SMITH v. KING AND CARTWRIGHT

21UD13416

PLAINTIFF'S MOTION TO DEEM MATTERS ADMITTED

This is a limited jurisdiction, residential UD action. This is one of five actions involving these same parties. At issue is whether Tracy Smith has the superior possessory interest in 5348 Messing Road, Valley Springs CA. A brief chronology is helpful:

> *On 12/02/19, Shane Cartwright (as landlord and record owner) entered into a written lease agreement with Tracy Smith (as tenant) for the referenced property – which consists of two homes situated on a 10-acre parcel. The lease was to expire on 01/01/22. Smith agreed to pay $2,800/month in rent for use of the whole premises (including both homes), though Cartwright noted additional time was needed "to relocate the occupant" of the front, older house. Critical to the current disputes, Smith paid an additional $20,000 to secure an option to purchase the subject property for $625,000. So long as Smith was not in default as a tenant, he could exercise this option any time prior to 01/01/22.*
>
> *According to Smith, within one year of his tenancy, he secured the necessary loan to purchase the property, and gave notice of his intent to exercise his option. This set a number of unpleasant events in motion, beginning with Cartwright's 12/03/20 unannounced site inspection of the premises. (According to Cartwright, Smith was harming the premises and conducting an unauthorized marijuana business on-site.) The parties met at the interior gate. This led to harsh words, threats, law enforcement involvement, and the filing of the first civil action (20CH45068). That event led Cartwright to commence the next civil action (21UD13373) based upon evidence that Smith had made material unauthorized alterations to the property. This then led to Smith trying to evict the occupants of the front house (Deborah Cartright and others), and the filing of another action (21UD13416). Smith made efforts to post notice on the front house, prompting those tenants to bring the fourth action (21CH45278).*

In this – the second Unlawful Detainer action – Smith caused to be served upon the tenants Wilma King and Deborah Cartwright (mother and daughter) a Request to Admit thirty-five (35) matters. The proof of service attached to the RFAs indicates service on both by regular U.S. Mail on 02/15/22. Counsel for plaintiff states (albeit not under penalty of perjury) that neither tenant has provided a response to date. While counsel indicates that responses were "due no later than 03/28/22," they were actually due much sooner. (See CCP §2033.250(b).) Nevertheless, it does appear that defendants are in violation of their discovery obligations.

In the ordinary course of events, granting these motions would be routine and perfunctory. However, given the history of hostilities, the expansive nature of the RFAs subject to the order to deem admitted, and the uncertainty of their application in other cases given the order of relation, this **Court requires the parties to personally appear** at the hearing to discuss the status of discovery and any proposed resolution of the cases.

CROCKER v. CALAVERAS COUNTY

21CV45343

DEMURRER TO PETITION

This is a civil action for breach of an alleged contract. Plaintiff has commenced three, nearly-identical civil actions here in this Court, as follows:

- 21CV45342: petition to confirm alleged arbitration award against Calaveras County Health and Human Service – Child Protective Services (using Judicial Council form)

- 21CV45343: breach of contract against Calaveras County Health and Human Service – Child Protective Services for not honoring an alleged agreement to reverse course in 21JD6338 and/or submit the juvenile dependency dispute to arbitration

- 21CV45540: petition to confirm alleged arbitration award against Calaveras County Health and Human Service – Child Protective Services (not using Judicial Council form)

On 04/15/22, this Court entered an order sustaining without leave to amend the County's demurrer to the respective operative pleading in both 21CV45342 and 21CV45540. This Court found that the absence of an arbitration agreement, a serious concern regarding the authenticity of the alleged award, and the juvenile court's exclusivity rendered the petitions incapable of bona fide cure through amendment. Petitioner has appealed those orders (see C096133).

In this remaining action, the County contends that plaintiff's breach of contract claim is both uncertain, and as alleged fails to state a cause of action.

A demurrer for uncertainty lies if the essential facts upon which a determination of the controversy depends are not easy to discern from the allegations made. (See *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695; *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.)

