Tentative Rulings for April 10, 2024
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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).)
The above rule also applies to cases listed in this "must appear" section.

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(20)

Tentative Ruling

Re: ***Anita Mosqueda v. Fresno Community Hospital and Medical Center***
Superior Court Case No. 21CECG00839

Hearing Date: April 10, 2024 (Dept. 403)

Motion: Plaintiff's Motion to Set Aside Summary Judgment Order

Tentative Ruling:

To deny without prejudice.

Explanation:

On 3/23/2023, the court granted defendant's motion for Order that matters in Request for Admissions ("RFA") be deemed admitted. This order was made on defendant's showing that plaintiff did not respond to the RFAs. The motion was unopposed.

On 8/3/2023, the court granted defendant's unopposed motion for summary judgment, which depended on the deemed admissions order.

Plaintiff now moves to set aside the summary judgment order, contending that she did serve responses to the RFAs, and that she was not served with the summary judgment motion.

Defendant has not filed any response to plaintiff's motion to set aside. However, plaintiff has not filed any proof of service of the motion. "Proof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing." (Cal. Rules of Court, rule 3.1300(c).) because plaintiff has not filed any proof of service of the motion, the court cannot hear the motion on the merits.

Additionally, the motion is unsupported by any declaration providing the factual basis for the motion. In law and motion practice, factual evidence is supplied to the court by way of declarations. (*Calcor Space Facility, Inc. v. Superior* Court (1997) 53 Cal.App.4th 216, 224.) The court must disregard facts stated in unverified memo of points and authorities, unless supported by reference to evidence presented in declarations or otherwise. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578.) The unsupported factual claims set forth in plaintiff's motion cannot provide the basis for setting aside summary judgment. In any case, more detail would need to be provided than is set forth in the moving papers.

In any future motion, plaintiff will also need to provide legal authorities relating to proper service of the motion for summary judgment, as plaintiff's filings in this action reference numerous different addresses for plaintiff. Plaintiff needs to make sure the court and opposing party are apprised of plaintiff's current address for service.

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: JS on 4/8/2024.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Safe Food Alliance v. Pacific Grains & Foods, LLC***
Superior Court Case No. 24CECG00604

Hearing Date: April 10, 2024 (Dept. 403)

Motion: Petition to Confirm Arbitration Award

Tentative Ruling:

To grant. Within 10 days of service of the order, petitioner shall submit to this court a proposed order and judgment (the proposed order filed on 2/16/2024 cuts off after the first page).

Explanation:

A petition to confirm an arbitration award must set forth: (a) the substance or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement; (b) the names of the arbitrators; and (c) set forth or have attached a copy of the award and the written opinion of the arbitrators, if any. (Code Civ. Proc., § 1285.4.)

Petitioner has complied with these requirements. The contract containing an arbitration agreement and the arbitration award are both provided. Thus, unless respondent properly moves to vacate, correct or dismiss the petition, the court must confirm the arbitration award and enter judgment thereon. (Code Civ. Proc., §§ 1286; 1287.4; *Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 744-45.) Respondent makes no such challenge to the arbitration award, and in fact has not filed any response to the petition to confirm the award. Accordingly, the court intends to grant the petition.

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: JS on 4/2/2024 .
(Judge's initials) (Date)

(37)

Tentative Ruling

Re: ***Leon Butler v. Amazon.com Services LLC***
Superior Court Case No. 22CECG02684

Hearing Date: April 10, 2024 (Dept. 403)

Motion: Defendant Amazon.com Services LLC's Demurrer

Tentative Ruling:

To overrule the demurrer as to the first and fifth causes of action. Defendant is granted 10 days' leave to file its answer to the First Amended Complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

To sustain the demurrer as to the third and fourth causes of action, without leave to amend. Defendant is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the third and fourth causes of action as to this defendant.

Explanation:

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 545.) The test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of his complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.) In assessing the sufficiency of the complaint against the demurrer, we treat the demurrer as admitting all material facts properly pleaded, bearing in mind the appellate courts' well established policy of liberality in reviewing a demurrer sustained without leave to amend, liberally construing the allegations with a view to attaining substantial justice among the parties. (*Glaire v. LaLanne-Paris Health Spa, Inc*. (1974) 12 Cal.3d 915, 918.)

