Tentative Rulings for October 28, 2021
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.

19CECG00360	***Bingham et al. v. Douangmala et al.*** **is continued to Tuesday, November 2, 2021, at 3:30 p.m. in Dept. 502**
19CECG03273	***City of Fresno v. White*** **is continued to Tuesday, December 21, 2021, at 3:30 p.m. in Dept. 502**
19CECG03274	***City of Fresno v. White*** **is continued to Tuesday, December 21, 2021, at 3:30 p.m. in Dept. 502**
20CECG00383	***Westcor Land Title Insurance Company v. Follette*** **is continued to Tuesday, December 21, 2021, at 3:30 p.m. in Dept. 502.**

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Tentative Ruling

Re:	***Saxton v. Central California Faculty Medical Group, Inc.*** Superior Court Case No. 20CECG03214
Hearing Date:	October 28, 2021 (Dept. 502)
Motion:	Defendant Central California Faculty Medical Group, Inc.'s Demurrer to the First Amended Complaint

Tentative Ruling:

To overrule. Defendant Central California Faculty Medical Group, Inc. is granted 10 days' leave to file its answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Plaintiff states one cause of action for loss of consortium based on his wife's termination from employment with defendant, which he alleges was wrongful as it was based on her disability and in violation of her right to protected medical leave.[1]

A claim for loss of consortium has four elements: (1) a valid and lawful marriage between the plaintiff and the person injured at the time of the injury; (2) a tortious injury to the plaintiff's spouse; (3) loss of consortium suffered by the plaintiff; and (4) the loss was proximately caused by the defendant's act. (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 284; *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746, fn 2.) In *Molien v. Kaiser Foundation Hospitals* ("*Molien*") (1980) 27 Cal.3d 916, 932-933, the Supreme Court held that a plaintiff could state a claim for loss of consortium based on psychological, as opposed to physical injuries to his or her spouse.

Plaintiff bases his claim on his wife's psychological injuries. The tortious injury he seeks to prove his wife suffered is the tort of wrongful termination in violation of public policy (*i.e.,* a *Tameny* claim, see footnote 1), with the public policy underpinning this tort being defendant's violation of the California Fair Employment and Housing Act (FEHA). Based on this court's ruling on the first demurrer that he had not sufficiently alleged the requisite level of harm to the marital relationship, plaintiff has added new allegations in the First Amended Complaint to the "Statement of Facts" section, to describe the harm plaintiff's wife suffered from her wrongful termination and the resulting effect this had on their marriage. (FAC, ¶¶ 44-45.) This is the only change to the pleading, and the loss of consortium cause of action in both the original Complaint and the First Amended complaint are identical, and thus include allegations that defendant's actions toward plaintiff's wife violated the FEHA and was also a wrongful termination in violation of public policy. (*Id.*, ¶¶ 48, 49, 51.)

[1] At the time plaintiff filed his complaint, his wife was not joined in this complaint, nor had she filed her own complaint against defendant. However, she has now filed a separate complaint against defendant in Case Number 21CECG01772. She alleges causes of action for, *inter alia*, FEHA discrimination and wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

Defendant argues that this FEHA language leaves the amended pleading with the same defects as the original one, because in sustaining the first demurrer, this court "made clear in its ruling that a loss of consortium claim *cannot* be premised on the plaintiff's spouse's alleged discrimination in violation of FEHA." (Opening brief, p. 7:17-19, emphasis in the original.) Thus, it again demurrers to the complaint.

However, the court believes defendant misunderstood the court's prior ruling on demurrer, and it clarifies that ruling herein. The court realized then that the tortious injury underpinning plaintiff's loss of consortium claim was a *Tameny* claim based on defendant's violation of the FEHA, i.e., that it was based on employment discrimination. This court never ruled that plaintiff's claim could not be based on employment discrimination via a common law *Tameny* claim with the FEHA violation as its underlying public policy, and it never intended to make such a ruling.

The operative question in determining whether plaintiff has adequately alleged "a tortious injury to plaintiff's spouse" as required (see elements, *supra*), is what tort the spouse is alleging (or could allege). Here, the tort is employment termination based on wrongful discrimination. The California Supreme Court has made it clear that the strong public policies embodied in the FEHA can support a *Tameny* claim. (See *Stevenson v. Superior Court* ("*Stevenson*") (1997) 16 Cal.4th 880, 897; *Rojo v. Kliger* ("*Rojo*") (1990) 52 Cal.3d 65, 70.) Moreover, in so ruling, the Supreme Court ruled in both *Stevenson* and *Rojo* that the FEHA did not supplant any existing common law remedy, and there had been a pre-existing public policy against employment discrimination. (See, *e.g. Stevenson* at p. 910; *Rojo* at p. 75 [[W]e believe the Legislature has manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination."].)

As noted in the prior ruling, on the last demurrer defendant relied heavily on federal courts, and mainly the ruling from a District Court in *Smith v. Grumman* (N.D. Cal. 2014) 60 F.Supp.3d 1051, 1056-1059 ("*Smith*"). *Smith* considered a wife's loss of consortium claim based on her husband's discriminatory termination wherein the wife contended that the FEHA provided a "sufficient public policy against disability discrimination claims to support a public policy tort claim" underlying her loss of consortium claim. (*Id.* at p. 1056.) The court first analyzed the wife's relation to the husband's FEHA claim, and it concluded that the loss of consortium claim "cannot flow from a FEHA claim because the FEHA provides protection for 'employees,' not their spouses." (*Id.* at p. 1057.) Then, it considered whether the loss of consortium claim could be supported by an employment discrimination claim under California common law, and concluded it could not. (*Id.* at p. 1058.) The *Smith* ruling based this on finding that in a state appellate court opinion, *Anderson v. Northrop Corp.* ("*Anderson*") (1988) 203 Cal.App.3d 772, 780, the court had found that termination of employment could not (with the implication being it could never) support a loss of consortium claim.[2] (*Smith* at p. 1058.)

