AMIN v VANDENBERG, et al.

20CV44940

PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

This is a dog bite/unsafe condition of public premises suit. Before the Court is plaintiff's motion for leave to file a First Amended Complaint.

Pursuant to Calaveras County Superior Court Local Rule 3.3.7 (adopted 1/1/18), "all matters noticed for the Law & Motion calendar **shall** include" specified language in the Notice of Motion, and "failure to include this language in the notice may be a basis for the Court to deny the motion." Based on plaintiff's failure to include the required language, the motion is DENIED, without prejudice to refile, to the extent it otherwise is timely and appropriate pursuant to relevant statutes.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal order is required.

BARR v. COUNTY OF CALAVERAS

18CV42976

DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION

This is an employment dispute, based principally on the claim that plaintiff was blackballed from promotional considerations. Before the Court this day are two separate motions for summary adjudication, collectively attacking the following causes of action contained in the operative Fourth Amended Complaint (filed 09/25/20):

1st COA: FEHA (Retaliation)

2nd COA: FEHA (Failure to Prevent Retaliation)

6th COA: Defamation

7th COA: Breach of Mandatory Duties

8th COA: Negligence Per Se

9th COA: Intentional Infliction of Emotional Distress

10th COA: Negligent Infliction of Emotional Distress

11th COA: Estoppel

12th COA: Breach of Implied-In-Fact Contract

13th COA: Breach of Implied Covenant of Good Faith and Fair Dealing

14th COA: Common Count

As this Court has previously observed, the varied claims and contentions makes this case a challenge to resolve at any level. To the extent this is ever to reach a jury, management is going to be important.

Requests for Judicial Notice

Plaintiff asks this Court to take judicial notice of nine matters, consisting of four enactments and five job descriptions posted on the County's website. Asking a court to take judicial notice *of a document* is asking the court to take judicial notice of its existence and – to the extent it is not subject to dispute – the significance or legal effect of its existence, if any. Taking judicial notice of a document does not equate with any determination regarding the truth of its contents or accepting a particular interpretation of its meaning. In fact, the *truth of the contents* will not be considered unless the document (1) is a judgment, statement of decision, or order; (2) reflects statements made by the party against whom it is offered; or (3) contains information which cannot

be factually disputed. (See *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753-754; *Fontenot v. Wells Fargo Bank, NA* (2011) 198 Cal.App.4th 256, 265; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118.) Thus, to the extent plaintiff asks this Court to find for present purposes that the four enactments and five job postings exist, the request for judicial notice is GRANTED, but only to the limited extent detailed above.

Plaintiff's Separate Statements

The purpose behind the separate statement requirement is to inform the court and the parties of what issues and facts truly must be addressed on the motion. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252; *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 322.) To this end, separate statements must follow the format set forth in CRC 3.1350: they must separately identify each supporting material fact, and do so "plainly and concisely." (CCP §437c(b); CRC 3.1350(d); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472.)

In opposition to the pending motions for summary adjudication, plaintiff offers an additional 617 "undisputed" material facts. There are several significant issues with the separate statements submitted by plaintiff.

First, CRC 3.1350(f)(3) requires the opposing party to include their additional facts at the end of the responsive separate statement – not in a new document which plaintiff filed 12/23/21.

Second, although CRC 3.1350(f)(3) permits the opposing party to submit "additional material facts," the controlling statute actually limits the submission to "any other material facts the opposing party contends are ***disputed***." (CCP §437c(b)(3) [emphasis added].) As such, only those additional facts "in dispute" may be considered. (See *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 94.)

Third, the vast majority of the additional facts – whether designated as disputed or otherwise – are not "material" since they do not "make a difference in the disposition of the motion." (CRC 3.1350(a)(2).)

Fourth, for summary adjudication, additional material facts offered in opposition must separately identify each cause of action and each supporting material fact relating thereto. (CRC 3.1350(d).) Plaintiff's separate statement in opposition to the "larger" MSA motion does not attach any of the 611 facts to any cause of action. It is the jurisprudential equivalent to throwing a vat of spaghetti against the wall in the hopes that one noodle will stick. (See *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 72.)

While this Court is hesitant to ascribe bad intentions to zealous lawyering, it is hard to see the propriety of counsel's attempt to bury opposing counsel and this Court in 617 additional facts. (See CRPC 3.2: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to

cause needless expense.") Regardless of intent, this Court must honor defendant's objection to the hodge-podge filed by plaintiff and strike the "additional undisputed material facts" 1-611 (the other six are not *as* defective). However, to the extent something genuinely material exists in the mass of asserted "material facts", and is supported in the opposing memorandum of points and authorities (50 of those facts are mentioned), this Court will take those facts into consideration. (See *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 438.)