In ruling on a demurrer, the court can consider only matters that appear on the face of the complaint or matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) No other extrinsic evidence can be considered. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) Here, defendant demurs as to each cause of action alleged against it in the First Amended Complaint ("FAC").

Wrongful Termination

Defendant demurs to the first cause of action for wrongful termination, arguing that plaintiff has failed to identify a public policy which is thwarted by plaintiff's termination. To properly plead wrongful termination in violation of public policy, plaintiff must plead that his "dismissal violated a policy that is (1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision." (*Turner v. Anheuser-*

Busch, Inc. (1994) 7 Cal.4th 1238, 1256.) Here, plaintiff has identified Government Code section 12940, subdivision (a) which provides protections based on race and national origin. (See FAC, ¶ 37.) Plaintiff alleges that he is an African American male and that Amazon would have treated the incident differently if he were a member of another race. (FAC, ¶ 32.) Plaintiff further alleges that defendant treated him as a criminal, rather than the other employee who was filming him in the restroom, based on his race. (FAC, ¶¶ 38-39.) As such, plaintiff has sufficiently alleged a public policy which is thwarted by plaintiff's dismissal, by alleging he was terminated based on his race, when he should have been considered a victim. The court overrules the demurrer to the first cause of action.

Emotional Distress

Plaintiff's third and fourth causes of action are for intentional infliction of emotional distress and negligent infliction of emotional distress, respectively. Defendant argues that it cannot be held liable for torts committed by plaintiff's co-worker because the co-worker is not identified as a supervisor. Vicarious liability for tort causes of action will extend to an employer for "torts of its employees committed within the scope of the employment." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296.) An employee's "willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Ibid*.) An employer will not be held liable for such torts where the acts "did not have a causal nexus to the employee's work." (*Id*. at p. 297.) This may be achieved by showing the tort is "an 'outgrowth' of the employment; the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken'." (*Id*. at p. 298, internal citations omitted.)

Here, in both causes of action for emotional distress, plaintiff alleges conduct by the other employee and by defendant Amazon. For Amazon, plaintiff alleges the conduct of failing to protect plaintiff from the other employee, failing to treat plaintiff as the victim of a crime, suspending and terminating plaintiff after he was a victim of a crime, and masking the other employee's identity from plaintiff. (FAC, ¶¶ 51, 61.) Defendant spends considerable time arguing that the other employee was not a supervisor, but does not provide the legal authority for its position that the other employee's status as a supervisor or associate is pertinent here. Additionally, these arguments do not consider how plaintiff has alleged Amazon's own conduct was outrageous, separate and apart from the conduct of the other employee. The court will not sustain demurrer to these causes of action on this basis.

Defendant also argues that these claims are subject to workers' compensation exclusivity. Workers' compensation provides the exclusive remedy for workplace torts which occur as a normal part of the employment relationship. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756.) Here, focusing on the conduct plaintiff alleges by defendant Amazon, the conduct is all related to the employment relationship between plaintiff and defendant Amazon and Amazon and the other employee. Thus, the claims for emotional damages alleged by plaintiff are both subject to workers' compensation

exclusivity. The court sustains the demurrer to the third and fourth causes of action, without leave to amend in light of the exclusive remedy.

Negligence

Plaintiff's fifth cause of action is for negligence. Defendant included negligence as subject to the workers' compensation exclusivity, but each of the cases defendant relied on for this argument were specifically addressing emotional distress, not negligence generally. Plaintiff's negligence cause of action asserts that defendant Amazon had a duty to plaintiff to prevent or respond to criminal activity on its premises (FAC, ¶ 68), that refusal to identify the other employee, failure to properly respond to the incident, and terminating plaintiff breached said duty (FAC, ¶¶ 70-72), and that this breach caused plaintiff harm because he could not pursue legal action against the other employee and for wrongful termination (FAC, ¶ 73). Given these allegations do not appear to allege a physical or emotional injury, it is unclear, in light of the case law defendant relies on, how workers' compensation would provide the exclusive remedy here.