A demurrer for failure to state a cause of action is sutainable if it appears that plaintiff is not entitled to any relief. In other words, a general demurrer for failure to state will not succeed if the pleading states, however inartfully, facts disclosing some right to relief. (*New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709, 714; *Wittenberg v. Bornstein* (2020) 51 Cal.App.5th 556, 566; *Weimer v. Nationstar Mortgage, LLC* (2020) 47 Cal.App.5th 341, 352.)

The pleadings in this matter (as in the related actions) tend to be difficult to decipher, if not entirely incoherent. The operative pleading here is no different. Plaintiff addresses such anomalies as ex post facto laws, the Treaty Clause, an oath of office "accepting" this Judge's appointment to the bench, a manufactured "affidavit of show of cause," 18 U.S.C. §242, judicial conflicts under CCP §170.1, the Social Security Act, grandparent visitation rights, and finally an alleged agreement with the County to pay plaintiff $1M plus $10,000/day until the juvenile court returns his daughter.

Regarding the latter averment, to plead a viable cause of action for breach of contract, it is necessary to show: (1) parties capable of contracting, (2) mutual consent, (3) a lawful object, (4) sufficient cause or consideration, (5) plaintiff's performance or excuse for failure to perform, (6) defendant's breach, and (7) damage. (Civil Code §§ 1550, 1605; *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453; *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 525.) In determining whether a breach is material, trial courts consider (1) the extent to which the injured party will obtain the substantial benefit bargained for, (2) the extent to which the party failing to perform has already partly performed or made preparations for performance, (3) the greater or lesser hardship on the party failing to perform, and (4) the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. Courts weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, and the cruelty of enforced adherence. In other words, whether a partial breach of a contract is material depends on the importance or seriousness thereof and the probability of the injured party getting substantial performance. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602-1603; *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 278; in accord, *NIVO 1 LLC v. Antunez* (2013) 217 Cal.App.4th Supp. 1, 5.) Precision or *in haec verba* is not required, nor is attaching the actual contract if in writing. Pleading the legal effect (i.e., enough facts to show actionable breach of an enforceable agreement) is good enough. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 401-402.)

The pleading is uncertain because plaintiff has attached and incorporated therein an Application to Stay Proceedings Pending Arbitration. This Court can take judicial notice of the fact that plaintiff contends he already completed arbitration, and that the arbitrator made an award in his favor. Since the alleged contract between the parties allegedly included an arbitration clause, and plaintiff has elected his remedy by pursuing relief in the arbitral forum, this civil action for breach of the contract (i.e., refusing to arbitrate) is now subject to abatement. It may be that plaintiff is referring to a different contract, but it cannot be determined from the pleading. To make matters more cumbersome, plaintiff has not filed any opposition to the demurrer, which generally connotes a declaration from the pleader that he or she has done the best they can. At the very least plaintiff is not asking for leave to amend.

Demurrer **sustained without** leave to amend. The Clerk shall provide notice of this Ruling to the parties forthwith. Defendant to prepare a formal Judgment pursuant to Rule of Court 3.1312 in conformity with this ruling.

BARR v. COUNTY OF CALAVERAS

18CV42976

DEFENDANT'S MOTIONS FOR SUMMARY ADJUDICATION

This is an employment dispute, based principally on the theory that plaintiff was retaliated against after blowing the whistle on department irregularities, and ultimately denied a promotion which he was allegedly qualified for. Before the Court this day are more defense motions for summary adjudication.

Brief Overview of the Case

Plaintiff was employed by defendant as a Code Enforcement Officer from 2001 through 2016, and thereafter as a Senior Code Enforcement Officer, until he voluntarily resigned from the County in August of 2017. During the latter two years of his tenure with the County, he twice applied for the position of Building Official, which was considered a professional promotion from code enforcement. Although plaintiff had performed many of the duties associated with the Building Official position, the County considered his experience to be inadequate for the position. Although plaintiff was of the opinion that certain individuals harbored a grudge against him for reporting department, he pointed specifically at the County's refusal to consider his military service as a functional equivalent. Nevertheless, plaintiff participated in a panel interview, but was not selected. Plaintiff left the County, and secured a position as Building Official in a neighboring county, reportedly making more money.

