Tentative Rulings for April 26, 2022
Department 403

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.

19CECG04425 ***Megan Zupancic V. Stephen Labiak*** **is continued to Thursday, May 19, 2022 at 3:30 P.M. in department 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(27)

Tentative Ruling

Re: ***In re Jaime Lopez, Jr.***
Superior Court Number: 21CECG03815

Hearing Date: April 26, 2022 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. The Court intends to sign the proposed orders, as modified. No appearances necessary.

Explanation:

The date of birth stated in section 9(c) in the proposed order approving compromise (MC-351 [proposed]) is different than the date of birth stated in the petition. The court intends to correct this via interlineation using the date of birth stated in the petition (12/16/10). (Petition MC-350, § 2.)

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: KCK on 04/22/22 .
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In Re: Fatima Silva***
Superior Court Case No. 22CECG01005

Hearing Date: April 26, 2022 (Dept. 403)

Motion: Petition to Compromise Disputed Claim of Minor

Tentative Ruling:

To grant. However, petitioner only provided the "Order Approving Compromise" (Judicial Council Form MC-351), and she also needs to submit the form "Order to Deposit Funds in Blocked Account" (Judicial Council Form MC-355), filled out to provide for the deposit of $3,456.30 into a blocked account. Once the court has both orders, it will sign them. No appearances are necessary, but if petitioner wishes to appear in order to submit the additional order, she will need to call and request oral argument.

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: KCK on 04/22/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Caro, et al. v. Fresno American Indian Health Project, et al.***
Superior Court Case No. 21CECG01660

Hearing Date: April 26, 2022 (Dept. 403)

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

Tentative Ruling:

To sustain, with leave to amend, defendants' demurrer to each cause of action as to plaintiff Martin Ibarra ("Ibarra"), for failure to state sufficient facts to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

To sustain, with leave to amend, defendants' demurrer to the second cause of action as to both plaintiffs, for failure to state sufficient facts to state a cause of action and uncertainty. (Code Civ. Proc., § 430.10, subd. (e), (f).)

To sustain, with leave to amend, defendant Linda Bowman's ("Bowman") demurrer to the third and sixth causes of actions as to Caro, for failure to state sufficient facts to state a cause of action and uncertainty. (Code Civ. Proc., § 430.10, subd. (e), (f).)

To overrule defendants Fresno American Indian Health Project ("FAIHP") and Selina De La Pena's ("De La Pena") demurrer to the third, fourth, fifth and sixth causes of actions as to Caro.

To grant defendants' motion to strike the portions of the complaint as it pertains to punitive damages, specifically paragraphs 24, 32, 39, 46, 53, and 60, and the prayer on page 12, line 13, with leave to amend.

Plaintiffs are granted 30 days' leave to file the first amended complaint. The time to file the first amended complaint will run from service by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Demurrer:

Procedural Defects: The opposition argues that FAIHP and De La Pena's demurrer fails to identify Caro as a party subject to their demurrer, thus their demurrer should only be considered with respect to Ibarra. A notice of motion or demurrer must provide "the nature of the order being sought and the grounds for issuance of the order." (Cal. Rules of Court, rule 3.1110, subd. (a).)

Although no specific party is named in the notice of demurrer, given that the caption states that the demurrer is as to "plaintiffs'" complaint, the court finds the notice to be sufficient to apprise the opposing party that both plaintiffs are the subject of FAIHP and De La Pena's demurrer.

Demurrer for Uncertainty: Bowman demurs to the second, third and sixth causes of action on the ground of uncertainty, as the complaint fails to allege which causes of action are stated against her.

Indeed, the causes of actions are uncertain, as it is unclear which defendants are being sued under each separate cause of action. Rule of Court, rule 2.112 requires a plaintiff's complaint to affirmatively plead, among other things, the party or parties against whom each cause of action is being brought. (Cal. Rules of Court, Rule 2.112, subd. (4).)

