

Tentative Rulings

Law & Motion and Family Law Calendar for December 28, 2015

December 23, 2015, 4:00p.m.

Department Two

To request a hearing on any matter on this calendar, you must call the Court at 530-283-6305 by 12:00 noon, Dec. 24, 2015 notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

If you do appear and want the matter reported by a court reporter in unlimited civil, family law or probate, you must contract with and provide your own court reporter. The Court does not provide an official reporter for these calendars.

Probate – 9:00 a.m.

Case No. PR15-00016– Estate of Little

Tentative Ruling: **Granted.** The court finds that notice has been given as required by law. Petitioner's Petition for Waiver of Accounting and Final Distribution of the Estate is granted.

Case No. PR15-00046 – Guardianship of Castillo

Tentative Ruling: **Appearance required.** The court has not received the guardianship investigation report.

Case No. PR15-00041 – In re Chambers

Tentative Ruling: **Granted.** The court finds that notice was given as required by law. Petitioner's Petition for Order Transferring Assets and Income to Dolores Chambers for Medical Spousal Support Purposes, and Enlarging Her Community Spouse Resource Allowance is granted. Petitioner is to prepare the Order.

Civil – 9:30 a.m.

Case No. LC10-00026 – Asset Acceptance, LLC vs. Vesper

Tentative Ruling: **Granted.** Plaintiff's Motion for Order Setting Aside Default Judgment is granted. At the request of the plaintiff, this matter is dismissed without prejudice.

Case No. CV15-00109 – Lowry vs. Lake Almanor Country Club

Tentative Ruling: **General demurrers sustained in part; motion to strike denied.** The general demurrers of defendant, Lake Almanor Country Club (“LACC”) to the first, third and fourth causes of action are sustained, with leave to amend; the general demurrers to the fifth through eighth causes of action are over-ruled. The motion to strike is denied in full.

A cause of action “. . . ‘on grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability.’” (*Faust v. California Portland Cement Company* (2007) 150 Cal.App.4th 864, 886. A “. . . ‘qualifying [physical] disability . . . limits the individual’s ability to participate in one or more major life activities.’” (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 659. (Citation omitted.))

It is alleged in the First Amended Complaint (“FAC”) that plaintiff, Wayne Lowry (“Lowry”), explained to his supervisor, Alan Dubroff (“Dubroff”), that the medication for Lowry’s thyroid condition “. . . had been making it difficult for him to keep up with the demands made of him.” (*Id.*, para. 14.) While a “. . . plaintiff is required only to set forth the essential facts of his case . . .” (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 382), and the burden to establish a prima facie case of discrimination is “. . . not intended to be ‘onerous[.]’” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 322), this allegation, even when liberally construed, does not establish that Lowry’s condition limited his ability to participate in a major life activity.¹

The third and fourth causes of action, for failure to make, and failure to engage in a good faith interactive process to make, reasonable accommodation, are also legally insufficient, because, under both causes, a plaintiff “. . . must . . . establish that he or she suffers from a disability covered by FEHA.” (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 (failure to accommodate); *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 86 (failure to engage in interactive process).)²

Accordingly, the general demurrers to the first, third and fourth causes of action are sustained, with leave to amend.

LACC has not challenged the legal sufficiency of the second cause of action, for age discrimination, which renders the fifth cause of action, for failure to prevent discrimination, legally sufficient. (*Rope v. Auto-Chlor System of Washington, Inc.*, *supra*, 220 Cal.App.4th at 660 (valid cause of action for discrimination under FEHA supports cause of action under *Government Code section 12940 (k)*.)

“To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614. (Citation omitted.)) LACC demurs to the sixth cause of action, for retaliation, on the grounds that the FAC fails to allege facts establishing that Lowry

¹ However, sufficient facts are alleged to establish both the second and third elements of the first cause of action. (FAC, paras. 7, 13, 15 and 21.)