Summary Adjudication Burdens

The purpose of the law of summary adjudication is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. A defendant moving for summary adjudication may prevail on the motion in one of three ways: (1) by affirmatively negating at least one of plaintiff's essential elements; (2) by showing that plaintiff does not have, and cannot get, evidence to establish an essential element after fully exploring plaintiff's case through discovery; or (3) by presenting evidence as to each element of an affirmative defense upon which defendant bears the burden of proof at trial. Once the defendant's initial burden is met, the burden shifts to the plaintiff to show by substantial evidence that a triable issue of material fact exists as to the claim or defense (though for certain issues in employment cases, the burden may then shift back to the moving party). Contrary to popular folklore, summary judgment is no longer a disfavored remedy; instead, it is "now seen as a particularly suitable means to test the sufficiency of the plaintiff's case" to see if trial is really warranted. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851-854.)

Faithfully navigating the moving and opposing papers is a challenge, but nothing compared to the onerous task navigating the operative pleading. The structure of the operative pleading makes it quite challenging to address the factual sufficiency of plaintiff's retaliation claims. Rather than provide averments in support of each cause of action, plaintiff "incorporates by reference" the first 270 paragraphs in the operative pleading (spread over 39 pages), as the basis for the first cause of action, and then re-incorporates all of the paragraphs into each successive cause of action. See 4thAC Para 272 et seq. This is a widely "disfavored practice" because it "tends to cause ambiguity." (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 605.) This is particularly cumbersome on summary adjudication, which looks to the operative pleading for the outer measure of materiality. (See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 444; *Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 289-290.) Although this Court is supposed to consider all theories reasonably subsumed within the pleading, in this instance it will by necessity have to defer to the parties' memoranda for clarity on what is, and is not, part of each cause of action.

1st and 2nd COA: FEHA Retaliation and Failure to Prevent – MSA GRANTED

Pursuant to Govt. Code §12940(h), "it is an unlawful employment practice, unless based upon a bona fide occupational qualification ... for 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." This is commonly referred to as the anti-retaliation statute. The essential elements of a retaliation claim under FEHA are:

1. plaintiff engaged in a protected activity;
2. defendant subjected plaintiff to an adverse employment action; and
3. a causal and temporal link between plaintiff's protected activity and defendant's conduct.

To summarily adjudicate a retaliation claim, defendant must show no protected activity, no adverse employment action (which includes not only terminations or demotions but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect the terms, conditions or privileges of employment, including opportunity for advancement), no causal/temporal link between the two, OR that defendant had a legitimate reason for subjecting plaintiff to adverse employment action. Plaintiff can defeat the motion by showing that defendant's "legitimate reason" was a pretext, and that the conduct was actually (and principally) motivated by a desire to punish plaintiff. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044-1052; *Gupta v. Trustees of Calif. State Univ.* (2019) 40 Cal.App.5th 510, 519-522; *Light v. California Dept. of Parks & Recreation* (2017) 14 Cal.App.5th 75, 91-92; *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1533; *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1226; *Kelley v. Conco Cos.* (2011) 196 Cal.App.4th 191, 213; *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 421; *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358; *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 390; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.)

According to defendant's separate statement of material facts, plaintiff's retaliation claims are based on the premise that he was not invited to interview for the Building Official position in 2016 because:

1. In 2005, plaintiff made a report to the Board of Supervisors that Shirley Ryan and Tom Mitchell were unwilling to hire Stacy Torales as a permanent Code Enforcement Officer because Stacy was a woman; and
2. In 2007, plaintiff participated in a grand jury investigation into alleged office finance improprieties relating to the funding of nuisance abatement procedures.

(See UMF 2, 4, 8, 10; AUMF 31-37, 74-76.)

Since the protected activity and adverse employment action must occur close in time to one another, plaintiff's claims would fail out of the gate if he were only suggesting that

defendant secretly harbored a retaliatory animus for over a decade. (See, *e.g., Clark County School Dist. v. Breeden* (2001) 532 U.S. 268, 273 [20 months too remote]; *Flores v. City of Westminster*, 873 F.3d 739, 750 (9th Cir. 2017) [adverse action should generally occur within 3-8 months to be actionable]; *Pearson v. Massachusetts Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013) [12 months too remote]; *Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1036 (9th Cir. 2006) [eight months too remote].) However, a long delay between plaintiff's protected activity and defendant's adverse employment action is not an absolute immutable death knell if the employer has engaged in an ongoing, unbroken campaign of disparate treatment (but falling short of adverse employment action) consistent with a retaliatory intent. (See *Hawkins v. City of Los Angeles* (2019) 40 Cal.App.5th 384, 394; *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 456; *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 421.)

Plaintiff proffers a number of discrete events during the ensuing 15 years to show a campaign of retribution as follows (see, e.g., AUMF 30-579):

1. A complaint against plaintiff for "refusing" to train Stacy's replacement;
2. A complaint against plaintiff for using profanity at work;
3. A complaint against plaintiff for drinking at work;
4. A refusal to grant plaintiff's request for reclassification;
5. A refusal to grant plaintiff's out of class pay (which was partially resolved, adverse to plaintiff, in a union grievance arbitration in 2018);
6. A refusal to clear plaintiff for an interview in 2016; and
7. A refusal to clear plaintiff to the second round of interviews for the permanent Building Official position (due to low interview scores).

