Judge Candela – Law & Motion – Wednesday, July 24, 2024 @ 9:00 AM
TENTATIVE RULINGS

1. **22CV01393 Thompson, Matthew A v. City of Chico et al.**

EVENT: Defendants' Motion for Summary Judgement, Or in the Alternative, Summary Adjudication

Defendants' Motion for Summary Judgement, Or in the Alternative, Summary Adjudication is GRANTED in PART and DENIED in PART.

Plaintiff's Request for Judicial Notice is GRANTED.

Preliminarily, the Court acknowledges Plaintiff has, in his opposing papers conceded the following causes of action fail as a matter of law: 5th, 7th, 9th and 10th causes of action. As a result, the 5th, 7th, 9th and 10th causes of action are hereby dismissed with prejudice.

The Court notes it is not considering the new evidence presented by Defendants in their reply papers.

First Cause of Action – Retaliation Pursuant to Labor Code Section 1102.5

The motion is GRANTED as to the First Cause of Action.

The parties agree that an element of a retaliation claim under the Labor Code requires Plaintiff to demonstrate that he engaged in protected activity. The issue presented is whether an employee, who disagrees with a supervisor concerning the appropriate level of discipline of a third-party employee, engages in protected activity when the employee does not recommend the supervisor's opinion at the Skelly hearing.

Internal personnel matters not involving the disclosure of a legal violation do not rise to the level of blowing a whistle. (See *Patten v. Grant Joint Union High School Dist*., (2005) 134 Cal. App. 4th 1378, 1384-1385) To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected "whistleblowers" arising from the routine workings and communications of the job site. (*Id* at p. 1385)

The fact Plaintiff disagreed with his supervisor concerning the appropriate level of discipline in no way involves disclosure of a legal violation. As in *Patten*, the disagreement between Plaintiff and his supervisor is an "internal personnel matter."

Plaintiff attempts to argue that forcing him to provide an opinion at the Skelly hearing would necessarily deprive the third party his due process rights, thus there is a disclosure of a legal violation. Plaintiff cites no case law in support of this argument.

Defendant's UMF 8 states the employee who was subject to the Skelly hearing only received a letter of reprimand. Plaintiff does not dispute this fact and his evidentiary objections are overruled.

As Defendant correctly points out, a letter of reprimand does not trigger the Skelly procedures, see *Stanton v. City of W. Sacramento*, (1991) 226 Cal. App. 3d 1438, 1442. Thus, even if Plaintiff was correct and providing an opinion at a Skelly hearing one did not agree with would constitute a due process violation, the employee in this case was not entitled to the procedure as he only received a letter of reprimand.

Consequently, there is no evidence Plaintiff was engaged in protected activity in that there was no legal violation.

Regarding the allegations in the FAC that Plaintiff put Defendants on notice concerning age discrimination allegations, UMF 30 provides Plaintiff made no such allegations until the same day he was terminated and afterwards. Plaintiff's objections to UMF 30 are overruled, and Plaintiff does not otherwise dispute UMF 30. As a result, because the age discrimination allegations did not take place until after termination, there is no causal relationship between the protected activity and the adverse employment action.

Second Cause of Action – Retaliation under the FEHA

The Motion is GRANTED as to the Second Cause of Action.

As the parties noted, retaliation under the FEHA is established in two ways:

> (1) if it occurs because of the employee's opposition to unlawful employment conduct pursuant to the FEHA, or (2) if it is in retaliation for the employee's participation in proceedings set up by FEHA to enforce its provisions.
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> (*Mathieu v. Norrell Corp.*, (2004) 115 Cal.App.4th 1174, 1188)

Opposition to Unlawful Employment Conduct

Plaintiff contends he had reasonable belief that his subordinate, Richard Burgi was being disciplined in part due to his age. His theory is that because it was generally understood that older employees were more costly, management had an incentive to terminate older employees. Plaintiff further contends that, because Defendants were already knowingly engaged in the practice, Plaintiff had no obligation to put Defendants on notice of his age discrimination allegations.

The relevant question … is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful

discriminatory manner. (*Yanowitz v. L'Oreal USA, Inc*., (2005) 36 Cal. 4th 1028, 1047 citing *Garcia-Paz v. Swift Textiles* (1994) 873 F.Supp. 547, 1047)

Here, we have no evidence of any pre termination communication from Plaintiff to defendants which could be construed as conveying an allegation of age discrimination. The circumstantial evidence proffered by Plaintiff regarding PERS and the fact older employees are more costly does not establish a "communication to the employer".

There is no evidence Defendants knew Plaintiff's reasons for disagreeing with the discipline of Mr. Burgi were based on age discrimination.

Complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct. (*Yanowitz*, supra at p. 1047) Plaintiff presents no evidence that he put defendants on notice "as to what conduct it should investigate."

Participation in Proceedings

The plain language of Gov. Code 12940(h) is limited to participation "in any proceeding under this part." As Defendant correctly noted, a Skelly hearing is not a proceeding under the FEHA. Consequently the facts presented do not trigger section 12940(h).