² Assuming, *arguendo*, that LACC’s knowledge of Lowry’s condition must be alleged, the allegations of the FAC are sufficient. (*Id.*, paras. 12, 14.)

engaged in a protected activity, because it does not allege that he made a “complaint” about safety under *Labor Code section 6310*. This argument overlooks the allegations that, at a staff meeting, Lowry expressed concern about the safety of the patrolmen while engaged in quasi-law enforcement activities, given the proposed “sweeping changes” being discussed. (FAC, paras. 18-19.) This is sufficient. (See, *Cabesuela v. Browning-Ferris Industries of California* (1998) 68 Cal.App.4th 101, 106, 108-109 (plaintiff raised issue of health and safety hazards at staff meeting).)³

The rule that a plaintiff may not “split” a cause of action has a narrow application and is invoked when “. . . a plaintiff attempts to divide a primary right and enforce it in two suits.’ ” (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1146.) Hence, while a plaintiff may not split a single cause of action and make it the basis of several suits, he may plead a number of legal theories in a single complaint (4 *Witkin, California Procedure* (5th Ed. 2008) *Pleading*, §§ 45, 49, 402), even though he or she is only entitled to a single recovery. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.) Nothing in the record suggests that Lowry has split a cause of action by bringing two suits against LACC.⁴

Further, Lowry has alleged facts establishing violations of *Labor Code section 226(a)(6)* and (9) (FAC, para. 33, Exhibit 1), as to which injury is established by statute. (*Id.*, section 226(e)(2)(B)(i).) Having alleged facts establishing violations of *Labor Code section 226(a)*, the seventh and eighth causes are legally sufficient to state causes of action under the Private Attorney’s General Act (“PAGA”), *Labor Code sections 2698, et seq.*

The demurrer to the fifth through eighth causes of action are thus overruled.

Malice may be inferred from an employer’s efforts to hide the discriminatory reason behind an employment action (*Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912; see, also, *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 717 (no malice where employer did not attempt to hide reason for termination)), and thus the FAC alleges facts sufficient to support a claim for punitive damages. (FAC, paras. 15-16; see, *Turman v. Turning Point of Central California, Inc.* (2011) 191 Cal.App.4th 53, 63-64 (underlying facts must rise to level of malice, oppression or fraud).) Similarly, as discussed above, the FAC alleges facts sufficient to state PAGA causes of action. Accordingly, the motion to strike is denied in full.

³ *Muller v. Automobile Club of Southern California* (1998) 61 Cal.App.4th 431, cited by LACC, is inapposite. While the court states, in *dicta*, that “. . . voicing of a fear about one’s safety in the workplace does not necessarily constitute a complaint about unsafe working conditions[]”, it affirmed summary judgment of a retaliation cause of action, because the plaintiff “. . . did not assert that she was terminated because she expressed safety concerns.” (*Id.*, at 451-452. (Italics added and in original.) It is specifically alleged in the FAC that Lowry was terminated because of his safety complaints. (*Id.*, at paras. 21, 67.)

⁴ The Court also notes that, in *Achal v. Gate Gourmet, Inc.*, 2015 WL 4274990 (N.D. Cal. 2015), the two separate claims, brought under *Labor Code section 226(a)* for failure, both to furnish and to maintain, accurate wage statements, withstood the motion to dismiss. (*Id.*, at 19-20.)

Family Law – 10:30 a.m.

Case No. FL02-23382 – Mar. of Bresnyan

Tentative Ruling: **Appearance required.**

Case No. FL13-00052 – Elmore vs. Fleisher

Tentative Ruling: **Appearance required.** The court notes there is no proof of service in the file on the petitioner.

Case No. FL13-00121 – Handley vs. Widberg

Tentative Ruling: **Appearance required.**

Case No. FL13-00117 – Mar. of Hardgrave

Tentative Ruling: **Appearance required.** The court will set the matter for a contested hearing.

Case No. FL15-00152 – Mar. of Mulhall

Tentative Ruling: **Appearance required.** R4

CASE MANAGEMENT CONFERENCE TENTATIVE RULINGS

Case No. CV15-00077 – Thornberg vs. Parsons

Tentative Ruling: **Appearance required.** The parties should be prepared to discuss ADR options and set a trial date.

Case No. CV09-00065 – Adams vs. Dept. of Fish & Game

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.

Case No. CV15-00006 – Bank of America vs. Burrows

Tentative Ruling: **No appearance required.** The court has signed the stipulated judgment.

Case No. CV15-00007 – Quothy vs. SGI Resort Properties

Tentative Ruling: **Appearance required.** The court will discuss the status of the case with the parties.