Here, the complaint names three defendants, FAIHP, De La Pena and Bowman (Compl. ¶5-7.) None of the causes of action allege any claims against Bowman. Therefore, the complaint is uncertain to the extent that it fails to specify which causes of action are being brought against which defendants. The court intends to sustain the demurrer to the second, third and sixth causes of action on the ground of uncertainty, with leave to amend to clarify which defendants are being sued in each cause of action.

Additionally, FAIHP and De La Pena also demur to each cause of action on the ground of uncertainty, as they fail to allege: (1) which facts in the general allegations apply to each cause of action; and (2) whether the claims in the complaint are included in Caro's Department of Fair Employment and House ("DFEH") complaint. Although FAIHP and De La Pena have properly raised their uncertainty claims by special demurrer, the notice of demurrer provides that the sole ground for relief is "that each of the first six Causes of Action fail to state a claim for which relief can be granted." (FAIHP and De La Pena, Notice of Demurrer; 2:1-2.) Thus, the court limits its ruling to the ground specified in FAIHP and De La Pena's notice of demurrer—failure to state a claim.

Demurrer to First Cause of Action for Disparate Treatment Based on Race, Color, National Origin and/or Ancestry: Defendants demur to the first, second, third, fourth, fifth and sixth causes of action as alleged by Ibarra, on the grounds that he fails to state a claim as he lacks standing to bring suit under FEHA. Ibarra states six causes of actions based on his loss of consortium resulting from his wife, Caro's, emotional distress and termination from employment from FAIHP, which he alleges was wrongful as it was based on her race, national/origin and disability in violation of her right to protected medical leave.

Defendants argue that no cause of action is stated here because the relevant case law clearly establishes that Ibarra, who is not alleged to be an employee of FAIHP, is not protected by FEHA. The FEHA prohibits employers from engaging in discriminatory employment practices toward any persons, whether in hiring, discharge, or discrimination in compensation, terms, conditions or privileges of employment. (Government Code, § 12940, subd. (a)-(o).) "The 'fundamental foundation for liability' under FEHA is the 'existence of an employment relationship' between the parties, even if indirect." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 301 [internal citations omitted].)

Here, plaintiffs do not allege that an employment relationship between Ibarra and defendants exist, nor do they cite to any authority extending FEHA protection to the spouse of the employee.

Defendants also contend that Ibarra has not exhausted his administrative remedies prior to bringing suit. To bring a civil action under the FEHA, generally, the aggrieved employee must first exhaust his or her administrative remedies with the DFEH. "Specifically, the employee must file an administrative complaint with DFEH identifying the conduct alleged to violate FEHA." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 153.) Here, plaintiffs allege only that Caro obtained a right-to-sue letter from the DFEH. The opposition argues that Ibarra is exempt from pursuing the requisite administrative remedies as he is only bringing causes of actions based on loss of consortium claims. However, all of the causes of action alleged by Ibarra are based on defendants' violation of the FEHA, therefore plaintiffs have failed to allege facts sufficient to establish that Ibarra has exhausted his administrative remedies prior to bringing his FEHA claims.

As a result, plaintiffs have failed to state sufficient facts to state a cause of action under FEHA as to Ibarra. Defendants' demurrer as to all causes of action alleged by plaintiff Ibarra is sustained with leave to amend, as it is possible that plaintiffs may be able to allege more facts to show that Ibarra was an employee of FAIHP and that he did, in fact, exhaust his administrative remedies.

Demurrer to Second Cause of Action for Hostile Work Environment Harassment: Defendants argue that plaintiffs have failed to allege sufficient facts to show that the alleged harassment was sufficiently severe and pervasive to support a claim of harassment. "An employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their protected status." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 582 [internal citations omitted, brackets in original omitted].)

To meet the threshold severity or pervasive standard, "the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466.) "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [she] was actually offended." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 583 [brackets in original omitted; brackets added].) "The existence of a hostile work environment is assessed based upon the totality of the circumstances and a discriminatory remark…" (*Ibid*.) The following circumstances may be considered: "1. The frequency of the racial conduct; 2. The severity of the racial conduct; 3. Whether the racial conduct was physically threatening or humiliating, or a mere offensive utterance; and 4. Whether the racial conduct unreasonably interfered with Plaintiff's work performance." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466.)