An adverse employment action affects an employee, not a former employee. (*Featherstone v. Southern Calif. Permanente Med. Group* (2017) 10 Cal.App.5th 1150, 1161-1162.) Moreover, as explained in *Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721 (at 734), "in the case of an institutional or corporate employer, the institution or corporation itself must have taken some official action with respect to the employee, such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action … conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable." As such, any conduct attributed to defendant while plaintiff was no longer an employee of the County, or which was not material, cannot give rise to a retaliation claim. Negative job reviews and written reprimands are not themselves per se retaliation. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 875-876; in accord, *Durant v. District of Columbia Government,* 875 F.3d 685, 698 (D.C. Cir. 2017).)

It is critical for plaintiff to describe the adverse employment action he is suing over, and that he was an active employee at the time the action took place. Given that most of

the above list does not describe actionable adverse employment action, it seems to this Court that the singular theory here is that based on a complaint in 2005, plaintiff was denied an interview in 2016. This is a challenging bouncing ball to follow. A claim that plaintiff – while employed – was unfairly barred from being considered for a promotion could support a retaliation claim if the public employer (rather than a supervisor) was involved in that decision, the person ultimately promoted was not "sufficiently qualified" for the position, and the interview process was unfairly slighted to plaintiff's disadvantage. See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 986; *Adetuyi v. City and County of San Francisco*, 63 F.Supp.3d 1073, 1089 (N.D. Cal 2014); *Hatfield v. City of Bremerton*, 73 Fed.Appx. 198, 199-200 (9th Cir. 2003); *Tunnel v. Powell*, 219 F.Supp.2d 230, 243 (N.D. Cal. 2002). However, it seems that the position was never filled, and that interview process was a nullity. Plaintiff has some hearsay evidence that had he been allowed to interview in 2016 the Board would have (1) filled the position and (2) filled it him him – but these seem to be matters of gross conjecture. There is little meaningful discussion of this issue in the briefs, largely because of plaintiff's shotgun approach to this litigation. As such, defendant has met its initial burden and plaintiff has failed to meet his shifted burden to establish a material triable issue of fact. Based on the foregoing, defendant's MSA is GRANTED as to the 1st and 2d causes of action.

6th COA: Defamation – MSA Denied

Though not included in the "main" motion for summary adjudication, defendant has subsequently requested adjudication of the 6th cause of action. While most of the MSA involves factual disputes about what was said, what was meant, and what is provably false, a threshold issue raised in the moving papers – and ignored in the opposition – is whether the GCA claim form was timely.

No suit for personal injury damages may be maintained against a governmental entity unless a formal claim has been presented to such entity within six months of accrual of the cause of action. (Gov't Code §911.2; *Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1118.) If the claimant fails to file within six months, he or she may apply in writing to the public entity for permission to file a late claim. (Gov't Code §911.4.) There is no question that plaintiff's 05/26/17 claim was late for purposes of preserving defamatory statements made more than six months earlier, but based on the evidence presented the County took no responsive action to the belated filing.

Pursuant to Govt. Code §911.3:

> "When a claim that is required by Section 911.2 to be presented not later than six months after accrual of the cause of action is presented after such time without the application provided in Section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action … any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented."

It is well established that failure to give the warning within 45 days after the claim was presented that the claim was late results in waiver of the defense that the government claim was untimely. (*Phillips v. Desert Hosp. Dist.* (1989) 49 Cal.3d 699, 706 ["this possibility of waiver encourages public entities to investigate claims promptly, and to make and notify claimants of their determinations, thus enabling the claimants to perfect their claims. The overall result is an incentive to public entities to manage and control the claims made against them."]; *Roger v. County of Riverside* (2020) 44 Cal.App.5th 510, 524-526 ["while a public entity is not required to investigate a claim for timeliness, it fails to do so at the risk of waiving a timeliness defense in litigation"]; *Estill v. County of Shasta* (2018) 25 Cal.App.5th 702, 709 ["the notice must warn the person making the government claim that his or her only recourse is to apply without delay to the public entity for leave to present a late claim"].)

Since the County's inactivity waived the timing defect, and did not complain about the content of the GCA notice itself, there is no basis for carving up the claim to decide if certain defamatory statements were adequately set forth in the GCA notice or not. Although defendant may be correct that one of the defamatory statements was not described in the GCA notice, that does not render the entire cause of action defective. Summary adjudication must dispose of the entire claim. This does not.

As for the substance of the claim, defamation "involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 946.) Defamation may consist of libel (written) or slander (oral). See Civil Code §§ 44-46. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.) Statements are defamatory per se (eliminating the need to prove special damages) if they tend directly to injure in respect to the person's office, profession, trade or business by imputing general disqualification in those respects which the office or other occupation peculiarly requires or charge the plaintiff with a crime. (*Id*.)

