

Tentative Rulings for December 5, 2023
Department 502

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 502

Begin at the next page

(34)

Tentative Ruling

Re: ***In re: Aaliyah Perez Castaneda***
Superior Court Case No. 23CECG04715

Hearing Date: December 5, 2023 (Dept. 502)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny, without prejudice. Petitioner must file an amended petition, with appropriate supporting papers and proposed orders. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

The petition submitted does not include sufficient information regarding the injuries, medical treatment, and the minor's recovery for the court to evaluate. As a result, the petition is denied without prejudice.

The injuries and treatment identified in the petition are inconsistent with the medical records provided in Attachment 8. Item 6 of the petition identifies claimant's injuries as an abrasion to the right clavicle, right iliac crest fracture and right shoulder pain. Item 7 indicates claimant "had an orthopedic surgery" and was examined by Family Healthcare Network. The medical records from Community Regional Medical Center included in Attachment 8 include diagnoses of mildly displaced right mid-clavicle fracture, iliac crest fracture, and small pulmonary contusion and do not reflect claimant having undergone surgery. The petition also identifies Family Health Care Network as a treatment provider but has not included these records in Attachment 8.

The records included with Attachment 8 do not include a report reflecting the claimant has recovered completely from her injuries. The only follow up treatment record from Community Regional Medical Center is dated March 10, 2022. The report indicates the clavicle fracture alignment has not changed and there appear to be early signs of healing near the fracture. Although a new report is not necessary, a report reflecting the claimant has recovered completely from her injuries is required.

There are additional discrepancies within the documents submitted that should be addressed in a future submission. The gross settlement amount identified in the Petition is \$109,000, however the MC-351 Order Approving Compromise states the gross amount of the settlement is \$109,900. The requested attorney fees of \$30,520 reflect 28% of the gross settlement of \$109,000 and are consistent with the 28% contingency fee in the agreement included with Attachment 13a. Counsel's declaration to the court regarding fees states the agreement was for 40% of the fees and the firm agreed to a reduced fee of 33 1/3% from the settlement amount. (Attachment 13a, ¶ 4.) Both the petition at Attachment 18b2 and the Order Approving Compromise set out the bank branch address where the blocked account is to be opened as "702 south ave. [¶] Carmen,

(36)

Tentative Ruling

Re: ***Paula Garcia v. India Oven, Inc.***
Superior Court Case No. 23CECG01606

Hearing Date: December 05, 2023 (Dept. 502)

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

Tentative Ruling:

To sustain, with leave to amend, the demurrer to the sixth and seventh causes of action. (Code Civ. Proc., § 430.10, subd. (e).) To grant the motion to strike the portions of the complaint as it pertains to punitive damages, specifically page 17, line 28 – page 18, line 6; page 19, lines 7-12; and page 19, line 28, with leave to amend. (Code Civ. Proc., § 436; Civ. Code, § 3294.)

Plaintiff is granted 20 days' leave to file the second amended complaint. The time to file the second amended complaint will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

Retaliation:

Defendants, India Oven, Inc., Gurdev Singh, and Gurdeep Singh, demur to the sixth cause of action for wrongful termination in violation of public policy and to the seventh cause of action for retaliation in violation of the California Fair Employment and Housing Act ("FEHA"), on the grounds that plaintiff, Paula Garcia, has not alleged any fact showing that she engaged in a "protected activity." In particular, defendants contend that the "protected activity" alleged in the First Amended Complaint ("FAC") does not constitute a protected activity under FEHA.

Government Code section 12940, subdivision (h), states that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).)

"Past California cases hold that in order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1042, internal citations omitted.)

Here, plaintiff alleges that she “engaged in a protected activity under FEHA by notifying [d]efendant[s] of her injury...” and that “she suffered adverse employment action... because she was terminated in retaliation for requesting the worker’s compensation and initiating the process of seeking an accommodation by reporting her injury.” (FAC, ¶ 93.) However, defendants rely on *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216 (“*Moore*”) to argue that such notification of injury does not constitute a protected activity.

Indeed, the court in *Moore* held that “[n]otifying one’s employer of one’s medical status, even if such medical status constitutes a ‘disability’ under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA.” (*Id.*, 247.)

The opposition does not address the issue of whether a protected activity has properly been alleged, but rather, asserts that a claim for a FEHA discrimination cause of action based on her work injury. However, plaintiff does not allege any facts to indicate that she was terminated or otherwise discriminated against based on her injury. Instead, she alleges that defendant Gurdeep Singh told her to seek medical attention if she was injured and that she was terminated after requesting for the video footage of the fall leading to the injury and for defendants’ workers’ compensation information. (FAC, ¶¶ 25-28.)

Therefore, plaintiff has not sufficiently pled a claim for either retaliation or discrimination under FEHA.

Violation of Labor Code Section 132a:

Defendants further demur to the sixth cause of action for wrongful termination in violation of a public policy on the grounds that the Workers’ Compensation Appeals Board has exclusive jurisdiction over claims arising from violations of Labor Code section 132a.

Both parties agree that a violation of Labor Code section 132a, on its own, cannot be the basis of a tort action for wrongful termination. (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 755–756.) However, plaintiff argues that it is permissible to bring a tort claim for disability discrimination, even if plaintiff may also have a claim under Labor Code 132a. Defendants, in their reply, do not contest that contention, but assert that plaintiff failed to articulate a claim under FEHA. As previously discussed, plaintiff has not pled facts sufficient to state a cause of action under FEHA.

Thus, the court intends to sustain defendants’ demurrer to the sixth and seventh causes of action. Leave to amend is granted, as it is possible that plaintiff may allege more facts to support a claim for discrimination and/or for retaliation based on a request for accommodation.¹

¹ It should be noted that notification of an injury and a request for a reasonable accommodation are two distinct actions. For example, in *Moore*, it was alleged that “[d]efendant unlawfully retaliated against [the plaintiff] as a result of her ‘notifying’ [d]efendant ‘of her disability(ies) and

