieved by a violation].)

USC's reliance on *Antebi* on this issue is misplaced. In *Antebi* the court held that a former student who sued the university for conduct that occurred before he graduated did not have standing to sue under the Leonard Law, reasoning that the language of the statute only afforded a remedy to current students. What USC fails to recognize, however, is that *Antebi* did not concern an organization's associational standing. "Cases are not authority for issues they neither discuss nor decide." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 835, fn. 5.)

USC also fails to recognize that soon after *Antebi* was decided, the Legislature amended the statute to clarify that former students may seek relief under the Leonard Law for conduct that occurred before they graduated. (See 2008 Cal. Legis. Serv. Ch.525 (S.B. 1370), § 5; Ed. Code § 94367(b) ["A student enrolled in a private postsecondary institution at the time that the institution has made or enforced any rule in violation of subdivision (a)" may bring suit].)

USC also challenges Plaintiffs' standing on the ground that Plaintiffs have not met the third criteria for associational standing, namely, that the Leonard Law explicitly requires participation of individual students in the lawsuit and there are no students named as plaintiffs in this lawsuit. The Court finds that Plaintiffs have met the third criteria. Since the Policy potentially implicates the First Amendment rights of all incoming first-year students and all sorority and fraternity members equally, neither the claim asserted (violation of the Leonard Law) nor the relief requested (an permanent injunction prohibiting implementation of the Policy and a declaration that the Policy will infringe Plaintiffs and the members' First Amendment rights) requires participation of individual members in this lawsuit. Accordingly, Plaintiffs have standing to assert the claims of its members under the Lemon law against USC.

The complaint does not allege facts showing the Policy created by USC subjects students to disciplinary sanctions.

California's Leonard Law, codified at Education Code section 294367, extends constitutional free speech rights to students at private universities. The Leonard Law provides, in pertinent part:

> (a) No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.
>
> (b) A student enrolled in a private postsecondary institution at the time that the institution has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

(Ed. Code § 94367(a), (b).)

"Where possible, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law...." (*Major v. Silna* (2005) 134 Cal.App.4th 1485, 1493 [internal quotations and citations omitted].) "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' " (*Yu v. University of La Verne (Yu)* (2011) 196 Cal.App.4th 779, 788 [interior alterations and citations omitted].)

"If, however, the statutory language is ambiguous or reasonably susceptible to more than one interpretation, we will 'examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes,' and we can 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' " (*Id.* [interior alterations and citations omitted].)

"We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' Further, 'We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules.' " (*Id.* [interior alterations and citations omitted].)

By its plain language, in order to state a claim under the Leonard Law, a plaintiff must allege a private university "ma[de] or enforce[d] a rule subjecting a student to ***disciplinary sanctions*** solely on the basis of conduct that is speech or other communication" protected by the Constitution. (Ed. Code § 94367(a) (emphasis added).) Merriam-Webster's dictionary defines "disciplinary" as, inter alia, "designed to correct or punish breaches of discipline took • *disciplinary* action" (https://www.merriam-webster.com/dictionary/disciplinary [emphasis in original].) In turn, "discipline" is defined as, inter alia, "control gained by enforcing obedience or order" and "punishment." (https://www.merriam-webster.com/dictionary/discipline). Plaintiffs have not alleged facts showing that the Policy is a disciplinary sanction. Specifically, Plaintiffs have not alleged that USC made or enforced, or seeks to enforce, the Policy in order to

correct or punish any individual student or groups of students. The announcement of the Policy, attached to the complaint, does not refer to any disciplinary action or enforcement measure. The Policy, as stated in the announcement attached to the complaint, provides only that students must meet a certain GPA and unit-requirement in order to join a fraternity or sorority. (Compl., Ex.1.)

In their opposition, Plaintiffs argue that USC has made such a rule without providing any analysis as to how the Policy amounts to a disciplinary sanction. In support of their position, Plaintiffs point out that the Student Handbook expressly provides that USC reserves the right to revoke, limit and/or suspend the privileges of student organizations that do not abide by all university policies as well as discipline students for violating standards or policies established for sororities and fraternities. However, the Student Handbook highlights the reason why Plaintiffs' Leonard Law claim fails. The complaint simply does not allege that the Policy was created as a disciplinary sanction against any sorority or fraternity for failure to abide by university policies or against any individual student for violating the standards and policies established for sororities and fraternities. In fact, the exhibit attached to the complaint, USC's announcement of the Policy, provides that it was made after "reviewing the most effective ways to support students in their first year of enrollment" and that USC "concluded that the benefit of allowing new students one semester to acclimate to USC academics and social life far outweigh the benefits of not making this policy change." (Compl., Ex. 1.) Nothing alleged in the complaint or contained in the attached exhibits shows that the Policy is a disciplinary sanction.