Defendant's contention that every statement pled by plaintiff as part of the defamation cause of action is nonactionable opinion fails. A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment. (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434.) However, "a statement couched as an opinion, by one having special knowledge of the subject, may be treated as an actionable misstatement of fact." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080-1081; in accord, *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112.) Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question for the jury. (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 624.) The "totality of circumstances" must be considered, including the words used, context of the publication, its nature and content, and audience knowledge and understanding, to determine if there is an express or implied provably false factual assertion, or if the statement is merely opinion. Not every word need be false and defamatory to support a defamation claim and the test is not

quantitative. A single sentence may be the basis for a defamation action even if buried in much longer text. (*Id*.)

This Court concludes that those in supervisory positions telling those in authoritative positions that plaintiff was involved in "illegal" things does not immediately connote an opinion, and instead permits a reasonable inference that the speaker was making a statement of fact which could be proved true or false. Thus, a triable issue of fact exists as to whether they were actionable.

Finally, one of the claims occurred during a closed session. Whether this particular statement enjoys certain protections afforded by various privileges is of no import since eliminating one claim does not resolve the entire cause of action.

Based on the foregoing, defendant's MSA as to the 6th cause of action is DENIED.

7th COA: Breach of Mandatory Duties – MSA DENIED

A public entity is liable for failing to exercise reasonable diligence in discharging a mandatory obligation codified in a constitutional provision, statute, charter provision, statewide initiative, ordinance, or state agency regulation – but not rules, policies, guidelines, local charters, ordinances or resolutions. (See Govt. Code §§ 810.6, 811.8, 815.6; *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 179; *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 620-621; *Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 687-688; *Strong v. State of Calif.* (2011) 201 Cal.App.4th 1439, 1450-1452.) When such a mandatory obligation exists, the government may be liable when the duty was designed to protect against the kind of injury allegedly suffered, and breach of the duty proximately caused injury. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 348.)

To construe a statute as imposing a mandatory duty on a public entity, the mandatory nature of the duty must be phrased "in explicit and forceful language." (*Guzman, supra*.) If the enactment at issue permits a degree of discretion in its execution, it is not sufficiently mandatory for liability purposes. (See *County of Los Angeles v. Superior* Court (2012) 209 Cal.App.4th 543, 550-552.) Here, plaintiff alleges the following provisions as a basis for a breached mandatory duty:

- Calaveras County Code of Ordinances §2.64.060: "There shall be no discrimination against any employee or applicant because of race, creed, color, religion, sex, national origin, age or physical or mental impairment. Calaveras County is an equal opportunity employer." Plaintiff has not alleged, much less demonstrated a triable issue of fact for, any discrimination by the County, and certainly nothing involving his race, creed, color, religion, sex, national origin, age or physical or mental impairment.

- Calaveras County Code of Ordinances §2.64.115: "The CAO shall direct the preparation of announcements for employment selection procedures. Each

announcement shall state (A) the duties and salary range of the class; (B) the place and date to file applications; (C) such additional information as may be appropriate." Plaintiff has not alleged, much less demonstrated a triable issue of fact for, any shortcoming or transgression regarding the CAO directing inclusion of needed information in job postings.

- Calaveras County Code of Ordinances §2.64.225: "The CAO and each officer and department head shall encourage economy and efficiency in, and devotion to, county service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently the services assigned to them, as well as willingness to learn new skills as may be necessary. Employees in good standing in county service should be encouraged to advance according to merit, ability and position availability." While plaintiff may allege that the County failed to give him due regard for his prior years of service and team play, this ordinance includes no mandatory duty of any kind. There is nothing explicit and forceful which the County must do, and no way to ever test whether it adequately "encouraged" things to happen.

- Calaveras County Code of Ordinances §2.64.565(H): "It is the duty and responsibility of those in public service to conduct their affairs in an ethical manner. As such, those employed by the county shall … faithfully comply with all laws and regulations applicable to the county and impartially apply them to everyone." This is part of the general ethical canons applicable to all public employees, not a mandatory duty on the part of the County to do anything.

- Calaveras County Code of Ordinances §2.64.590. This is a verbose ordinance regarding the content, frequency and storage of employee performance appraisals. It begins with "all regular employees should receive, at least annually, performance appraisal and evaluation" – which on its face does not create a mandatory duty. The rest of the ordinance describes what "shall" be in an appraisal if one is done, and how frequently they "should" be completed. Plaintiff does not address in his opposition brief how this ordinance was violated, and nothing is apparent to this Court.