Here, plaintiffs allege that the racial harassment was severe and pervasive, but only describe one instance of such harassment—that Bowman commented: "Well, I don't know what you don't get. Maybe it's just because you're Mexican or it's your

education. Was it your upbringing? Was English not your first language?" (Compl., ¶ 12.) Plaintiffs have alleged that Caro suffered severe work-related anxiety, stress, chest pain and lack of sleep as a result of the harassment defendants subjected her to. (Compl. ¶ 16.) Thus, while plaintiffs have shown that the alleged conduct was subjectively offensive to Caro, plaintiffs have not shown that the conduct was objectively severe or pervasive enough to meet the threshold standard. As a result, plaintiffs have not alleged sufficient facts to state a valid claim for harassment.

Additionally, De La Pena argues that plaintiffs have failed to allege, and cannot allege, any facts that she perpetrated any of the alleged harassment against Caro. "To establish a prima facie case of a hostile work environment, [plaintiffs] must show that (1) [Caro] is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [brackets added, internal citations omitted].)

Here, it is undisputed that Caro is a member of a protected class. While it is alleged that she was subjected to unwelcome harassment based on her race, color, national origin and/or ancestry, no facts are alleged to indicate that De La Pena was liable for this harassment. Although supervisory employees can be held personally liable for harassment, an essential element of liability is the supervisor perpetrating personal conduct that constitutes harassment, which the complaint has not alleged. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62.) Alternatively, plaintiffs also allege that De La Pena excluded Caro from meetings, deprived her of certain work projects, and criticized her for small and inconsequential matters. (Compl., ¶ 15.) However, plaintiffs have not alleged any facts to establish that De La Pena's motive for these acts were based on Caro's protected status.

The court intends to sustain the demurrer to the second cause of action, with leave to amend to allege the facts necessary to establish a cause of action for hostile work environment harassment.

Demurrer to Third Cause of Action for FEHA Retaliation: FAIHP demurs to the third cause of action for retaliation in violation of FEHA on the ground that plaintiffs have not alleged sufficient facts to show that defendants engaged in sufficient racial conduct to give rise to a retaliation claim under FEHA, or that Caro's complaint to her supervisor about the conduct was a substantial motivating reason for FAIHP's adverse employment actions against Caro. Additionally, Bowman demurs to the third cause of action on the ground that non-employer individuals are not liable under FEHA for retaliation against employees.

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) [brackets added].)

"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, plaintiffs allege that Caro engaged in a protected activity by opposing Bowman's "ongoing harassing conduct" and that she complained to her superior, De La Pena, about Bowman's conduct. (Compl. ¶ 36.) De La Pena, acting on behalf of FAIHP, then excluded Caro from meetings, deprived her of certain work projects, and criticized her for small and inconsequential matters. (*Id*., ¶ 15.) Plaintiffs' protected activity was a substantial motivating reason for FAIHP's adverse employment actions against Caro. (*Id.*, ¶ 37.)

Plaintiffs' allegations are somewhat vague, as it is unclear exactly what "ongoing harassing conduct" defendants are accused of committing. It appears that plaintiffs are referring to Bowman's behavior during the course of Caro's employment at FAIHP, where she is alleged to have made racially-charged comments to Caro, to the effect that [she] was stupid because she was "Mexican," or that she was unable to understand, speak or read English. (Compl., ¶ 12.) Upon complaining about Bowman's behavior to De La Pena, Caro alleges she was met with adverse employment actions in the form of discrimination against her terms, conditions or privileges of employment. Plaintiffs allege that Bowman's behavior was motivated by Caro's race or national origin, and that Caro's complaint(s) about such behavior were substantial motivating reasons for De La Pena's, acting on behalf of FAIHP, adverse employment actions against Caro. Therefore, it does appear that Caro has sufficiently alleged a claim for retaliation against FAIHP.

