

Tentative Rulings for March 9, 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).)

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

20CECG03004 *Blair v. City of Fresno* is continued to Wednesday, April 27, 2022, at 3:30 p.m. in Department 502.

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Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Garcia v. Rich Doss, Inc.***
Superior Court Case No. 18CECG04533

Hearing Date: March 9, 2022 (Dept. 502)

Motion: Plaintiff's Motion for Final Approval of Class Action Settlement, Attorneys' Fees and Expenses, and Incentive Award

Tentative Ruling:

To grant final approval of the settlement. To grant attorney fees in the amount of \$75,000.00, and attorney costs in the amount of \$12,751.56. To grant administrator costs in an amount of \$8,500.00. To grant the named plaintiff (class representative) an incentive award in the amount of \$5,000.00.

To order that on or before March 30, 2021, the plaintiff shall lodge a revised "Order Granting Final Approval of Class Settlement" and a revised "Final Judgment," each corrected as discussed in the explanation below. No amount under this final approval and judgment, including payment of the attorney fees and costs, administrator costs, or the plaintiff's incentive award, may be paid until the parties ensure via the court's online case management system (Odyssey) that the Order and Judgment has been signed and filed. Notice of the judgment is to be given to class members by an insert with the checks distributed to them, which insert refers the class to the Court's Odyssey search link and gives the case number for this case. (Cal. Rules of Court, rule 3.771(b).) That link is:

<https://publicportal.fresno.courts.ca.gov/FRESNOPORTAL/Home/Dashboard/29>

To order the parties to return on January 24, 2023, at 3:30 p.m. in Department 502 in order to inform the court of the total amount actually paid to the class members, pursuant to Code of Civil Procedure section 384, subdivision (b), so that the judgment can be amended and the distribution of any cy pres funds can be ordered. Documentation as to the amount paid to class members must be filed on or before January 10, 2023.

Explanation:

Final Approval of Settlement:

California Rules of Court, rule 3.769(g) states: "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." Subsection (h) states: "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment."

The Court has vetted the fairness of the settlement through prior hearings, each with its own filings. The settlement here generally meets the standards for fairness, and the class has approved it, with no objections, and no opt-outs. There were two notices which were undeliverable. However, the court finds that the method of notice followed, which this court approved at the prior hearing, comports with due process and was “reasonably calculated to reach the absent class members”:

“Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice,” but “it is the court’s duty to ensure that the notice ordered is reasonably calculated to reach the absent class members.” *Hallman v. Pa. Life Ins. Co.*, 536 F.Supp. 745, 748–49 (N.D.Ala.1982) (quotation marks and citation omitted); see also *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 11, 13 (1st Cir.1980); *Key v. Gillette Co.*, 90 F.R.D. 606, 612 (D.Mass.1981); cf. *Lombard*, at 155. After such appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court’s actions, including settlement and judgment, even though those individuals never actually receive notice. *Cooper*, 467 U.S. at 874, 104 S.Ct. 2794; 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789 (2d ed.1986).

(*Reppert v. Marvin Lumber and Cedar Co., Inc.* (1st Cir. 2004) 359 F.3d 53, 56-57.)

Incentive Awards:

Plaintiff asks the court to confirm that he, as class representative, be paid an enhancement or incentive award of \$5,000 from the settlement. This is a relatively modest award for his efforts in bringing and prosecuting this action, taking time to discuss the facts and law with class counsel, and preparing for the mediation which resulted in settlement. The court finds the amount requested to be reasonable, and approves the request.

Costs:

Class counsel presents evidence of the actual costs incurred in the litigation to date and requests cost reimbursement in the amount of \$12,751.56. All costs are permissible and are granted.

Attorney Fees:

The settlement provided for attorney fees that the parties agreed on fees calculated at one-third of the gross settlement amount. Counsel has provided evidence of the actual time expended by class counsel, as a cross-check of the lodestar. The court finds that the amount requested in fees is reasonable and justified by the efforts made and results obtained with this settlement, and awards attorney fees in the amount of \$75,000.00.

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Tentative Ruling

Re: ***Williams et al. v. Court Appointed Special Advocates for Fresno and Madera Counties***
Superior Court Case No. 21CECG01104

Hearing Date: March 9, 2022 (Dept. 502)

Motion: by defendant on demurrer to complaint

Tentative Ruling:

To sustain the demurrer as to the third cause of action for Violation of the Ralph Civil Rights Act under Civil Code section 51.7, with leave to amend. To sustain the demurrer as to the sixth cause of action for Accounting, with leave to amend. Plaintiffs shall serve and file their amended complaint within ten (10) days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Plaintiffs bring the instant action against defendant on nine causes of action based on wrongful termination and various Labor Code violations. Defendant demurs on the basis that the complaint fails to allege facts sufficient to state causes of action. Defendant challenges plaintiffs' third cause of action, for Violation of the Ralph Civil Rights Act under Civil Code section 51.7, and sixth cause of action, for Accounting.

In determining a demurrer, the court assumes the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883.) On demurrer, the court must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.)

On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. A demurrer is simply not the appropriate procedure for determining the truth of disputed facts. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.) It is error to sustain a demurrer where plaintiff "has stated a cause of action under any possible legal theory. In assessing the sufficiency of a demurrer, all material facts pleaded in the complaint and those which arise by reasonable implication are deemed true." (*Bush v. California Conservation Corps* (1982) 136 Cal.App.3d 194, 200.) A plaintiff is not required to plead evidentiary facts supporting the allegation of ultimate fact; the pleading is adequate if it apprises defendant of the factual basis for plaintiff's claim. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) When the complaint is defective, great liberality should be exercised in permitting a plaintiff to amend the complaint if there is a reasonable possibility that the defect can be cured by amendment. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549.)

