Tentative Rulings for May 24, 2022
Department 502

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

18CECG02674 ***Dong v. Mikhail*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

18CECG04534 ***Boiling Air Media Inc. v. Panalpina Inc.*** **is continued to Tuesday, June 14, 2022 at 3:30 in Department 502**

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Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Vargas v. Fowler Packing Company, Inc.***
Superior Court Case No. 19CECG03930

Hearing Date: May 24, 2022 (Dept. 502)

Motion: By Defendant summary judgment, or alternatively, summary adjudication

Tentative Ruling:

To grant the motion for summary judgment. (Code of Civ. Proc., § 437c, subd. (c).) The prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment ruling.

To vacate the September 12, 2022 trial date.

Explanation:

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case ... .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) In addition, "[t]o avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

The initial burden rests with the employer as the moving party to show that no unlawful discrimination occurred. (Code Civ. Proc. § 437c, subd. (p)(2); see *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 360; *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1036.) It does this first by showing that the employee's action has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) It may do so by evidence that either: 1) negates an essential element of the employee's claim; or 2) shows some "legitimate, nondiscriminatory reason" for the action taken against the employee. (*See Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202–203.)

If the employer meets their initial burden, to avoid summary judgment the employee must produce " '"substantial responsive evidence" that the employer's showing was untrue or pretextual[]'" thereby raising at least an inference of discrimination. (*Hersant v. California Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005; see also *University of Southern California v. Superior Court, supra,* 222 Cal.App.3d at p. 1036.)

Defendant contends plaintiff cannot recover on his causes of action because he was unqualified to perform the essential duties of his position and that legitimate non-discrimination reasons supported his termination. Defendant asserts plaintiff's own deposition testimony that accommodations would be ineffective as demonstrating that plaintiff cannot perform essential functions and notes the principle that the "elimination of an essential function is not a reasonable accommodation." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375.) Defendant also relies on a declaration by its Vice President, Farming, Scot Sanders, who, on personal knowledge, attests to several persisting (i.e. not isolated) instances where plaintiff was formally disciplined for inappropriate and harassing conduct to other employees. Mr. Sanders was the company official who decided to terminate plaintiff, after conferring with the former human resources manager. (Sanders, Decl. ¶ 30.) The various complaints and warning notices (which are signed by plaintiff) are attached to Sanders' declaration.

Accordingly, defendant's evidence indicates that its decision to terminate plaintiff was not driven by discriminatory animus, but rather singularly the result of plaintiff's documented and uncorrected inappropriate conduct. Thus the burden shifts to plaintiff to show pretext. Plaintiff, however, has not filed an opposition, and consequently has not satisfied his burden.

Therefore, defendant's motion for summary judgment is granted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 5/20/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Vanlaningham v. California Highway Patrol***
Superior Court Case No. 21CECG02373

Hearing Date: May 24, 2022 (Dept. 502)

Motion: Defendant Seldon's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain defendant Seldon's demurrer to both causes of action in the first amended complaint, with leave to amend, on the grounds of failure to state facts sufficient to constitute a cause of action and uncertainty. (Code Civ. Proc. § 430.10, subd. (e), (f).) Plaintiff shall serve and file her second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

First, to the extent that defendant argues that the opposition was not properly served and thus the court should disregard it, defense counsel has forfeited this argument by arguing the merits of the opposition in the reply. Nor has counsel shown that she was prejudiced by the allegedly improper service. Therefore, the court will not disregard the opposition.

Next, the first amended complaint is uncertain to the extent that it alleges that Officer Seldon is being sued in both his individual and official capacities, yet at the same time it alleges that he was acting in the course and scope of his employment at the time of the accident. (See caption of FAC, and see also FAC, ¶¶ 15-21.) If plaintiff is suing Officer Seldon in his official capacity as an officer of the California Highway Patrol, then she needs to allege a statutory basis for holding him liable. (Govt. Code § 815.) She alleges that the "government defendants", i.e. the State of California and the California Highway Patrol, are vicariously liable under section 815.2 as employers of Seldon. (FAC, ¶ 22.) However, she never alleges that Seldon himself is liable under section 815.2.

Thus, it is unclear what the statutory basis for holding Seldon liable is. Nor does plaintiff allege how she could hold Seldon liable for negligence in the absence of a statute, as she has alleged that he was an employee of the State acting in the course and scope of his employment at the time of the accident. If plaintiff seeks to hold Seldon liable under section 815.2 or some other statute, then she needs to affirmatively allege the statutory basis for her claim against him. As she has not done so, the court intends to sustain the demurrer to the first cause of action for failure to state facts sufficient to constitute a cause of action and uncertainty.

The second cause of action for negligence per se also fails to state a claim for the same reasons, as again plaintiff has not alleged any statutory basis for holding Officer Seldon liable for negligence despite the fact that she alleges that he was acting as an employee of the State at the time of the accident. Furthermore, negligence per se is not

a separate tort, but is simply an evidentiary presumption arising from the violation of a statutory duty. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 675.) Therefore, the court intends to sustain the demurrer to the second cause of action for failure to state facts sufficient to constitute a claim and uncertainty.

However, the court intends to grant leave to amend, as it is possible that plaintiff will be able to allege more facts to support her claims against Officer Seldon if given a chance to do so.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 5/20/2022.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Lopez v. Donor Network West, Inc.***
Superior Court Case No. 21CECG02454

Hearing Date: May 24, 2022 (Dept. 502)

Motion: Defendant Donor Network West, Inc.'s Demurrer and Motion to Strike the First Amended Complaint

Tentative Ruling:

To continue the motion to Tuesday, June 21, 2022, at 3:30 p.m. in Department 502, in order to allow the parties to meet and confer *in person or by telephone*, as required. If this resolves the issues, defendant shall call the court to take the motion off calendar. If it does not resolve the issues, defense counsel shall file a declaration, on or before June 15, 2022, stating the efforts made.

Explanation:

Defendant did not satisfy its requirement to meet and confer prior to filing the demurrer and motion to strike. Code of Civil Procedure sections 430.41 and 435.5 make it very clear that meet and confer must be conducted "in person or by telephone. (*Id.*, subd. (a) as to each statute.) Sending written communication first, as defense counsel did here, can be helpful to the process, but this does not shift the burden for meeting and conferring to the plaintiff.

The parties must engage in good faith meet and confer, in person or by telephone, as set forth in the statute. The court's normal practice is to take such motions off calendar, subject to being re-calendared once the parties have met and conferred. Presently, however, given the extreme congestion in the court's calendar currently, rather than take the motion off calendar, the court will instead continue the hearing to allow the parties to meet and confer, and only if efforts are unsuccessful will it rule on the merits.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 5/20/22.
(Judge's initials) (Date)