Additionally, Bowman contends that non-employer individuals cannot be liable for an employee's retaliation claim. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173. Here, plaintiffs allege that Bowman was "an employee or an agent of, or a person providing services under a contract with, FAIHP." (Compl., ¶ 9.) Plaintiffs do not allege any facts showing that Bowman employed plaintiffs such that she could be subjected to individual liability for the retaliation under FEHA. Thus, plaintiffs have failed to sufficiently allege a claim for retaliation against Bowman.

The court intends to overrule FAIHP's demurrer as to the third cause of action as to Caro, but sustain Bowman's demurrer to the same, with leave to amend, as it is possible that plaintiffs may allege more facts to show that Bowman was an employer of plaintiffs. Further, as previously discussed, the court intends to sustain the demurrer as to third cause of action as to Ibarra, with leave to amend.

Demurrer to the Fourth Cause of Action for Disparate Treatment Based on Physical Disability and Medical Condition. To establish a cause of action for disability discrimination in violation of FEHA, the plaintiff must show: (1) she suffered from a disability; (2) she was capable of performing the essential functions of her position [with a reasonable accommodation]; (3) she was subjected to an adverse employment action because of the disability; and (4) the employer knew of the disability when it decided to

terminate her employment. (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1380 [brackets added].)

Here, plaintiffs allege that Caro suffered "severe work-related anxiety and stress, with physical manifestations such as chest pain and lack of sleep." (Compl., ¶ 16.) Plaintiffs also allege that Caro's physical disability and/or medical condition were substantial motivating reasons for defendants' adverse employment actions—the termination of her employment. (Compl., ¶ 44, 18.) Additionally, under the fifth cause of action for failure to engage in interactive process, plaintiffs allege that FAIHP knew of Caro's physical disability and medical condition, and Caro would have been able to perform essential job requirements with a reasonable accommodation. (Compl., ¶ 49.) While these allegations are made under a separate cause of action, the court will consider the allegations as to both causes of actions. (Code Civ. Proc., § 452 [plaintiffs' allegations must be liberally construed.]; *Gressley v. Williams* (1961) Cal.App.2d 636, 639 [Complaints which show some right to relief are held sufficient against demurrer-even though the facts are not clearly stated; or are intermingled with irrelevant matters.].) Thus, it does appear that plaintiffs have sufficient alleged a claim for disparate treatment based on physical disability and/or medical condition against FAIHP.

Defendants further argue that plaintiffs have not demonstrated that her alleged disabilities qualify as a physical disability or medical condition, as defined by FEHA, and that plaintiffs fail to indicate a timeline to which Caro suffered her symptoms.

"FEHA states a 'physical disability' includes, but is not limited to, 'any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: [¶] (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. [¶] (B) Limits a major life activity. For purposes of this action: [¶] ... [¶] (ii) A ... condition ... limits a major life activity if it makes the achievement of the major life activity difficult. [¶] (iii) 'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working." (*Brown v. Los Angeles Unified School District* (2021) ("*Brown*") 60 Cal.App.5th 1092, 1104 [internal citations omitted].)

In *Brown*, the plaintiff alleged that she could not work because she suffered from electromagnetic sensitivity, which included various symptoms such as "chronic pain, headaches, nausea, itching, burning sensations on her skin, ear issues, shortness of breath, inflammation, heart palpitations, respiratory complications, foggy headedness, and fatigue…" (*Ibid.*) There, the appellate court determined plaintiff's First Amended Complaint to have adequately pled a physical disability because the "described symptom affect[ed] one or more of the body systems listed in the statute and limited Brown's major life activity of working as a teacher…" (*Ibid*.)

Provided that the alleged symptoms affect one or more of the body systems listed in the statute and limited Caro's major life activity of working as an accountant at FAIHP, plaintiffs have adequately pled a qualifying physical disability. Additionally, since the complaint provides that Caro was terminated during her medical leave, which she requested as a result of her physical disability, no further timeline of her symptoms is necessary. (Compl., 16-18.)