Defendant also argues that plaintiff has failed to sufficiently allege negligence. To plead negligence, a plaintiff must allege a duty, breach, causation, and damages. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) Defendant argues that plaintiff has failed to allege a cognizable duty by Amazon and failed to allege a breach of said duty or causation. Plaintiff has set forth allegations that Amazon owed him a duty to prevent and respond to crime on its premises. Defendant's case citations primarily address negligent supervision in the context of an employer knowing an employee may engage in certain conduct, but none addressed the potential liability for an employer failing to respond to an alleged crime occurring on its premises. Also, plaintiff has alleged a duty exists. Disputes about whether the duty alleged is cognizable go to the merits, which is not a consideration on demurrer. Defendant also argues termination alone cannot be a basis of for negligence. However, this does not take into consideration that plaintiff has also alleged harm from failing to inform him of the other employee's identity, preventing plaintiff from reporting the crime. Amazon has not raised any argument regarding this on demurrer. The court overrules the demurrer as to this cause of action, in light of defendant's failure to address these theories.

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: JS on 4/8/2024.
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Garcia v. Royer***
Superior Court Case No. 20CECG03454

Hearing Date: April 10, 2024 (Dept. 403)

Motions (x3): Compel further responses

Tentative Ruling:

To deny plaintiff's three motions to compel further responses. (Superior Court of Fresno County, Local Rules, rule 2.1.17.)

Explanation:

The instant motions were filed without leave of court. Where the moving party's request for a Pretrial Discovery Conference under The Superior Court of Fresno County Local Rules, Rule 2.1.17, has been denied (as here), a motion to compel further discovery responses may only be filed where the order denying expressly grants moving party permission to do so. Here, the Order on Request for Pretrial Discovery Conference entered by this court on February 5, 2024, denied the request and specified that the denial was due to insufficient meet and confer attempts. The court did not fill in the portion of the form allowing plaintiff to file these motions. The motions were thus not filed in conformity with Local Rule 2.1.17, and will not be considered on their 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: JS on 4/8/2024.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Perez v. Precision Numeric Machine, Inc.***
Case No. 23CECG00663

Hearing Date: April 10, 2024 (Dept. 403)

Motion: Defendant's Demurrer and Motion to Strike Portions of the First Amended Complaint

Tentative Ruling:

To overrule the demurrer as to the entire complaint based on the statute of limitations. To overrule the demurrer to the first cause of action for unpaid wages and the first cause of action (cause of action "2A") for fraud. To sustain the demurrer to the second fraud cause of action (cause of action "2B"), for failure to state facts sufficient to constitute a cause of action, without leave to amend. To sustain the demurrer to the slander cause of action, without leave to amend.

To deny the motion to strike the allegations of paragraphs 11, 12, 19, and 20. To grant the motion to strike paragraphs 16, 17, 21, 22 (second sentence only), and 38 (first sentence only) from the first amended complaint. To deny leave to amend.

Explanation:

Demurrer: First, to the extent that defendant demurs to the entire first amended complaint on the ground that it fails to state facts sufficient to constitute a cause of action because all of the claims are barred by the statute of limitations, the court intends to overrule the demurrer.

The court may sustain a general demurrer to the entire complaint where it is clear from the allegations on the face of the complaint that the claims are barred by the statute of limitations. (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) However, "[u]nder some circumstances, the statute of limitations will not begin to run until the injured party discovers or should have discovered the facts supporting liability." (*Id*. at p. 1209.) '[i]t is the complainant's burden to plead not merely the ultimate fact of reasonable delay in discovery, but specific facts which allow a legitimate inference that the delay was reasonable. The demurrer presents an issue at law as to the sufficiency of the alleged facts set out in the pleading. It follows that whether a complaint states sufficient facts to avoid a facial defect is a question of law which may be resolved upon demurrer." (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 299–300, citations and footnote omitted.)

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. As we said in *Sanchez* and reiterated in *Gutierrez*, the limitations period begins once the plaintiff 'has notice or information of circumstances to put a reasonable person *on inquiry* ....' A plaintiff need not be aware of the specific

'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110–1111, citations, footnote and some quote marks omitted, italics in original.) In order to allege delayed discovery, the plaintiff must allege facts showing the circumstances surrounding the discovery and what he discovered to put him on notice of his potential claims. (*Hobart v. Hobart Estate Co*. (1945) 26 Cal.2d 412, 441-442.)