Current Procedural Posture

On 01/07/22, this Court issued a lengthy tentative decision granting in part, and denying in part, defendant's earlier motions for summary adjudication. After oral argument, and consideration of plaintiff's post-hearing objections, this Court adopted the tentative and entered an order summarily adjudicating in defendant's favor the following causes of action:

- The 1st COA for FEHA (Retaliation);
- The 2nd COA for FEHA (Failure to Prevent Retaliation);
- The 8th COA for Negligence Per Se;
- The 9th COA for Intentional Infliction of Emotional Distress;
- The 10th COA for Negligent Infliction of Emotional Distress;
- The 11th COA for Promissory Estoppel;
- The 13th COA for Breach of Implied Covenant of Good Faith and Fair Dealing; and
- The 14th COA for Common Count.

Accounting for the causes of action not subject to the summary adjudication motions, as well as those causes of action for which summary adjudication was denied, the following causes of action remain in the operative Fourth Amended Complaint:

- The 3rd COA for Labor Code Retaliation (§1102.5(b));
- The 4th COA for Labor Code Retaliation (§1102.5(c));
- The 5th COA for Labor Code Retaliation (§98.6);
- The 6th COA for Defamation (Slander and Libel);
- The 7th COA for Breach of Mandatory Duties; and
- The 12th COA for Breach of Contract (Implied).

Defendant's current motions for summary adjudication seek to dispose of the 3rd, 4th, 5th, 7th and 12th causes of action, leaving just the defamation theory intact to proceed to resolution. Defendant previously failed to secure summary adjudication of the 7th and 12th causes of action, but claims to have a new theory.

On 04/29/22, this Court denied plaintiff's preemptive request to strike both of the current defense motions for summary adjudication. As to the "labor code" motion, this Court found that the motion was procedurally proper given that they were not the subject of the earlier motion and raised different concerns. (See CCP §437c(f)(2); in accord, *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 700 n.13; *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72.) As to the "second bite" motion involving the 7th and 12th causes of action, this Court found that addressing the merits in advance of trial served the interests of all – but that plaintiff was free to address the procedural posture – and potentially seek sanctions - in the opposition papers. (See *Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1104-1106.)

Requests for Judicial Notice

Both sides ask this Court to take judicial notice of various items. 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 a determination regarding the truth of its contents or accepting a particular interpretation of its meaning. (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.) With that caveat, the requests are GRANTED.

Evidentiary Objections

On a motion for summary adjudication, the trial court must consider all of the evidence submitted by the parties except that to which objections have been made and sustained. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 281.) A party who wishes to exclude evidence from consideration must "quote or set forth the

objectionable statement or material [and] state the grounds for each objection to that statement." (CRC 3.1354(b).) It is incumbent upon the party objecting to make clear the specific ground of the objection, and not rely on boilerplate generalities. (See *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 764.) Assuming objections are made in the proper format, the trial court need only rule on those evidentiary objections that it deems material to disposition of the motion. (CCP §437c(q).)

With that primer in mind:

- Plaintiff's Objections (3rd-5th): Sustained as to Nos. 11, 12, 13, 15, 16. All others overruled.
- Plaintiff's Objections (7th, 12th): Sustained as to No. 5. All others overruled.
- Defendant's Objections: Sustained as to Nos. 5, 6, 7, 15 ("which was military/veteran discrimination"). All others overruled.

*The Labor Code Retaliation Claims – **3rd and 5th MSA denied; 4th MSA granted***

Defendant begins with a generic representation that Labor Code retaliation claims are just like FEHA retaliation claims, and that since this Court already granted summary adjudication on the FEHA claims, it should do the same for the Labor Code claims. If only it were that black and white.