On the other hand, plaintiffs have failed to plead sufficient facts to establish that Caro has a qualifying medical condition. (Gov. Code, § 12926(i). [A medical condition is either a health impairment related to or associated with a diagnosis, record, or history of cancer; or genetic characteristics.].) However, the issue of the medical condition is of no consequence, as Caro has adequately alleged a claim for disparate treatment based on physical disability against FAIHP. Thus, the court intends to overrule the demurrer to the fourth cause of action as to Caro, but as previously discussed, to sustain as to the same for Ibarra, with leave to amend.

Demurrer to the Fifth Cause of Action for Failure to Engage in the Interactive Process: FAIHP plaintiffs have not alleged facts showing that FAIHP had knowledge of Caro's disability, and that Caro made a proper request for a reasonable accommodation.

Government Code, section 12940, subdivision (n) provides it is an unlawful employment practice "[f]or an employer ... to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical ... disability...." (Gov. Code, § 12940, subd. (n) [brackets added].)

Here, plaintiffs allege that (1) FAIHP knew of Caro's physical disability and medical condition; (2) Caro requested for a reasonable accommodation; (3) Caro would have been able to perform essential job requirements with a reasonable accommodation; and (4) FAIHP failed to participate in a timely, good faith interactive process to determine whether a reasonable accommodation could be made. (Compl., ¶ 49-51.) Therefore, plaintiffs have adequately pled a cause of action for failure to engage in the interactive process.

Defendants further argue that plaintiffs have failed to alleged sufficient facts to support her allegations, specifically who, when, and what request was made. However, defendants have provided no authority establishing that a cause of action for failure to engage in the interactive process requires such specificity in its pleading. Defendants also argue that the demurrer should be sustained without leave to amend, because plaintiffs cannot amend the complaint to show that Caro provided any reasonable medical documentation confirming the existence of a disability and the need for a reasonable accommodation. However, defendants provide no authority indicating that this allegation is required, at the pleading stage, to state a cause of action for failure to engage in the interactive process. Even if this were the case, the complaint is not unamendable, as the employee is obligated to produce such documentation if the disability and need for accommodation is either not obvious or is requested by the employer. (2 Cal. Code Regs., § 11069, subd. (d).) Therefore, the court intends to overrule the demurrer to the fifth cause of action as to Caro, but as discussed above, sustain the same as to Ibarra, with leave to amend.

Demurrer to the Sixth Cause of Action for Failure to Prevent Harassment, Discrimination and Retaliation: FAIHP contends that this cause of action requires actual discrimination, harassment or retaliation. Additionally, Bowman demurs to the sixth cause

of action on the ground that non-employer individuals are not liable under FEHA for failure to prevent harassment, discrimination and retaliation.

Under Government Code section 12940, subdivision (k), it is an unlawful employment practice "[f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k) [brackets added].)

FAIHP relies on *Dickson v. Burke Williams Inc.*, (2015) 234 Cal.App.4th 1307 ("*Dickson*") to argue that unless the underlying claim of discrimination, retaliation, or harassment is proven, the plaintiff cannot prevail on a separate cause of action for failure to prevent such discrimination, retaliation, or harassment. However, while plaintiffs must prove at trial that the underlying discrimination, retaliation, or harassment existed, plaintiffs are not required to prove such facts at the pleading stage. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [a demurrer is used to test the legal sufficiency of the complaint.].) It is sufficient that plaintiffs have adequately alleged their underlying FEHA causes of action and that plaintiffs have alleged that FAIHP failed to take the reasonable steps necessary to prevent discrimination, harassment or retaliation. As discussed above with regard to the other causes of action, the plaintiffs have sufficiently alleged their underlying claims for discrimination and retaliation. Therefore, the court intends to overrule the demurrer to the sixth cause of action as to Caro, but, as discussed above, sustain the same as to Ibarra, with leave to amend. Also, for the same reasons cited under the section with regard to the third cause of action, the court intends to sustain Bowman's demurrer to the sixth cause of action, with leave to amend.