Here, defendant contends that plaintiff had reason to suspect that defendant had engaged in some wrongdoing against him long before he filed his complaint, as he admits that John Owen, defendant's general manager, told him in 2005 that defendant was no longer going to round employees' time as it was adopting new computer software to track its employees' time. (FAC, ¶¶ 7, 8.) Defendant claims that plaintiff was on notice at this point that defendant was engaging in rounding, and that he should have investigated the facts to determine whether defendant was still rounding employees' time rather than waiting until 2023 to file his complaint. Therefore, defendant concludes that plaintiff's claim for unpaid wages is time-barred.

However, defendant has not shown that the plaintiff's unpaid wage claim is necessarily time-barred. While plaintiff admits that he knew of the defendant's rounding practice in 2005, he also alleges that defendant's general manger, John Owen, told him that defendant was no longer going to round its employees' time when it adopted its new computer timekeeping system in 2005. (FAC, ¶¶ 7, 8.) Plaintiff did not have access to defendant's timekeeping records, as this information was only available to supervisors or managers, so he had no way of knowing that Owen's statements were not true. (*Id*. at ¶¶ 9, 10.) It was not until March of 2022, when plaintiff had a conversation with Hector Garcia, a former supervisor at the company, that he learned from Garcia that defendant had continued to round in its favor. (*Id*. at ¶ 11.) Garcia has since passed away. (*Id*. at ¶ 12.) However, plaintiff was able to corroborate his statements by speaking with other people, including Garcia's widow, Julie Garcia, and Virginia Allegra, a former administrative assistant at defendant. (*Id*. at ¶¶ 12, 13.)

Therefore, plaintiff has alleged sufficient facts to show that he did not discover that defendant underpaid him by rounding his time records in its favor until March of 2022, less than a year before he filed his complaint. Since plaintiff filed his wage claim less than a year after he discovered the facts underlying the claim, the allegations of the first amended complaint do not conclusively show that the claim is time-barred. As a result, the court intends to overrule the demurrer to the unpaid wage claim based on the statute of limitations.

Likewise, defendant contends that plaintiff's fraud claims are time-barred, since he was aware of defendant's rounding practice since 2005 but he did not file his fraud claim until 2023. However, for the same reasons discussed above, the plaintiff has alleged sufficient facts to show delayed discovery of the fraud based on the rounding claim. As a result, the court intends to overrule the demurrer to the fraud claim, as the claim is not necessarily time-barred.

On the other hand, the court intends to sustain the demurrer to the second fraud claim, as it appears from the allegations of the first amended complaint that plaintiff was

aware of the facts underlying his claim, or had enough facts in his possession to place him on notice that defendant might have lied to him and caused him injury. The statute of limitations for fraud is three years. (Code Civ. Proc., § 338, subd. (d).) However, "[t]he cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid*.)

Here, plaintiff alleges that John Owen promised to pay him $18 per hour at the time he was hired in 1999. (FAC, ¶ 15.) He also alleges that this promise was never fulfilled, and that he was still making less than $18 per hour when he left defendant's employment in 2017. (*Ibid*.) Thus, he must have been aware of the fact that he was not being paid $18 per hour since 1999, or shortly thereafter, since this fact would have been evident in every paycheck that he received. Also, plaintiff never alleges any facts that would explain how he could have been ignorant of the fact that he was being paid less than $18 per hour until after he was terminated in 2017. It seems impossible that he would not have known that he was being paid less than $18 per hour for the 18 years that he worked for defendant. It is clear from the facts alleged in the first amended complaint that plaintiff knew that Owen had not kept his promise to pay him $18 per hour "soon" after he was hired in 1999, and that he was still only making $17.50 per hour in 2017. None of the facts alleged in the first amended complaint show that he only learned the true facts years after he left defendant's employment. Even assuming that he learned the truth about Owen's allegedly false statements around the time he was terminated in November of 2017, the statute still ran on his claim by November of 2020 at the latest. He did not file his complaint until February of 2023, over two years after the statute ran. Thus, the court intends to sustain the demurrer to the second fraud claim for failure to state facts sufficient to constitute a cause of action, as the claim is clearly barred by the statute of limitations.[1] The court will also deny leave to amend as to the second fraud claim, since plaintiff will not be able to allege any facts to plead around the running of the statute.