Pursuant to Labor Code §1102.5(b), employers shall not retaliate against an employee for disclosing information to a person with authority to investigate, discover, or correct the violation or noncompliance – or for testifying before any public body conducting an investigation, hearing, or inquiry – if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

Pursuant to Labor Code §1102.6, once the employee demonstrates by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.

Here, defendant surmises that the only adverse employment action to consider is plaintiff's failure to secure an interview or the promotion. However, the Labor Code covers wages, and plaintiff has alleged that he was denied out-of-class wages because higher-ups in the County held a grudge against him for (1) standing up to perceived gender discrimination, (2) reporting perceiving financial irregularities, (3) testifying in a grand jury proceeding about County waste, (4) filing two grievances regarding pay inequity, and (5) complaining that he was entitled to more pay, but not getting it. The issue of whether plaintiff was denied pay, or denied a promotion, because he was exercising rights protected by the Labor Code, represents a prima facie showing of Labor Code retaliation. In other words, if plaintiff was entitled to extra pay because he did the work, refusing to pay him because he did not follow the precise format for

making that request (when an implied agreement might exist waiving the formality) constitutes adverse employment action. Since defendant must meet the higher clear and convincing standard to show an absence of pretext, that is too fact-specific to decide here on summary adjudication. A jury could very well conclude that plaintiff was denied the extra pay because he was disliked, not because he failed to file a form. As for the HR decision not to allow plaintiff to interview in 2016, the concept that no damage occurred because the position was not filled is not entirely accurate since the position was apparently filled on an interim basis by someone else. Thus, assuming plaintiff can connect those dots, and the jury does not accept HR's conclusion that plaintiff was not qualified for the job (since this requires clear and convincing proof), he may show damage for not getting the interim appointment for one year.

Pursuant to Labor Code §98.6, employers shall not discriminate, retaliate, or take any adverse action against any employee because that employee engaged in any protected conduct, including having "made a written or oral complaint that he or she is owed unpaid wages." That is exactly what plaintiff did here. Although the arbitrator found that plaintiff's formality was a death knell to his union grievance, the law does not exalt form over substance – and plaintiff's complaints about pay in 2008 and 2016 were sufficient.

Defendant's contention that the claim form had to include the grand jury testimony is inaccurate. The claim must be in writing and must show (1) the name and address of the claimant; (2) the date and place of the accident or event out of which the claim arose; (3) a general description of the damage, loss or indebtedness incurred; (4) the names of any public employees allegedly responsible; and (5) the amount of the claim if under $10,000. The test is whether sufficient information is disclosed to enable a public entity to investigate and evaluate the claim to determine whether settlement is appropriate. (See Govt. Code §910; *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1234; *Connelly v. County of Fresno* (2006) 146 Cal.App.4th 29, 39; *Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1503; *White v. Superior Court* (1990) 225 Cal.App.3d 1505, 1511; *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 225-226.) The claim form here included the basic information necessary to acquaint defendant with the issues warranting investigation, and if defendant was genuinely confused, that issue was waived by defendant's failure to advise plaintiff accordingly. (See Govt. Code §911.)

The only anomaly here is the 4th cause of action for Labor Code §1102.5(c). Pursuant thereto, employers shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. Plaintiff has not identified any activity that he was asked to participate in, much less refusing to do so. (See *Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 718-719.)

In conclusion, there are triable issues of fact relating to the 3rd and 5th causes of action, but defendant is entitled to summary judgment on the 4th cause of action.

7th COA**: Breach of Mandatory Duties – **MSA Granted

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."

- 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."

- 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."

- 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."

- Calaveras County Code of Ordinances §2.64.590: “all regular employees should receive, at least annually, performance appraisal and evaluation” (etc).

- Calaveras County Board of Supervisors Resolution No. 2206. This is a policy statement imposing expectations of good conduct on the part of “employees, supervisors, managers, volunteers, interns, contractors, visitors and elected officials,” but not the County itself.

- 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.”

- 38 USC §4311. 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.