- Calaveras County Board of Supervisors Resolution No. 2206. The resolution refers to itself as a "policy statement," and specifically augments §2.64.565. which this Court has already concluded does not create a mandatory duty on the part of the County. Moreover, the policy imposes expectations of good conduct on the part of "employees, supervisors, managers, volunteers, interns, contractors, visitors and elected officials," but not the County itself. There is no mandatory duty imposed on the County to do anything if someone violates the policy, and such a duty could not override a public employee's vested property right in employment.

- 38 USC §4301. This statute sets forth the general purpose of the Uniformed Services Employment and Reemployment Rights Act of 1994, which is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and to prohibit discrimination against persons because of their service in the uniformed services." Nothing in this statute establishes a mandatory on the part of anyone, let alone the County, to do anything.

- 38 USC §4311. Pursuant hereto, servicemembers "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that" service. The statute further provides that "an employer may not discriminate in employment against or take any adverse employment action against any person" who exercised rights under the Uniformed Services Employment and Reemployment Rights Act of 1994. This is akin to whistleblowing and related retaliation. The statute does include the buzz word "shall" in a number of places, permitting a reasonable inference that the County may have a mandatory duty not to use military service as a "motivating factor" for adverse employment action – which is similar in effect to plaintiff's FEHA retaliation claim. This Court notes that a demurrer to the previously pled discrimination claim on this basis was sustained, but that does not end the inquiry if the statute creates a mandatory duty which County violated. It is too difficult on this record to determine whether the duty not to retaliate on account of plaintiff's military service was breached, and whether that breach is actionable under Govt. Code §815.6.

There is little meaningful discussion of this issue in the briefs. As such, the evidence and pleadings before this Court fail to meet defendant's burden of establishing a lack of a triable issue of material fact. Therefore, defendant's MSA as to the 7th cause of action is DENIED.

8th COA: Negligence Per Se – MSA GRANTED as Surplusage

The concept of "negligence per se" can be applied to public entities under the specific statutory framework of Government Code section 815.6. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499; *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185; *Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 292.) However, liability under 815.6 may be defeated by a showing of reasonable diligence to discharge said duty. (See *State Dept, supra*.) Because of the close parallel to the analysis under

Evidence Code §669, "[d]iscussions of whether a mandatory duty exists under Government Code section 815.6 and whether a standard of care has been legislatively prescribed under Evidence Code section 669 are interchangeable." (*Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 816-817.) However, since common law negligence no longer applies to public entities (Gov. Code §815), and 815.6 provides a defense not available under §669, the concept of negligence per se is duplicative at best. Although some cases support the pleading of both (see *Bologna v. City & County of San Francisco* (2011) 192 Cal.App.4th 429, 434-435), this Court cannot see how liability would ever attach on a negligence per se theory without also attaching to the mandatory duty. Presenting both to a trier of fact would only create confusion. For that reason, defendant's MSA to the 8th cause of action is GRANTED, but only on the basis that it is surplusage. No negative inference regarding the merits shall be drawn from this.

9th COA: Intentional Infliction of Emotional Distress – MSA GRANTED

The essential elements of a cause of action for intentional infliction of emotional distress are:

1. conduct which is extreme/outrageous, that is conduct which exceeds all bounds of decency and is more than mere insults, indignities, threats or annoyances;
2. directed at the plaintiff and carried out with the intent to cause, or with reckless disregard for the probability of causing, emotional distress;
3. resulting in severe emotional distress, that is emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it; and
4. harm actually caused by the defendant's conduct.

)Hughes v. Pair (2009) 46 Cal.4th 1035, 1050-1051; *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356; *Ragland v. U.S. Bank National Association* (2012) 209 Cal.App.4th 182, 204.) "There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical. Thus, whether conduct is 'outrageous' is usually a question of fact." (*So v. Shin* (2013) 212 Cal.App.4th 652, 671-672.) However, rude behavior – without more – is typically not enough to support a cause of action for infliction of emotional distress. (See *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108-1109; *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1129; *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496-498.)

Defendant has met its initial burden of showing that nothing so outrageous occurred as to plaintiff. In response, plaintiff concedes that he experienced no physical symptoms and did not seek any counseling or mental health treatment. He described some paranoia about going on vacation, and having to "watch his back" with new co-workers, but this is less about treatment working for the County and more about not getting the

job he really wanted. (See Barr Depo 302:25-319:3.) Based on the foregoing, defendant's MSA as to the 9th cause of action is GRANTED.

10th COA: Negligent Infliction of Emotional Distress – MSA GRANTED

There is no independent tort of negligent infliction of emotional distress; rather, the tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. It must be pled specifying the duty owed to plaintiff as one imposed by law, assumed by conduct or based on a special relationship. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072; *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 205; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 532; *Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1043.) Moreover, public entities can only be held liable for negligence if a statute specifically provides for such. (Gov. Code §815; *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803-804.) In other words, there is no common law negligence against a public entity. Given that this cause of action is not tethered to any statute, and does not appear susceptible to such anchoring, adjudication in defendant's favor is warranted. Defendant's MSA as to the 10th cause of action is GRANTED.