Motion to Strike:

Defendants move to strike the allegations regarding punitive damages from several paragraphs of the complaint, as well as the prayer for exemplary damages. They contend that there are insufficient facts alleged in the complaint that would tend to show that they acted with the malice, fraud, or oppression necessary to support a prayer for punitive damages. (Civil Code, § 3294.)

In order to recover punitive damages, plaintiffs must plead specific facts to support allegations of malice, oppression or fraud. (Civil Code, § 3294; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) "[¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c).)

"'Despicable conduct' is defined in BAJI No. 14.72.1 (1989 rev.) as 'conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' Such conduct has been described as '[having] the character of outrage frequently associated with crime.' As

well stated in Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal.App.3d 1149, 1154 [230 Cal.Rptr. 276]: '[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer "must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]"' Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1269, 1287, [internal citations omitted].)

Here, plaintiffs have alleged that Bowman made pervasive comments to Caro throughout the duration of her employment at FAIHP based on her race, color, national origin, and/or ancestry, but only specifically alleges one instance of such conduct—"Well, I don't know what you don't get. Maybe it's just because you're Mexican or it's your education. Was it your upbringing? Was English not your first language?" (Compl., ¶ 12.) When Caro reported Bowman's behavior to supervisor De La Pena, De La Pena, acting on behalf of FAIHP, began excluding Caro from meetings, depriving her of certain work projects, and criticizing her for inconsequential matters. (*Id*., ¶ 15.) As a result of defendants' conduct, Caro began suffering work-related anxiety, stress, chest pain and lack of sleep, which she was prescribed medical leave for. (*Id.*, ¶ 16-17.) During this medical leave, Caro was terminated from her employment. (*Id*., ¶ 17-18.) Plaintiff alleges that the substantial motives for defendants' actions were based on Caro's race, color, national origin, and/or ancestry and physical disability and/or medical condition. (*Id*., ¶ 22, 44.) Further, plaintiff alleges that all defendants were guilty of oppression, fraud and malice when they engaged in the subject conduct. (*Id*., ¶ 24, 32, 39, 46, 53 and 60.)

- Allegations as to Bowman:

Since conclusory allegations are insufficient to meet the heightened pleading standard to sustain a claim for punitive damages, the only allegation of despicable conduct directed against Bowman is that she stated: "Well, I don't know what you don't get. Maybe it's just because you're Mexican or it's your education. Was it your upbringing? Was English not your first language?" (Compl., ¶ 12.) Without more, Bowman's conduct does not reach the level of vileness or reprehensibility to support a claim for punitive damages.

- Allegations as to FAIHP and De La Pena:

Again, any conclusory allegations as to FAIHP and De La Pena's motives are insufficient; therefore, the court limits its consideration only to the described adverse employment actions: (1) Excluding Caro from meetings; (2) Depriving her of certain work projects; (3) Criticizing her for inconsequential matters; and (4) Terminating her employment. Without more, it is difficult to conclude this conduct to be the requisite despicable conduct necessary to support a claim for punitive damages.

Thus, the court intends to grant defendants' requests to strike the portions of the complaint as it pertains to punitive damages.

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: KCK on 04/25/22.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Silva Sr. v. City of Fresno et al.***
Superior Court Case No. 21CECG01516

Hearing Date: April 26, 2022 (Dept. 403)

Motion: Demurrer by Defendants City of Fresno and Fresno Area Express

Tentative Ruling:

To overrule the demurrer. Defendants shall file their answer(s) within ten (10) days of service of the minute order by the clerk.

Explanation:

Plaintiff filed suit against Defendants City of Fresno (the City) and Fresno Area Express (FAX) for three causes of action: injury from motor vehicle; general negligence; and tort of a public entity. Plaintiff alleges that on October 6, 2020, plaintiff was a passenger on a FAX bus, which is alleged to be owned, supervised, managed, maintained, equipped, repaired, controlled and/or operated by the City. That bus, the Route 9 Shaw bus driven by defendants' employee, was carelessly and negligently controlled and operated, leading the bus to be driven at an accelerated, high rate of speed before suddenly, and without warning, defendants' employee slammed on the breaks at the intersection of Shaw Avenue and West Avenue. As a proximate result of these acts, plaintiff suffered physical, mental, and emotional injuries.