When defendant previously moved to summarily adjudicate this cause of action in its favor, this Court made various observations regarding the referenced enactments. In short, this Court found that defendant met its initial burden to negate either duty or breach of – and plaintiff failed to raise a triable issue of fact regarding – Calaveras County Code of Ordinances §§ 2.64.060, 2.64.115, 2.64.225, 2.64.565(H), 2.64.590; the Calaveras County Board of Supervisors Resolution No. 2206; or 38 USC §4301. Where this Court was stuck was with regard to 38 USC §4311. As for that enactment, this Court made the following observation:

> *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.

Seizing upon the fact that defendant prevailed on 7/8 of this cause of action, it is no surprise that defendant has filed a second MSA. The question is whether defendant should be allowed a second swing, and if that effort has any more muster. This Court answers both in the affirmative.

As defendant correctly points out, and plaintiff does not dispute, the existence of a mandatory duty under Govt. Code §815.6 is a legal determination for the court to make, and it is most efficient for the Court to make that determination – if warranted – before a jury is empaneled. This Court has inherent authority to consider a second adjudication motion on the same cause of action, and in this particular instance that kind of review is amply supported since the prior ruling was not on the merits, but instead on a finding that the matter was not adequately briefed. This Court considered ordering supplemental briefing, but elected instead to deny on burden shifting grounds. Since this Court would be making the legal determination at some point, there is no time like the present.

38 USC §4311 is part of the Uniformed Services Employment and Reemployment Rights Act of 1994. It prohibits discrimination or retaliation on account of one's military service. Although it does not "mandate" action in the traditional sense of directing a public entity to *do* something, it is mandatory in that it directs a public entity *not* do something. Despite the suggestion in *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223 and *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488 that prohibitory statutes cannot create a mandatory duty, our Supreme Court has held that 815.6 applies when an enactment requires "that a particular action be taken or not taken." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.) The question is not whether the enactment is mandatory or prohibitory, but instead whether the enactment has implementing guidelines such that the public entity (or a court) can clearly delineate compliance. For that, we turn to the statute, which provides in pertinent part as follows (excerpted for ease of reading):

> "A person who has performed in a uniformed service shall not be denied promotion or any benefit of employment by an employer on the basis of that performance of service … An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter … An employer shall be considered to have engaged in actions prohibited if the person's service or action to enforce a protection is a motivating factor in the employer's action, unless the employer can prove that the

> action would have been taken in the absence of such service or exercise of a right."

This statute forbids employment discrimination on the basis of membership in the armed forces. While the statute does not itself contain implementing guidelines, 20 C.F.R. §1002 et seq provides pages and pages of guidelines on what is, and is not acceptable. For present purposes, this Court finds that 38 USC §4311 in conjunction with 20 C.F.R. §1002 et seq, provide sufficient direction to qualify as a mandatory duty under Govt. Code §815.6. However, plaintiff has not shown that he was subjected to adverse employment action on account of his military status.

Discrimination claims under §4311 are analyzed under a burden-shifting mechanism: the plaintiff bears the initial burden of showing by a preponderance of the evidence that his military service was a substantial or motivating factor in the adverse employment action; if the employee makes that prima facie showing, the employer can avoid liability by demonstrating, as an affirmative defense, that it would have taken the same action without regard to the employee's military service. An employer therefore violates Section 4311 if it would not have taken the adverse employment action but for the employee's military service or obligation. (See *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir.2007); *Posin v. County of Orange*, WL5858706 at *9 (C.D. Cal. 2016); *Montoya v. Orange County Sheriff's Department*, 987 F.Supp.2d 981, 1009 (C.D. Cal. 2013); in accord 20 C.F.R. §1002.23.)