The Leonard Law does not protect freedom of association.

USC argues that the Leonard Law protects free speech rights only to the extent stated in the statute, which does not extend to freedom of association. Plaintiffs argue, as they allege in the complaint, that the Leonard Law's protection of free speech encompasses the freedom of association. (See, e.g. Opp., p. 6:10-12 ("the freedom of association right Plaintiffs assert is rooted in the 1st Amendment's freedom of speech clause, and thus the Leonard Law applies.") and Compl., ¶ 36 ("the First Amendment right to free speech necessarily incorporates a right of freedom of association.").) In its reply, USC reiterates that it is only the free speech rights created by the Leonard Law that binds the university, and those statutorily created rights do not extend to the right of association.

USC relies on *Yu, supra,* 196 Cal.App.4th 779. Plaintiffs argue that USC's reliance on *Yu* misses the mark because the plaintiff in *Yu* argued that the Leonard Law encompassed the right to petition whereas, here, Plaintiffs invoke the right of expressive association. A review of the court's reasoning in *Yu*, however, makes it clear that Plaintiffs' distinction is without merit. In *Yu* the Court held that the Leonard Law did not protect both free speech rights as well as the right to petition the government for redress of grievances. (*Id.* at 789.) After noting that the First Amendment of the U.S. Constitution contains a number of "distinct rights" and that the various rights of the First Amendment are also protected by the California Constitution under different sections of Article I, the court explained:

> It is clear from the plain language of section 94367 that the statute applies to freedom of speech, and not to the right to petition. Although section 94367 expressly refers to 'speech or other communication,' it says nothing about the right to petition. Further, the statute refers to article I, section 2 of the California Constitution, which protects liberty of speech, but does not refer to article I, section 3 of the California Constitution, which protects the right to petition.

(*Id.*)

The court's reasoning in *Yu* is applicable here. Just as it is clear from the plain language of the statute that it does not apply to the right of petition, it is equally clear from the plain language of the statute that it does not apply to the right of association since the statute says nothing about the right of association just as it says nothing about the right of petition.

The court in *Yu* also examined the legislative history and found that the Legislature did not intend for the statute to encompass the right to petition. The court stated:

> In addition, as part of the law which enacted section 94367, the Legislature made findings and declarations regarding free speech in an uncodified statute. (Stats.1992, ch. 1363, § 4, pp. 6846–6847.) In section 4 of that uncodified statute, the Legislature also stated: 'It is the intent of the Legislature that a student shall have the same right to exercise his or right to free speech on campus as he or she enjoyed when off campus.' (Stats.1992, ch. 1362, § 4, p. 6847.) The Legislature, however, made no findings, declarations or statements about its intent relating to the right to petition.

(*Yu, supra,* 196 Cal.App.4th at 789–790 [footnotes omitted].)

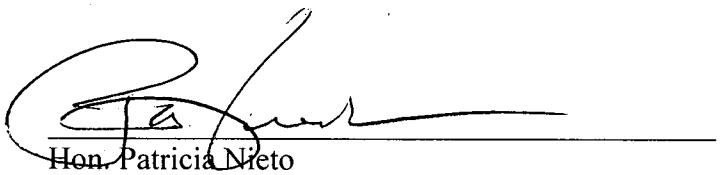
The same is true of the right of association: the Legislature made no findings, declarations or statements about its intent relating to the right of association. Thus, pursuant to the holding in *Yu*, the Leonard Law does not encompass the right of association on the campus of private universities. Plaintiffs cite no case law disapproving of or disagreeing with the reasoning in *Yu.* In addition, Plaintiffs cite no case law holding that the Leonard Law encompasses the freedom of association.

Further, as USC points out, Plaintiffs cite to federal case law which state that the freedom of association is "protected under," "closely linked" to, and "fundamental to" freedom of speech. (Opp. at 7:22-8:6.) USC correctly argues that freedom of association is not the same as freedom of speech. Freedom of association is a distinct constitutional right derived from multiple First Amendment freedoms, not just the freedom of speech. *See Healy v. James* (1972) 408 U.S. 169, 181 ["While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition."]; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 618 [explaining that its case law "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion[,]" and that "[t]he Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."].) Accordingly, the freedom of association itself is not based solely on freedom of speech and, therefore, any claim under the Leonard Law based on the freedom of association fails to state a cause of action.

In sum, while Plaintiffs' have standing to assert a Leonard Law claim on behalf of their members, they have failed to state a claim under the statute because they have failed to allege facts showing the Policy is a "disciplinary sanction" and the Leonard Law does not encompass the freedom of association. Therefore, the demurrer to the complaint is SUSTAINED without leave to amend.

Moving party is ordered to give notice.

Dated: November 5, 2018



Hon. Patricia Nieto
Judge of the Superior Court