Finally, the court intends to sustain the demurrer to plaintiff's slander cause of action. Defendant contends that the false statements that plaintiff has alleged were nothing more than opinions made by plaintiff's manager in performance evaluations, and thus were not actionable slander or defamation.

In *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, the Court of Appeal held that "unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior, it cannot support a cause of action for libel. This is true even when the employer's perceptions about an employee's efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts. Moreover, in light of *Foley,* where an employee alleges the employer's negative evaluations are *feigned,* the only potentially available

[1] Plaintiff also alleges as part of his fraud claim that defendant engaged in discrimination based on race and religion. (FAC, ¶ 38.) However, plaintiff has stated in his opposition that he is not attempting to state a claim for discrimination, so these allegations are apparently not an attempt to state a separate cause of action. Nor do they appear to support his fraud cause of action, which is based on the false promise to pay him $18 per hour. Any allegations regarding discriminatory conduct by defendant would not tend to show that defendant engaged in fraud. As a result, the court will disregard these allegations.

remedy lies in contract, for breach of the implied covenant of good faith and fair dealing." (*Id.* at p. 965, citation omitted, italics in original.)

In *Jensen*, the Court of Appeal concluded that the plaintiff could not prevail on his claim for defamation based on statements made by his manager in a performance evaluation where plaintiff's job performance was criticized. (*Id*. at p. 970.) The Court of Appeal noted that the evaluation was a routine performance review by plaintiff's manager. (*Ibid*.) Also, the court noted that the term "performance evaluation" implies that the document contains only opinions, not facts. (*Ibid*.) "Finally, we turn to the contents of the evaluation, none of which suggests Jensen lacked honesty, integrity or the inherent competence, qualification, capability or fitness to do his job, or that he had reprehensible personal characteristics." (*Id.* at pp. 970–971.) "But even if the comments were objectively unjustified or made in bad faith, they could not provide a legitimate basis for Jensen's libel claim because they were statements of opinion, not false statements of fact. Although the trial court did not grant the nonsuit based on that distinction, it clearly would have been authorized to do so: 'The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law.'" (*Id.* at p. 971, citations omitted.)

Likewise, in the present case, plaintiff has alleged that Owens defamed him by giving him poor performance reviews while he was employed by defendant and calling him a slow worker. (FAC, ¶ 44.) He made these false statements because defendant needed reasons to avoid paying plaintiff higher wages. (*Id*. at ¶ 43.) He would tell plaintiff that his performance was good, but at the same time he would state to management that plaintiff was slow in performing his duties. (*Id*. at ¶ 44.) Kevin Owen would also alter performance numbers to support the narrative that plaintiff's performance was slow. (*Id*. at ¶ 45.) As a result of this slander, plaintiff lost wages. (*Id*. at ¶ 46.)

However, plaintiff's allegations do not support his claim for defamation or slander. As discussed in *Jensen*, statements in an employee's performance evaluation are generally statements of opinion rather than fact, and thus cannot support a defamation claim unless they accuse the employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior. (*Jensen, supra*, at pp. 965, 970-971.) Here, plaintiff has not alleged any facts showing that Owen accused him of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior. The alleged statements that Owen made about plaintiff's performance to management were nonactionable opinions rather than statements of fact. Even if the statements were unsupported and made in bad faith, they were still only opinions that cannot form the basis for a slander or defamation claim as a matter of law. (*Id*. at p. 971.)

Also, while plaintiff alleges that another employee, Kevin Owen, altered production records to support the false narrative that he was a slow worker and thus helped justify John Owen's claim that his performance was inadequate, the alteration of the performance numbers was not in itself a defamatory statement. Such alterations were allegedly made to support John Owen's poor performance reviews, which were opinions rather than statements of fact. Therefore, plaintiff has not stated a valid claim for slander or defamation, and the court intends to sustain the demurrer to the slander cause of action. Furthermore, the court intends to deny leave to amend the slander cause of action, as there does not appear to be any way for plaintiff to allege more facts to cure the defect in his cause of action.