11th COA: Estoppel – MSA GRANTED

The elements of a promissory estoppel claim are:

1. a promise that, when made, was clear, definite and unambiguous in its terms;
2. reasonable and foreseeable reliance by the party to whom the promise was made;
3. resulting detriment or harm suffered by the party to whom the promise was made;
4. injustice could only be avoided by enforcing the promise.

(Flintco Pacific, Inc. v. TEC Management Consultants, Inc. (2016) 1 Cal.App.5th 727, 734; *West v. JPMorgan Chase Bank* (2013) 214 Cal.App.4th 780, 803-804.)

Plaintiff admits no clear and unmistakable promise to pay him for out of class pay, even though his immediate supervisor reportedly knew that plaintiff was subbing in at a higher grade as needed. Plaintiff further admits no clear and unmistakable promise by the County to interview him in 2016, or to ever offer the job to him. The allegation that "Defendant specifically promised in 2016 and 2017 that if it determined Todd was qualified for the interview process that he would be provided an interview with the BOS" (4thAC Para 324) cannot support an estoppel. He did interview for the position in 2017. Although he did not interview with the Board of Supervisors, only the Board of Supervisors can speak on behalf of the County and the promise of an interview did not come from the Board of Supervisors. (See Govt. Code §818.8: "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.") Beyond these, it is unclear what plaintiff seeks by way of this estoppel cause of action. Based on the foregoing, defendant's MSA is GRANTED as to the 11th cause of action.

12th COA: Breach of Implied Contract – MSA DENIED

A contract is either express or implied. The terms of an express contract are stated in words. The existence and terms of an implied contract are manifested by conduct. The distinction reflects no difference in legal effect but merely in the mode of manifesting assent. Accordingly, a contract implied in fact consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. Even when a written contract exists, evidence derived from experience and practice can now trigger the incorporation of additional, implied terms. Implied contractual terms ordinarily stand on equal footing with express terms, provided that, as a general matter, implied terms should never be read to vary express terms. "All contracts, whether public or private, are to be interpreted by the same rules … in the public employment context, governmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements." (*Retired Employees Assn. of OC, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178-1179 [implied contract based on county resolution]) "In the employment context, courts will not confine themselves to examining the express agreements between the employer and individual employees, but will also look to the employer's policies, practices, and communications in order to discover the contents of an employment contract … Implied employment contract terms may arise from the employer's official and unofficial policies and practices … The fact that the employer's implied promises are not matched by independent consideration on the employee's part is of no significance … Whether the parties' conduct creates such implied agreements is generally a question of fact." (*Scott v. Pacific Gas & Electric* (1995) 11 Cal.4th 454, 463-464 [implied contract based on employer's course of conduct and oral representations]; in accord, *Guz v. Bechtel* (2000) 24 Cal.4th 317, 345 [implied contract based on personnel policies and procedures in handbooks, manuals, and memoranda disseminated to employees]; *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240 [implied contract based on district's announced practice to adhere to salary schedule].)

Here, plaintiff alleges that outside the collective bargaining agreement he had a course, conduct and understanding that if he agreed to perform services that were outside the scope of his titled position that he would earn extra pay. This was never an express promise, as plaintiff concedes: rather, it was more of an understanding. Although that arrangement is not specific enough to support an estoppel cause of action, for a breach of contract cause of action all that must be shown is the legal effect of an understanding by which one party performs and the other accepts that performance. Since it was oral, there must be consideration, which plaintiff describes as doing the job nobody else was doing. (See Civil Code §§ 1550, 1605, 1614; *Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402; *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 284.) While the evidence permits an inference that plaintiff did this NOT for extra pay but rather for favorable consideration when the position was to be filled on a permanent basis, in the end this appears to this Court to present of a question for the finder of fact. There are different ways to view the evidence, and thus a triable issue of fact is established.

In general, implied contracts against a public entity are strongly disfavored. (See *Fairview Valley Fire, Inc. v. Department of Forestry & Fire Protection* (2015) 233 Cal.App.4th 1262, 1271 [no contract]; *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 438 [implied promise]; *Orthopedic Specialists of Southern California v. Public Employees' Retirement System* (2014) 228 Cal.App.4th 644, 649 [implied oral promise]; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1341 [oral modification to written contract].) However, since plaintiff was already in a contract with the County, this case may fall within the narrow exception. (See *Russell City Energy Co, LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 73.)

Defendant contends that the existence of a collective bargaining agreement prohibits an implied contract. That is normally the rule. (See *Cal Fire Local 2881 v. California Pub. Employees' Retirement System* (2019) 6 Cal.5th 965, 978; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203.) However, from the evidence it appears that the ALJ handling plaintiff's administrative hearing on the same topic concluded that the collective bargaining agreement did not cover the topic of out of class pay.