The decision in *Correa v. Pacific Maritime Association*, WL3816719 (C.D. Cal. 2018), while not binding, is highly persuasive. In that case, plaintiff was denied a promotion because he lacked the designated level of experience. He filed suit, claiming he was discriminated against on account of his military service. The trial court granted defendant's motion for summary adjudication. While conceding that a denied promotion qualifies as an adverse employment action, the district court found that there was no adverse action there because plaintiff did not qualify for the promotion, and no evidence to suggest that plaintiff's military service was a factor (at *5):

> "Plaintiff offers no evidence suggesting that Defendants were motivated by Plaintiff's military service in denying him registration as a Class B longshoreman. Plaintiff returned from military service in 2013, when he was immediately reinstated as a Casual longshoreman. It was not until almost two years later that the Class B registration occurred and Plaintiff was not selected. The two-year period between Plaintiff's return from military duty and the adverse employment action does not raise an inference that Defendants acted with discriminatory intent. Plaintiff does not identify any instance in which Defendants expressed hostility toward military service members. Nor does he show that Defendants treated military members worse than other employees. Accordingly, Plaintiff has not demonstrated a triable issue of fact about Defendants' discriminatory motivation."

In the case at bar, plaintiff's military service ended in 1991 – which was twenty-five (25) years prior to the alleged adverse employment action. Since plaintiff was able to obtain a job in code enforcement at the County, and kept that job (along with a promotion) for almost sixteen (16) years, even though a workforce layoff in 2008, his military service was obviously not a hinderance or deterrent. There is no basis for connecting dots between the decision made by HR (or the interview panel) that plaintiff was not qualified for the Building Official job and plaintiff's military service. Plaintiff was unsuccessful in convincing HR or the interview panel that his eight (8) years in the military twenty-five (25) years earlier was equal to "five years as a supervisor, two of which should be at the level of Chief Building Official/Deputy Community Development Agency Director or equivalent." The fact remains that the County was looking for someone with prior experience heading up a building department, and plaintiff did not have that experience – with or without his military service. The fact that some individuals involved with the screening process felt plaintiff's military service was "irrelevant" is unfortunate, but not evidence of disparate treatment or discriminatory animus *because of* his military service. In addition, since plaintiff did not meet the minimum qualifications for the Building Official, there is no causal connection. See *Banks v. East Baton Rouge Parish School Bd.*, 320 F.3d 570, 575-577 (5th Cir. 2003). Defendant has met its burden to show that plaintiff cannot establish breach of the duty not to discriminate on account of prior military service, and plaintiff has not raised a triable issue of fact. Since none of the other referenced enactments establish a mandatory duty, defendant is entitled to have this cause of action summarily adjudicated in its favor.

12th COA**: Breach of Implied Contract – **MSA Denied

In denying the earlier motion for summary adjudication of this cause of action, this Court ruled in pertinent part as follows:

> "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 there remains a triable issue of fact as to whether an implied contract could exist under the circumstances here."

The basis for this conclusion was four-fold:

1. Despite being generally disfavored, implied contracts can exist in public employment (*Retired Employees Assn. of OC, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178-1179; *Russell City Energy Co, LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 73.)
2. Implied contracts can arise from the employer's official and unofficial policies and practices (*Scott v. Pacific Gas & Electric* (1995) 11 Cal.4th 454, 463-464);

3. The evidence of plaintiff working out of class was sufficient evidence of consideration to bind any implied contract (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.); and
4. While the existence of a collective bargaining agreement generally cuts against the existence of any implied contract, a finding on this depends entirely on whether the implied contract conflicts with the express terms contained in the collective bargaining agreement (*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.)

Although this Court is not convinced that defendant had made a bona fide showing of the need to revisit this cause of action, the additional information provided cements this Court's prior conclusion. Defendants contends that a second bite is warranted because (1) defendant did not present in the earlier motion the theory that plaintiff's Government Claim form failed to include an implied contract charge, and (2) defendant did not adequately explain that the CBA covered the issue and fully displaced any potential implied agreement that plaintiff could get out-of-classification pay without following the CBA requirements.

Regarding the former, this Court is unclear what defendant is referring to. Pursuant to Govt. Code §905(c) and (f), there is no requirement to file a Government Claim when the dispute involves "claims by public employees for fees, salaries, wages, mileage, or other expenses and allowances" or "applications or claims for money or benefits under any public retirement or pension system." Plaintiff's implied contract cause of action is based entirely on wages and benefits due him. Thus, even if the claim form lacked particularly (defendant does not elaborate on this), it is of no consequence.