Defendants demur to plaintiff's first amended complaint (FAC). The City argues that no statutory basis exists to hold liable a public entity for the allegations of the FAC. FAX argues the same, and further argues that it is merely a department of the City, and therefore is not a proper defendant.

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.)

Fresno Area Express as a Defendant

Though FAX submits the present demurrer on the grounds that it is not a proper defendant because it is merely a department of the City, FAX submits no admissible evidence on a demurrer to support such a conclusion. FAX's demurrer on the grounds that it is an improper defendant is overruled.

Governmental Immunity

Defendants argue that each of the three causes of action of the FAC state no statutory bases upon which to impose liability on public entities such as themselves. However, a plain reading of the FAC shows that plaintiff identified Government Code section 815.2.[1] Though defendants take issue with the specificity of the facts, sufficient facts were alleged by way of form complaint, namely as to the first cause of action, plaintiff alleges that defendants operated the motor vehicle, employed the persons who operated the vehicle in the course of employment, or otherwise gave permission to operate the vehicle, and did so negligently on October 6, 2020 at the intersection of Shaw Avenue and West Avenue.

Defendants next argue that, despite the facts stated, plaintiff's reliance on Government Code section 815.2 is unsupported because no other statutory bases are stated that would otherwise give rise to liability. Plaintiff only refers to Civil Code section 2100 as a basis for liability in the third cause of action, and no other bases, other than Government Code section 815.2, are stated as to the first and second causes of action. However, every cause of action relies on the same nexus of facts. Thus, the question is whether such facts state a cause of action under any legal theory. (*Barquis*, *supra*, 7 Cal.3d at p. 103.)

All government tort liability must be based on statute. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.) Government Code section 815 abolished all common law or judicially declared forms of liability for public entities. (*See Miklosy*, *supra*, 44 Cal.4th at p. 899.) The applicability of statutory immunity does not even arise until it is determined that a defendant otherwise owed a duty of care to the plaintiff. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 784.)

In opposition, plaintiff argues that the facts support a separate statutory basis by way of Civil Code section 2100. Civil Code section 2100 states that "[a] carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." Defendants argue to the contrary, that Civil Code section 2100 imposes

[1] Government Code section 815.2 states, in pertinent part, that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov't Code § 815.2, subd. (a).)

no duty upon defendants specifically as public entities. However, the California Supreme Court previously held that:

> Government Code section 815 provides in part that, "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." … Although we applied Civil Code section 2100 to [a public transit] in *Acosta v. Southern California Rapid Transit District*, *supra*, we did not expressly address whether section 2100 "otherwise provide[s]" for the liability of a public entity within the meaning of Government Code section 815. We now expressly hold that Civil Code section 2100 does so provide. (*Lopez*, *supra*, 40 Cal.3d at p. 785, fn. 2.)

Though defendants argue that such a holding is limited to situations where the duty imposed was to prevent the assault of a passenger, the California Supreme Court did not so limit this holding. Neither did the First District Court of Appeals so find in relying on *Lopez*, and consequently broadly held that "Civil Code section 2100 applies to both public and private common carriers and is therefore a proper basis for public agency liability." (*Churchman v. Bay Area Rapid Transit Dist.* (2019) 39 Cal.App.5th 246, 250.)

Based on the above, the court finds that the FAC sufficiently states a statutory duty by defendants to exercise reasonable skill in operating a bus, to plaintiff who was a passenger thereof. Further, the court finds that the FAC sufficiently states bases upon which to seek to impose liability on defendants. Defendants' demurrer to the FAC is overruled in its entirety.

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: KCK on 04/25/22.
(Judge's initials) (Date)