Based on the foregoing, defendant's MSA as to the 12th cause of action is DENIED. In denying the MSA for this cause of action, this Court does not find that an implied contract exists, or that an implied contract could exist under the law. Instead, this Court is merely finding that the remains a triable issue of fact as to whether an implied contract could exist under the circumstances here.

13th COA: Breach of Implied Covenant – MSA GRANTED as Surplusage

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. The implied covenant acts as a supplement to the express contractual covenants to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract To this end, the covenant must be consistent with the express terms of the agreement; it cannot be endowed with an existence independent of its contractual underpinnings, and cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 855; *Pasadena Live, LLC v. Pasadena* (2004) 114 Cal.App.4th 1089, 1093.)

Outside the insurance arena, there really is no stand-alone cause of action for breach of the implied covenant of good faith and fair dealing – it is merely a basis in a larger breach of contract claim. (See *Bionghi v. Metropolitan Water Dist. of So Cal.* (1999) 70 Cal.App.4th 1358, 1370; in accord, *Avidity Partners, LLC v. State* (2013) 221 Cal.App.4th 1180, 1203.) Here, plaintiff's cause of action for breach of an implied contract to pay out of class wages to plaintiff already subsumes any breach of the covenant of good faith and fair dealing associated therewith. For example, if the trier of fact concludes that

plaintiff is entitled to out of class pay, and defendant frustrated that purpose by refusing to submit those time sheets, that is a single cause of action for breach of contract. For that reason, the MSA to this cause of action is granted, but only to the extent that it is surplusage. No negative inference regarding the merits of an implied covenant theory shall be drawn from this. Based on the foregoing, defendant's MSA as to the 13th cause of action is GRANTED; the 12th cause of action shall be deemed to include breach of both express terms in the implied contract, and the implied covenant of good faith and fair dealing.

14th COA: Common Count – MSA GRANTED

Under California law, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished." (*Kawasho Internat., U.S.A. Inc. v. Lakewood Pipe Service, Inc.* (1983) 152 Cal.App.3d 785, 793.) Plaintiff's cause of action for "common count" is poorly pled since there is more than one type of common count, with different essential elements.

Defendant assumes the cause of action is based on account stated. The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due. (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786; *Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600.) To be an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." (*H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 726.) When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. (*California B.G. Assn. v. Williams* (1927) 82 Cal.App. 434, 442.)

Account stated is not suited for a wage/hour claim, which this case essentially involves. This also is not suited as a common count for money had. "An action for money had and received will lie to recover money paid by mistake, under duress, oppression or where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right." (*Ezmirlian v. Otto* (1934) 139 Cal.App. 486, 496.) Plaintiff must allege (1) existing indebtedness, (2) immediate right to the funds, (3) defendant's actual possession, and (4) refusal to turn over. (*County of San Bernardino v. Sapp* (1958) 156 Cal.App.2d 550, 556.)Where the party seeking money has a contractual obligation that is still executory, he cannot plead a cause of action for money had and received. (*Ferrero v. Citizens of National Trust and Savings Bank of Los Angeles* (1955) 44 Cal.2d 401, 409.)

Finally, the common count could be a claim for quantum meruit. "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' To recover in quantum meruit, a party need not prove the existence of a contract, but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.) It applies "where one obtains a benefit which he may not justly retain … and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money.")*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388.)

To recover under a quantum meruit theory, a plaintiff must establish:

(1) That he or she was acting pursuant to either an express or implied request for such services from the defendant;
(2) That the services rendered were intended to and did benefit the defendant;
(3) That there was some understanding or expectation that the services were not gratuitous;
(4) The value of said services; and
(5) That the services have not been paid for.

(Huskinson & Brown, LLP v. Wolf (2004) 32 Cal.4th 453, 458; *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248-249; in accord, *Tenet Healthsystem Desert, Inc. v. Fortis Ins. Co., Inc.*, 520 F.Supp.2d 1184, 1196 (C.D. Cal. 2007).) The burden is on the person making the quantum meruit claim to show the value of his or her services and that they were rendered at the request of the person to be charged. (*Strong v. Beydoun* (2008) 166 Cal.App.4th 1398, 1404.) "[A] plaintiff must establish both that he or she was acting pursuant to either an express or implied request for such services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Advanced Choices, Inc. v. Department of Health Services* (2010) 182 Cal.App.4th 1661, 1673.)

First, there is no allegation that some benefit (direct or indirect) was intended for and conferred to defendant, which is an essential element. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248; *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 450.) Plaintiff does not allege to have incurred costs associated with his application, which is the only thing he could recoup under this theory. (See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Auth.* (2000) 23 Cal.4th 305, 308.)

Second, alleging mere nonpayment – without evidence of unjust enrichment to defendant – is not enough. See (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1263; *Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1328-1329.)

Third, quantum meruit will generally not lie where there exists a valid express contract between the parties covering the same subject matter. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 314; *P&D*

Consultants, Inc. v. City of Carlsbad (2010) 190 Cal.App.4th 1332, 1345; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203.)