Regarding the latter, the arbitrator found that "there is simply no basis for the arbitrator to award [plaintiff] the nearly seven years of back pay which he seeks for working in a higher classification than the Code Enforcement Officer. Even if the 2008 grievance was timely filed, it neither met the contractual requirements to constitute a grievance, nor was it properly advanced through the grievance procedure by the grievant. That 2008 so-called 'grievance' is therefore not properly before the arbitrator in this case." This is consistent with this Court's earlier understanding that the arbitrator did not reach the question of whether plaintiff was entitled to out-of-class for all the work he did from 2006 to 2016. As for the time period after 2016, when plaintiff was promoted and effectively removed from the bargaining unit, the arbitrator found that plaintiff was not entitled to extra pay for doing Mr. White's work because Mr. White never asked HR to approve it, and thus HR never approved it. The arbitrator did make it clear that he felt bound by the literal language in the MOU, and that he was not free to go outside the contract terms to see if an implied agreement was created by the manner in which the parties dealt with one another. For example, Mr. Renner (Mr. White's successor) raised the issue with HR, but that was not enough for the arbitrator. There had to be a formal written request

per §5.08. It is plaintiff's theory that raising the issue in any form or fashion was enough to trigger a duty on the part of HR to process the request – grant or deny, but not ignore. This theory is anchored by the concept of an implied contract to do so. There is a triable issue of fact as to whether this implied contract is entirely incompatible with the written contract, or whether they can both exist side by side.

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

AMIN v. VANDENBERG et al

20CV44940

DEFENDANTS' DEMURRER TO THREE CAUSES OF ACTION

This is a personal injury action involving a dog bite from an unleashed dog roaming free within a privately fenced area at the Frogtown RV park. According to plaintiff, as she was walking past defendants' space, their large dog leaned onto their flimsy fence, reaching plaintiff for the bite. Before the Court this day is a demurrer by co-defendant State of California/39th District Agricultural Association (hereinafter "CA-DAA") to plaintiff's Second (negligence), Fourth (dangerous condition of public property) and Fifth (premises liability) causes of action set forth in the operative First Amended Complaint. According to defendant, the Second and Fifth causes of action are displaced by Govt. Code §815, and plaintiff failed to exhaust administrative remedies to preserve the Fourth cause of action.

Second and Fifth Causes of Action

Generally, each person has a duty to use ordinary care and is liable for injuries caused by a failure to exercise reasonable care under the circumstances. Civil Code §1714. However, 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 [no common law negligence against public entities].) To adequately state a cause of action against a public entity, the pleader must set forth ultimate facts with particularity, averring "every fact material to the existence of its statutory liability." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795; *City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138.) This detail requires, at a minimum, that the pleader identify the precise statute or regulation creating the basis for liability. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458; *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.)

In opposition to the demurrer, plaintiff identifies Gov. Code §815.4 as the statutory predicate for the Second and Fifth causes of action. Since the predicate statute must be pled in the operative pleading, on that ground alone the demurrer must be sustained.

In addition, the facts alleged are insufficient to state the claim. A public entity is vicariously liable for the negligence of its independent contractor "to the same extent that the public entity would be subject to such liability if it were a private person," and only so long as the public entity would have been liable for the injury had the act or omission been that of an employee. A private person may be vicariously liable for the acts of an independent contractor if that contractor negligently performed a

nondelegable duty. (See *Schreiber v. Lee* (2020) 47 Cal.App.5th 745, 755-756; *Koepnick v. Kashiwa Fudosan America, Inc.* (2009) 173 Cal.App.4th 32, 36-38; *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726-727; *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742.) A public employer is only liable for the negligence of an employee if the tort was committed in the foreseeable course and scope of their work and for which a duty under the Government Claims Act exists. (See Govt. Code §815.2; *State of Calif. ex rel. Dept. of Calif. Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009; *Yee v. Superior Court* (2019) 31 Cal.App.5th 26, 39-40.)