Motion to Strike: First, defendant moves to strike the allegations of paragraphs 11, 12, 16, 19, 20, and 21 from the first amended complaint. These allegations relate to statements that Hector Garcia allegedly made to plaintiff regarding defendant's practice of rounding employees' time in defendant's favor so that defendant would not have to pay its employees their full wages. (FAC, ¶¶ 11, 12.) Garcia also allegedly told plaintiff that defendant has a policy of lying to its workers, as well as discriminating against its workers based on race and religion. (*Id*. at ¶ 16.) Garcia told plaintiff that defendant had only hired three "brown people" to work there, including plaintiff, and they were given a "hard time" and ended up quitting. (*Ibid*.) Garcia stated that defendant's management and John Owen would lie to Dave Counts, defendant's owner, about employees' performance. (*Id*. at ¶ 19.) Garcia told plaintiff that John Owen would tell plaintiff to his face that he was doing a great job, but that he wasn't receiving raises because "Dave Counts was greedy." (*Id*. at ¶ 20.) Garcia had not previously told plaintiff about the discrimination because he did not want plaintiff to be angry. (*Id*. at ¶ 21.) Garcia also claimed to have overheard management making discriminatory remarks about plaintiff's religion. (*Ibid*.)

Defendant contends that these allegations are improper and should be stricken because they are based on hearsay remarks made by Garcia, who is now deceased, and they will be inadmissible to prove plaintiff's case. However, the court intends to deny the motion to strike these allegations on the ground that they are inadmissible hearsay. "Hearsay" is an evidentiary objection, not a basis for a motion to strike. The court must assume that the allegations of the complaint are true for the purposes of ruling on a motion to strike, no matter how unlikely or difficult to prove the allegations may be. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53.) The fact that Garcia's alleged statements may be hearsay and ultimately inadmissible at trial does not mean that they are improperly alleged in the complaint. Therefore, the court will deny the motion to strike the allegations of paragraphs 11, 12, 16, 19, 20, and 21 on the basis of the defendant's hearsay objection.

On the other hand, the court intends to grant the motion to strike the allegations of paragraphs 16, 17, 21, 22, and 38. In these allegations, plaintiff claims that Garcia told him that defendant discriminated against him and other employees based on religion and race, that defendant discriminated against African Americans, that defendant's management made discriminatory remarks about his religion, and that defendant deliberately discriminates on the basis of race and religion. Defendant contends that these allegations are improper and irrelevant to plaintiff's claims for unpaid wages, fraud, and slander, and plaintiff does not appear to be alleging on any claims based on discrimination. Therefore, defendant moves to strike these allegations from the first amended complaint.

In his opposition, plaintiff admits that he is not alleging any discrimination claims. However, he contends that he has properly alleged discriminatory practices as part of a pattern and practice of defendant treating its employees and the law in an "offhand" manner.

Since plaintiff has not alleged any claims for discrimination based on race or religion, and he concedes that he has no intention of alleging such claims, the court will strike the allegations regarding defendant's discrimination from the FAC. Any allegations of discrimination based on race or religion are irrelevant to plaintiff's claims of unpaid wages, fraud, or slander. While plaintiff contends that the allegations are relevant to

show a pattern of defendant's poor attitude toward its employees and the law, the allegations have nothing to do with whether defendant underpaid plaintiff, slandered him, or committed fraud against him. Therefore, the court will strike out allegations of paragraphs 16, 17, 21, 22 (second sentence only), and 38 (first sentence only) from the first amended complaint as irrelevant and improper. Furthermore, the court will deny leave to amend, as it does not appear that there is any chance that plaintiff can amend the complaint in such a way as to render the allegations relevant or proper here.