[2] The opinion in *Anderson* did not identify the basis of the wrongful termination claim, other than stating the suit was for "wrongful termination and breach of covenant of good faith and fair dealing." (*Anderson, supra,* 203 Cal.App.3d at p. 774.) The opinion does not mention the word "discrimination."

This court's analysis on the first demurrer followed the same analytical framework the *Smith* court did: it first analyzed whether the loss of consortium claim could be based on the employee spouse's FEHA claim directly, and then whether it could be based on the employee spouse's wrongful termination claim based on the same discrimination as alleged in the FEHA claim. As to the FEHA claim, this court found the analysis in *Smith* more persuasive than the arguments made by plaintiff in opposing the demurrer. But this court disagreed with *Smith's* analysis of the common law claim based on employment discrimination, finding that the court in *Smith* appeared to have misinterpreted, or at least to have over-extended, the holding in *Anderson*. Namely, the *Smith* court concluded that California courts had ruled that the "emotional disquiet" the employed spouse might suffer from wrongful termination "*does not*" reach the requisite level to "substantially disturb the marital relationship on more than a temporary basis," and in so doing it cited and quoted from *Anderson*. (*Smith*, *supra,* 60 F.Supp.3d at pp. 1058, emphasis added, quoting *Anderson, supra,* 203 Cal.App.3d at p. 780.)

This court found that the *Smith* court did not accurately reflect the holding in *Anderson*, since in that case the appellate court simply found that plaintiff had not sufficiently alleged that the employee spouse's "emotional disquiet" had reached the requisite level and therefore the trial court had properly sustained demurrer. (*Anderson, supra*, 203 Cal.App.3d at p. 781.) Thus, in the second stage of this court's analysis on the first demurrer, it did not agree with the *Smith* holding as to the common law wrongful termination claim. This court then went on to sustain the demurrer because plaintiff had not adequately alleged the requisite degree of emotional disquiet, but gave leave to amend.

In the second stage of the analysis in *Smith,* the court noted that plaintiffs had failed to "cite a single case recognizing an emotional injury arising from employment discrimination as sufficient to support a loss of consortium claim." (*Smith* at p. 1058.) However, this court notes that there was at least one unpublished Federal District Court opinion extant at that time, *Settlemyers v. PlayLV Gaming Operations, LLC* (D. Nev., Aug. 3, 2010, No. 2:09-CV-02253-RCJ-LR) 2010 WL 3070426 (out of Nevada, but interpreting California law), which relied on *Anderson* to find that a loss of consortium claim *could* be stated based on an employment discrimination claim. (*Id.* at *6.) It found that the non-employee spouse had not sufficiently alleged the requisite degree of harm to the marital relationship, but gave leave to amend. (*Ibid.*) Granted, this ruling was not binding on the *Smith* court, but it does tend to show that other courts have ruled differently than *Smith* with regard loss of consortium claims based on *Tameny* claims arising from employment discrimination. Certainly, the *Smith* opinion is not binding on this court. And it is important to note that defendant has not cited to a single state court appellate opinion which agrees with the conclusions in *Smith*, i.e., finding that a loss of consortium claim can never arise from employment discrimination.

On balance, the court finds that there is no controlling case law that prohibits a loss of consortium claim to be based on an employment discrimination claim. Therefore, plaintiff's reference to the FEHA in his cause of action does not offend: the wife's *Tameny* claim is based on the public policy represented by the FEHA. As noted above, the California Supreme Court has recognized that the public policies embodied in the FEHA can support a *Tameny* claim, and there had been pre-existing public policy against

discrimination prior to the FEHA. (*Stevenson, supra,* 16 Cal.4th at p. 910; *Rojo, supra,* 52 Cal.3d at p. 75.)

The court also finds that the additional allegations regarding the psychological injury suffered by plaintiff's wife and the resulting effect on the marital relationship are sufficient to withstand demurrer. In *Anderson* the court recognized that a loss of consortium claim could be supported by a claim of wrongful termination of the other spouse, but the psychological injury must be severe, such as "a level of a 'neurosis, psychosis, chronic depression, or phobia' sufficient to substantially disturb the marital relationship on more than a temporary basis." (*Anderson, supra,* 203 Cal.App.3d at p. 780, quoting and citing *Molien, supra,* 27 Cal.3d at p. 933.) Plaintiff alleges:

> As a result of the wrongful termination, Dr. Saxton suffered severe emotional distress, including but not limited to a severe depression that lasted more than a year. Dr. Saxton isolated herself; became easily irritable and short tempered; was distracted; less empathetic; and cried almost every day, which is out of character for Dr. Saxton who is normally a stoic person. For the first year after the termination, she spent much of the day in a rocking chair in the living room, staring at the television or a book because she was too depressed to do anything else.

(FAC, ¶ 44.)

This alleges more than a temporary impairment, as it lasted more than a year. And it was severely disabling. This degree of psychological harm raises a reasonable inference that the marital relationship was more than "superficially or temporarily impaired" (*Anderson, supra,* 203 Cal.App.3d at p. 781) which prevented her from providing companionship, emotional support, and love to her husband.

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

Tentative Ruling
Issued By: RTM on 10/25/21.
(Judge's initials) (Date)