Third Cause of Action – Age Discrimination

The Motion is DENIED in PART and GRANTED in PART. The Motion is GRANTED as to Defendant Brendan Ottoboni and DENIED as to Defendant City of Chico.

Defendants correctly argue that a discrimination claim (as opposed to harassment) does not impose individual liability on the supervisor, see *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158. Thus, the motion is granted as a matter of law in favor of Defendant Brendan Ottoboni.

Regarding Defendant City of Chico, Plaintiff has presented evidence supporting a prima facie case of age discrimination. When the employee has made this showing, the burden shifts to the employer to go forward with evidence that the adverse action was based on considerations other than age discrimination. (*Hersant v. Department of Social Services*, 57 (1997) Cal. App. 4th 997, 1003)

Here, Defendants have presented evidence indicating Plaintiff's termination was based on job-performance reasons. (Declaration of Brendan Otooboni, page 107 lines 1-9) When the employer offers evidence justifying the adverse action on a basis other than age, the burden shifts back to the employee to meet his ultimate obligation of proving that the reason for the adverse action was age discrimination. (*Hersant v. Department of Social Services*, (1997) 57 Cal. App. 4th 997, 1003)

We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Yanowitz v. L'Oreal*

USA, Inc., *supra,* at p. 1037) The familiar rule is that, when ruling on a motion for summary judgment, the court may not weigh the plaintiff's evidence or inferences against the defendant as though the court were sitting as the trier of fact. (*Jorgensen v. Loyola Marymount University*, (2021) 68 Cal. App. 5th 882, 889)

Although Defendant makes many arguments in an attempt to discredit Plaintiff's theory (including inconsistent statements made by Plaintiff) that he was terminated because of his age and the agencies' desire to reduce costs incurred as a result of its older employees, the Court simply cannot weigh evidence on summary judgment. There is also evidence that Plaintiff performed at least some of his duties competently as evidenced by his performance reviews. Additionally, there is the undisputed fact that he was employed for 32 years. A triable issue of fact exists for the jury whether Plaintiff was terminated for non-discriminatory reasons or whether he was terminated for age related reasons as Plaintiff argues.

Fourth Cause of Action – Associational Discrimination

The Motion is GRANTED in PART and DENIED in PART.

Consistent with the Court's ruling in the age discrimination cause of action, the motion is granted as a matter of law with respect to Defendant Brendan Ottoboni. The Motion is GRANTED as to Defendant Brendan Ottoboni and DENIED as to Defendant City of Chico.

The Court reincorporates its analysis concerning the age discrimination cause of action. As with the age discrimination cause of action, a triable issue of fact exists whether Defendant was terminated for non-discriminatory reasons.

Sixth Cause of Action – Intentional Infliction of Emotional Distress

The Motion is GRANTED.

The parties do not dispute outrageous conduct is an element of an IIED claim. In *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, the Second District Court of Appeal found, as a matter of law, that age discrimination cannot meet the outrageous conduct requirement:

> An essential element of [intentional infliction of emotional distress] is a pleading of outrageous conduct beyond the bounds of human decency. (See, e.g., *Cole v. Fair Oaks Fire Protection Dist*. (1987) 43 Cal. 3d 148, 155; *Agarwal v. Johnson* (1979) 25 Cal. 3d 932) Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination.
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> (*Id at p.* 80)

Even assuming plaintiff could prove that his termination was motivated by discriminatory animus, such conduct does not rise to you level of intentional infliction of emotional distress pursuant to *Janken*.

Eighth Cause of Action - Defamation

The motion is GRANTED.

The parties do not dispute that publication to a third party is an element of a defamation claim. Plaintiff was incompetent and insubordinate were the alleged defamatory statements according to the First Amended Complaint.

Defendants have met their initial burden demonstrating no triable issue of fact exists that Mr. Ottoboni never published the alleged defamatory statement to a third party. He testified that while he communicated the fact that Plaintiff was terminated to serval persons within the organization, “he did not get into specifics.” (Deposition Transcript of Brendan Ottoboni page 61, lines 11-19).

Plaintiff has failed to provide any evidence contradicting Mr. Ottoboni’s testimony that he did not get into specifics. Consequently, the Court finds no triable issue of fact exists whether the defamatory statements were published.

Even if a triable issue of fact existed, Plaintiff has failed to provide any evidence creating a triable issue of fact that the statements were made with malice. The parties do not dispute the statements fall within the qualified privilege of Civil Code § 47(c). As a result, the burden is on Plaintiff to demonstrate malice, see *Noel v. River Hills Wilsons, Inc*., (2003) 113 Cal. App. 4th 1363, 1369. Malice cannot be inferred simply based on the fact that Mr. Ottoboni communicated the fact plaintiff was terminated.

Defendants shall prepare and submit a form of order consistent with this ruling within 2 weeks.