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: JS on 4/8/2024.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Lee v. Ly, et al.***
Superior Court Case No. 22CECG02744

Hearing Date: April 10, 2024 (Dept. 403)

Motions: (1) by defendants Xang Moua, Kayasit Ly, Vang Chong Thao, Michael Her, Seng Yang, Mao Her, Mai Kerr Thao, Xiong Pa Her, John Moua, and Youa Thao Demurring against the Fourth Amended Complaint; and
(2) by plaintiff for Leave to File the Fifth Amended Complaint

Tentative Ruling:

To sustain the demurrer to the entirety of the Fourth Amended Complaint as to all demurring defendants, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

To continue plaintiff's motion for leave to file the Fifth Amended Complaint to Wednesday, June 5, 2024, to allow time for the *limited purpose* of allowing plaintiff to lodge a revised proposed pleading, deleting any and all reference to defendants Hmong Cultural New Year Celebration, Inc., Mitch Herr, Vilay Lee, Cher Yang, Xang Moua, Kayasit Ly, Vang Chong Thao, Michael Her, Seng Yang, Mao Her, Mai Kerr Thao, Xiong Pa Her, John Moua, and Youa Thao. No new allegations may be alleged.

Plaintiff must lodge the revised proposed pleading no later than on Wednesday, May 22, 2024, at 5:00 p.m.

The prevailing parties are directed to submit directly to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as provided above.

Explanation:

Demurrer

Defendants Xang Moua, Kayasit Ly, Vang Chong Thao, Michael Her, Seng Yang, Mao Her, Mai Kerr Thao, Xiong Pa Her, John Moua, and Youa Thao demur to the sole cause of action for libel asserted in the Fourth Amended Complaint on the ground that it fails to state facts sufficient to state a cause of action and for uncertainty.

All of plaintiff's proposed causes of action for libel, false light, negligent and intentional infliction of emotional distress derive from the same set of allegations pertaining to defamatory images, videos, and/or comments made by the demurring defendants. These allegations are as follows:

Plaintiff alleges that all defendants posted a flyer at the entrance of the Fresno Fairgrounds (and also uploaded onto Facebook), which showed "WARNING!!! WARNING!!! WARNING!!! – NO ENTRY FOR THESE INDIVIDUALS" followed by plaintiff's photo. (Proposed Complaint, ¶¶ 86, 92.) Tonnah Her made comments as follows: (1) "It's very sad to see adults teach their children to do this. The apple doesn't fall far from the tree. I feel sorry for them they love and respect their parents enough to let their parents use them like this"; (2) "I want to assume it was Lis Ceeb's team"; and (3) "Conspiracy los natawn Lis Ceeb lawv tog tod puas yog? Smh" ([Translation:] Conspiracy came from Lee Cheng them is that right? smh). (*Id*., ¶ 95.) John Moua made a comment on a post stating: "The title is misleading. Needs to add 'Lee Cheng' daughter! Don't blame on Hmong gangsters lol" (*Ibid*.) Youa Thao made a comment on a post stating: "Lee Cheng's daughter of course!!" which plaintiff alleges is in reference to plaintiff being a thief due to Cheng Lee's influence. (*Ibid*.) Plaintiff also generally alleges that there were defamatory images, video, and negative comments posted about her and her family. (*Id*. ¶¶ 96-97.)

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259, internal citations and quotations omitted.) "A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim…" (*Id*., at p. 1264, internal citations and quotations omitted.)

The posting—indicating that plaintiff was not allowed access into the Fresno Fairgrounds, as alleged, did not contain any defamatory content. It simply provided that plaintiff and others depicted on the poster were not allowed entry into the Fresno Fairgrounds. The general allegations that there were defamatory images, video, and negative comments posted about plaintiff and her family, without more, are insufficient to support any of plaintiff's proposed causes of action, which are all based on the alleged libelous conduct. Thus, the proposed complaint fails to allege *any fact* supporting a defamatory statement made by any demurring defendant, with the exception of John Moua and Youa Thao.[2]

The comments that are attributed to John Moua and Youa Thao are, on their face, not defamatory. Although plaintiff explains that Mr. Thao's comment "Lee Cheng's daughter of course!!" is in reference to plaintiff being a thief, insufficient facts are alleged to make such a connection. No such similar explanation is provided for Mr. Moua's comment. It appears from the allegations that plaintiff is attempting to show that these comments were made in response to another comment or posting on social media, which if drawn together would allow the court to make sense of plaintiff's allegation that these are defamatory statements; however, no such "original" comment/posting or other information is provided for in the proposed complaint.