Violation of the Ralph Civil Rights Act

The complaint alleges that an employee/agent of defendant, Paul Braswell committed an act of violence against plaintiff Cynthia LoMonaco because of her sex, in violation of the Ralph Civil Rights Act of 1976.¹

Plaintiff alleges the following facts in support. LoMonaco was an outreach specialist for defendant who would set up events used as outreach to the community to enlist advocates to provide mentoring and guidance to foster youth. At some point in time, LoMonaco alleges being subjected to demeaning behavior by Braswell, who had developed a reputation for being verbally aggressive to staff. Braswell assigned LoMonaco to weekend presentations without her input. LoMonaco complained about the scheduling to no result. LoMonaco further alleges that Braswell had disagreements with other female employees, and that Braswell disrespected her. LoMonaco is not aware of any efforts by defendant to address the complaints with Braswell.

On some occasion, in response to LoMonaco's complaints regarding Braswell, Wilma Hashimoto, defendant's executive director, threatened LoMonaco in a passive-aggressive manner that LoMonaco's position historically reported to Braswell, and could return to that structure.

On yet another occasion, Braswell recommended certain software that LoMonaco believed was incompatible with defendant's existing system. When questioned, Braswell lost his temper and entered LoMonaco's cubicle. Braswell stood over LoMonaco, who was seated. Braswell's position in the cubicle prevented LoMonaco from moving, standing, or exiting the cubicle. Braswell physically encroached on LoMonaco's space, yelled at her, demeaned her, and embarrassed her in front of the entire staff. When LoMonaco reported the incident to Hashimoto, Hashimoto directed LoMonaco to accept any apology offered by Braswell. Some period later, LoMonaco was terminated. Based on the above, LoMonaco alleges that defendant's working environment promoted and allowed a culture of abuse, favoritism, and discrimination.

The Ralph Civil Rights Act of 1976 states, in pertinent part, that:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. (Civ. Code § 51.7, subd. (b).)

Civil Code section 51, subdivision (b) includes sex. Under the Ralph Act, a plaintiff must establish that the defendant threatened or committed violent acts against the plaintiff, and a motivating reason for doing so was a prohibited discriminatory motive. (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291.) Here, defendant does not contest the characterization that the acts described above were discriminatorily

¹ Civ. Code § 51.7, subd. (a).

motivated due to LoMonaco's sex, only that the complaint fails to sufficiently allege an act of violence or intimidation by threat of violence.

Both parties cite to federal court cases to define violence, or intimidation by threat of violence. (*Campbell v. Feld Entertainment, Inc.* (N.D.Cal 2014) 75 F.Supp.3d 1193 [by defendant]; *Wintaro v. Toshiba Am. Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276.) Decisions by federal courts interpreting California law are not binding, and are merely persuasive. (*Finely v. Super. Ct.* (2000) 80 Cal.App.4th 1152, 1160.) It is only proper to look at federal decisions interpreting California law where the reason is analytically sound. (*Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98, 110, fn. 9.)

The *Campbell* court defined "violence" to mean some physical, destructive act. (*Campbell, supra*, 75 F.Supp.3d at p. 1205.) The court finds that *Campbell* is consistent with California law. "Violence" in the criminal context is generally defined to mean any wrongful application of physical force against property or the person of another. (E.g., *People v. Bravot* (1986) 183 Cal.App.3d 93, 97.)² Likewise, there can be no "threat of violence" without some expression of intent to injure or damage a plaintiff or her property. (*Ramirez v. Wong* (2010) 188 Cal.App.4th 1480, 1486.)

Nowhere in the complaint does LoMonaco allege any use of physical force against her person or property. At best, the complaint states that Braswell, as defendant's agent, physically encroached on LoMonaco's space. However, LoMonaco's space is neither her person, nor her property. Neither does the complaint allege any intent on the part of defendant to injure or damage LoMonaco's person or property. Therefore, the court sustains the demurrer as to the third cause of action, with leave to amend.

Accounting

An action for an accounting has two elements: (1) that a relationship exists between the plaintiff and defendant that requires an accounting; and (2) that some balance is due the plaintiff that can only be ascertained by an accounting. (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869.) The relationship between the plaintiff and defendant need not be a fiduciary relationship. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) All that is required is that some relationship exists that requires an accounting. (*Ibid.*) An accounting action is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation. (*Ibid.*)

The complaint fails to establish a relationship between plaintiffs and defendant that requires an accounting. The complaint alleges that plaintiffs and defendant had a fiduciary relationship, by way of employment, and that plaintiffs and defendant were custodians of public funds, acting as the State of California's agent. However, the

² In contrast, *Wintaro* provides no meaningful guidance. In *Wintaro*, the Ninth Circuit Court of Appeals found that there was violence where a co-worker physically kicked the plaintiff at least once, and or intimidation by threat of violence when the co-worker stated to the plaintiff "chick, you better walk faster or I am going to hurt you again." (274 F.3d at p. 1289-1290.) In other words, there was a clear act of violence, and a clear threat of violence. Though *Wintaro* further held that to test whether threatened violence was intimidating, a court should employ a reasonable person test as to whether a person under substantially similar conditions would have been intimidated, *Wintaro* cites no California law to support such a test.