Unlike a private landowner, whose duty of care might extend to conditions unknown, a public entity is only responsible for conditions which create substantial (as distinguished from a minor, trivial or insignificant) risk of injury when used with due care (see Govt. Code §830(a)), and only for those conditions which was created by an employee within the scope of his or her public employment, or which the entity had actual or constructive notice of the condition sufficiently before the injury to have taken measures to protect against the risk involved, including repair, warnings, or safeguards. (See, *e.g.*, *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 753-754 [crosswalk with no signals]; *Hedayatzadeh v. City of Del Mar* (2020) 44 Cal.App.5th 555, 561-568 [lack of pedestrian barriers]; *Huerta v. City of Santa Ana* (2019) 39 Cal.App.5th 41, 48-51 [poor lighting]; *Fuller v. Department of Transp.* (2019) 38 Cal.App.5th 1034, 1042-1043 [narrow roadway].) Pursuant to Govt. Code §835.2(b), a public entity has constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." Finally, there is no liability just because a condition is visible and nontrivial; otherwise, "the constructive notice element would be automatically satisfied in every instance where that dangerous condition preexisted the accident and thus would effectively write the negligence element out of the statute." (*Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 520.)

If the above sounds familiar, that is because these are the essential elements for a statutory Govt. Code §§ 830(a) and 835 claim for dangerous condition of public property – i.e., plaintiff's Fourth cause of action. To drive a further point on the topic, the idea that an independent contractor's negligence might be imputed to a public entity for failing to remove a dangerous condition on public property only attaches consistent with Govt. Code §840.2 – which plaintiff has not alleged either. In conclusion, the proposed Second cause of action for vicarious liability is really no different than the Fourth cause of action, and the Fifth cause of action is entirely duplicative of the Second and Fourth.

Demurrer to Second cause of action SUSTAINED with 20 days leave to amend. **Demurrer to Fifth cause of action is SUSTAINED WITHOUT** LEAVE to amend (see *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 692; *Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 290).

Fourth Cause of Action

Plaintiff's fourth cause of action is for dangerous condition of public property. Defendant does not take issue with the allegations pled. Instead, defendant contends that plaintiff has not exhausted the prefiling notice requirement because there is no reference to the flimsy gate as being the real problem. First, the flimsy gate is merely a symptom of the problem of not requiring dogs to be tethered. It is not, as defendant contends, the crux of the case since a strong gate would have been unnecessary had the dog been tethered. Second, the test for prefiling notice is substantial compliance, not perfection.

The GCA claim must be in writing and must show (1) the name and address of the claimant; (2) the date and place of the accident or event out of which the claim arose; (3) a general description of the damage, loss or indebtedness incurred; (4) the names of any public employees allegedly responsible; and (5) the amount of the claim if under $10,000. The test is whether sufficient information is disclosed to enable a public entity to investigate and evaluate the claim to determine whether settlement is appropriate. See Govt. Code §910; *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1234; *Connelly v. County of Fresno* (2006) 146 Cal.App.4th 29, 39; *Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1503; *White v. Superior Court* (1990) 225 Cal.App.3d 1505, 1511; *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 225-226. The claim form here included the basic information necessary to acquaint defendant with the issues warranting investigation, and if defendant was genuinely confused, that issue was waived by defendant's failure to advise plaintiff accordingly. See Govt. Code §911. Plaintiff is entitled to have her claim form liberally construed, and here the liability is premises on an unleashed dog biting an unsuspecting invitee – whether the fence failed to stop it, or a picnic bench made the reach earlier – are secondary to the lack of a leash (and the lack of enforcement).

Demurrer to Fourth cause of action is **OVERRULED**.

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

IN RE: Thirty-Two Thousand Dollars ($32,000.00) Currency of the United States

22CV45789

PETITIONER'S MOTION FOR FORFEITURE JUDGMENT

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 petitioner'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.