It should also be noted that these alleged statements are also insufficient to give rise to a claim for emotional distress. Mere "insults, indignities, threats, annoyances, petty oppressions or other trivialities" are not actionable "outrageous conduct" where the case

[2] The court notes that defendant, Tonnah Her, has not yet appeared in the action and does not discuss the validity of the statements attributed to that defendant.

is lacking in other circumstances of aggravation. Plaintiffs cannot recover merely because of "hurt feelings." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1265-1266.)

Plaintiff has had multiple opportunities to allege facts sufficient to state a cause of action against the demurring defendants and has not done so. Nor does she successfully plead any meaningful new facts against the demurring defendants in her proposed Fifth Amended Complaint, which is attached to her declaration in support of her motion for leave to amend. (Lee Decl., filed on Feb. 27, 2024, at Exh. 1.) As this is the third consecutive failure (and fourth, if the court were to count the proposed pleading) to state facts sufficient to support a cause of action, the court finds that plaintiff is required to offer to the court additional facts to demonstrate a *reasonable* possibility to cure the defect. (Code Civ. Proc., § 430.41, subd. (e)(1).) As no showing was made, the demurrer is sustained, without leave to amend.

Leave to Amend

On February 27, 2024, plaintiff filed her motion for leave to file a Fifth Amended Complaint. The proposed Fifth Amended Complaint raises four causes of action for Libel, False Light, Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress against defendants Kayasit Ly, Vang Chong Thao, Mao Her, Xang Moua, Tonnah Her, Michael Her, Seng Yang, Mai Cheng, Mai Kerr Thao, John Moua, Youa Thao, Xiong Pao Her, Der Chang, Steve Xiong, Mitch Herr, Vilay Lee, Cher Yang, and Hmong Cultural New Year Celebration, Inc. ("HCNYC").

Plaintiff has met the formalities required of a motion to amend the complaint, and has given due notice to all appearing defendants. Motions for leave to amend the pleadings are directed to the sound discretion of the judge. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . ." (Code Civ. Proc., § 473, subd. (a)(1); see also Code Civ. Proc., § 576.) Judicial policy favors resolution of cases on the merits, and thus the court's discretion as to allowing amendments will usually be exercised in favor of permitting amendments. This policy is so strong, that denial of a request to amend is rarely justified, particularly where "the motion to amend is timely made and the granting of the motion will not prejudice the opposing party." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Nonetheless, as the opposition points out, the court's power to allow amendment is not unlimited. Ordinarily, the court does not consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. Generally, "the better course of action would [be] to allow [plaintiff] to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings" such as a demurrer or motion to strike. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.) However, the court undoubtedly has discretion to deny leave to amend where a proposed amendment fails to state a valid cause of action. (*California Cas. Gen. Ins. Co. v. Sup. Ct.* (1985) 173 Cal.App.3d 274, 280-281.) Especially where "the trial court has sustained a demurrer without leave to amend, we must also ' "determine whether or not the plaintiff could amend the complaint to state a cause of action." ' [Citation.] However, 'the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. [Citation.] "To meet this burden, a plaintiff must submit

a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." ' [Citations.]" (*AIDS Healthcare Foundation v. City of Los Angeles* (2022) 86 Cal.App.5th 322. 347-348, citations omitted.)

For the reasons previously provided above, the court denies plaintiff's request for leave to file her proposed Fifth Amended Complaint, as the proposed pleading fails to provide any new facts demonstrating a reasonable possibility to cure the defects raised by the demurring defendants.[3] However, in light of the judicial policy in favor of permitting amendments, plaintiff is allowed to file an amended complaint against the non-demurring parties who have not opposed plaintiff's motion. Accordingly, the court continues plaintiff's motion for leave to amend in order to allow time for plaintiff to lodge a revised proposed pleading which deletes any and all reference to the demurring parties.[4]

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: JS on 4/8/2024.
(Judge's initials) (Date)

[3] It is also noted that the court previously sustained the Mitch Herr, Vilay Lee, Cher Yang, and HCNYC's demurrer as to the entire complaint without leave to amend, on the ground that plaintiff's Third Amended Complaint was barred by claim preclusion. (See the Law and Motion Minute Order, filed on, January 3, 2024.) Plaintiff fails to provide any support to show what facts she could plead to cure the existing defects.
[4] The court need not reach the parties' arguments pertaining to statute of limitations and delayed discovery.