Fourth, Govt. Code §815 generally provides that a public entity is only liable for statutory violations, and quantum meruit is not so codified. Since this Court is allowing the contract claim to proceed, and since the existence of an enforceable contract generally invalidates a claim for quantum meruit, the quantum meruit claim will not survive either way. (See *Sheppard* and its progeny.)

Based on the foregoing, defendant's MSA as to the 14th cause of action is GRANTED.

The Court Clerk shall provide notice of this ruling to the parties forthwith. Defendant is to prepare a formal Order in conformity with this ruling in compliance with Rule 3.1312.

SMITH v. CARTWRIGHT et al

21CV45132

PLAINTIFF'S MOTIONS TO COMPEL INITIAL RESPONSES TO DISCOVERY

At its essence, this is a landlord-tenant dispute. Defendant is the record owner of 5348 Messing Road in Valley Springs and leased the property to plaintiff with an option to purchase at a fixed sum within two years. According to plaintiff, defendant reneged on the agreement, and secretly recouped rent from tenants in the "front" house on the property despite plaintiff's rental agreement purportedly covering both residences; defendant has a contrary interpretation of events.

The litigation history between plaintiff and defendant is complex, as reflected in the various legal proceedings between them. (See 20CH45068, 21UD13373, 21UD13416, and 21CH45278.) In this seemingly straightforward civil action, plaintiff alleges thirteen (13) causes of action, ranging from breach of contract to invasion of privacy and assault.

Before the Court is a single motion to compel defendant's responses to four sets of discovery, to wit: form interrogatories, special interrogatories, request for admissions, and request for production of documents. The discovery was served in a UD action (21UD13373) on or about 04/07/21. Although there appeared to be some concern regarding the propriety of the discovery when served, counsel in the UD action (who happened to also serve as counsel here) stipulated on behalf of landlord to treat that discovery as having been served in this civil action, with a service date of 08/15/21. Counsel then promptly withdrew from representing landlord in this civil action.

Despite representing himself, landlord served – on or about 09/14/21 –objections to all four sets of discovery. The objections were technically served in the UD action, and included an objection based on the discovery cut-offs for UD cases. According to defendant, the discovery was served after the initial trial date, which rendered them void *ab initio* per CCP §2024.020. The objection is not well taken. The right to conduct discovery in UD proceedings is tied not to "the initial trial date" as it is in ordinary civil cases, but rather to "the date set for trial." (See CCP §2024.040(b)(1).) In other words, discovery automatically follows a new trial date, and so long as 04/07/21 was more than 5 days before trial, the discovery served in the UD action was proper.

Nevertheless, plaintiff herein has moved for an order to compel ***initial*** responses to all discovery. That is the wrong motion. Defendant objected to the discovery in toto, which does not require a verification. (See CCP §§ 2030.250(a), 2131.250(a), 2033.240(a); *Blue Ridge Ins. Co. v. Superior Court* (1988) 202 Cal.App.3d 339, 344.) Since there was

an initial response, plaintiff was required to bring a motion for *further* responses to overrule objections, and include with that motion the statutorily required separate statement. (See CCP §§ 2030.310(a)(3), 2031.310(a)(3), 2033.290(a)(2); CRC 3.1345.)

As such, the motion to compel an initial response is DENIED, without prejudice to file an appropriate motion if timelines otherwise allow. As the motion is denied, plaintiff's request for sanctions is also DENIED.

The Clerk shall provide notice of this Ruling to the parties forthwith. No further formal order pursuant to Rule of Court 3.1312 is required.

LVNV FUNDING v. COPPS

21CF13587

PLAINTIFF'S RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

This is a limited jurisdiction collections case involving a debt of $2,793.06. Before the Court is an unopposed motion by plaintiff for a judgment on the pleadings directed at defendant's barren answer.

Plaintiff contends it is entitled to a judgment in its favor based upon defendant's non-substantive answer. Defendant filed a Judicial Council form answer, and tendered a first appearance fee, but in the answer she failed to check any of the boxes. As such, she has neither admitted anything, nor has she denied anything.

A statutory motion for judgment on the pleadings is similar to a demurrer, except that the motion (1) can be made at any time 30 days prior to the initial trial date, but (2) only after defendant has answered and (3) only on the grounds of subject-matter jurisdiction or failure to state a cause of action. (CCP §438(c)-(f).) The rules governing pleading scrutiny are the same as those applicable to demurrers. (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321. See *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.) The present motion is not technically based on a failure to state since defendant did not make any statements. This more properly should have been a motion to strike the answer. Nevertheless, the fact remains that defendant needs to check at least one box on her answer to put anything in issue.

The motion for judgment on the pleadings is GRANTED, but defendant shall have 30 days leave to amend to file a proper Answer. If no Answer is filed, then plaintiff may proceed via default prove-up.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to prepare a formal Order pursuant to Rule of Court 3.1312 in conformity with this ruling.