Vivian Lake v. Buckets of Dough Santa Maria LLC Case No. 23CV05499
Hearing Date: February 14, 2024
Demurrer/Motion to Strike (Complaint)

EXECUTIVE SUMMARY

- This memorandum has two parts. I will address the merits of defendant's demurrer initially, and then the merits of defendant's motion to strike.
- For edification, California courts have an unusual way of describing what occurs with a demurrer and a motion to strike. The court sustains or overrules a demurrer, but grants or denies a motion to strike (and most other motions).
- Defendant has satisfied its meet and confer obligations as to both motions.
- As for defendant's demurrer (which consists of a special and a general demurrer):
    - Overrule defendant's special demurrer based on uncertainty as to all five causes of action. The causes of action are not incomprehensible as written.
    - Overrule defendant's general demurrer as to all five causes of action, as plaintiff has sufficiently alleged a prima facie basis for each. While there may be future problems with these causes of action at summary judgment/trial under the *McDonald Douglas* burden-shifting requirements for all alleged Fair Employment and Housing Act (the FEHA) violations (as it appears defendant can legitimately contend there was a nondiscriminatory, nonretaliatory bases for plaintiff's discharge); and while plaintiff could have made a more robust effort in the operative pleading; the five FEHA causes of action have been sufficiently pleaded. All plaintiff must do is plead a prima facie basis for each, a task that has been described by our high court as "not onerous." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 379.) Plaintiff has been aided in this endeavor by the fact this court must view the operative pleading favorably where reasonably possible (this helped plaintiff on key (critical) elements that were required to be pleaded). In the end, plaintiff has pleaded enough to demonstrate that all five causes of action are not patently meritless, which is (in the end) the very reason for the "prima facie" requirement in the first place. (*Ibid.*) Whether these claims ultimately survive summary judgment/adjudication and/or trial is an entirely different matter (I have made observations in the memorandum where I think problems may exist), but those issues need not be addressed today.
- As for defendant's motion to strike:
    - Grant defendant's request to strike all punitive damages' allegations (as to all five causes of action), *with leave to amend*. Defendant is required to plead malice, oppression, and fraud with factual specificity, and that has not been accomplished. The allegations are boilerplate. All plaintiff alleges is that a corporate officer, director or managing agent knew there were relevant employment policies. There are no factual allegations to indicate that any officer, director or managing agent had actual knowledge of plaintiff's situation (i.e., that he or she knew of plaintiff's disability or the fact she engaged in protected activity), knew plaintiff was being terminated, and played any role in the decision, or ratified the decision, to discharge plaintiff. While plaintiff need not plead the identity of the particular individual, there must be factual allegations of malice, fraud, or oppression,

personally or through ratification, from which these states of mind can be inferred. That has not been done. Give plaintiff 30 days to file an amended pleading.

- Direct defendant to provide a proposed order for signature.

FULL MEMORANDUM

On December 11, 2023, plaintiff Vivian Lake (plaintiff) filed a complaint against defendant Buckets of Dough, Santa Maria, LLC (defendant), advancing five causes of action under the Fair Employment and Housing Act (the FEHA)[1], contained in Government Code[2] section 12920, et seq., as follows: 1) disability discrimination in violation of section 12940, subdivision (a); 2) retaliation because plaintiff was terminated after she engaged in protected activity (i.e., making a request for a disability accommodation), in violation of section 12940, subdivision (h); 3) failure to prevent a violation of FEHA involving discrimination/retaliation, in violation of section 12940, subdivision (k); 4) failure to make a reasonable accommodation for a disability, in violation of section 12940, subdivision (m); and 5) failure to engage in a timely, good faith interactive process for a reasonable accommodation, in violation of section 12940, subdivision (n). Briefly, according to the operative pleading, defendant hired plaintiff on October 3, 2022, as a baker. For the majority of plaintiff's life, she "has suffered from ADHD, depression and anxiety." On the morning of October 15, 2022 (i.e., 12 days after defendant hired plaintiff), plaintiff experienced "a significant episode relating to her disability and timely reached out to several supervisors, over five hours before her shift started. One Julie Pickett (apparently plaintiff's supervisor), responded to plaintiff's "inability to come into work" as follows in a telephone call: "After failure to follow the call off policy we will choose to part ways here. Your check will be directly deposited to your bank on file." Plaintiff responded (according to the operative pleading) in the same conversation as follows: "I do believe that is considered wrongful termination, since I have a psychiatric disability. Terminating me for needing time to mentally recover is unlawful in California. I do have ADHD which unfortunately includes severe depression and anxiety which can impair my ability to function. . . . [I]t is unlawful to fire me for not being mentally well enough to work today. . . ." Defendant ultimately terminated plaintiff.

There are two parts to the memorandum. The first part addresses defendant's demurrer, which consists of a special and a general demurrer; the second part addresses defendant's motion

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[1] The Fair Employment and Housing Act (California Government Code Section 12900-12951 & 12927-12928 & 12955 - 12956.1 & 12960-12976) provides protection from harassment or discrimination in employment because of: age (40 and over), ancestry, color, creed, denial of family and medical care leave, disability (mental and physical) including HIV and AIDS, marital status, medical condition (cancer and genetic characteristics), national origin, race, religion, sex, and sexual orientation. (https://www.dor.ca.gov/Home/FairEmploymentAct, last accessed 2/8/24.)

[2] All further statutory references are to the Government Code unless otherwise indicated.

to strike all punitive damages from the operative pleading. Plaintiff has filed opposition to both motions; defendant has filed a replies to both oppositions. All briefing has been read.

A) Demurrer

I will first detail relevant legal background that frames inquiry. I will then discuss defendant's meet and confer obligation; address the merits of defendant's challenge to all five causes of action based on uncertainty (through a special demurrer); and then explore the merits of defendant's general demurrer as to each of the five causes of action (i.e., based on claims that plaintiff has failed to plead sufficient facts for each cause of action).

i) General Legal Background

Before addressing the merits of defendant's special and general demurrer, some general legal background seems appropriate, as it will help frame the inquiry and streamline the analysis.

First, a demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co*. (2004) 116 Cal.App.4th 968, 994.) Code of Civil Procedure §430.10(e) provides for a demurrer on the ground that a complaint fails to state a cause of action. A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.) The complaint must be "liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc. § 452; see *Stevens v. Sup.Ct. (API Ins. Services, Inc.)* (1999) 75 Cal.App.4th 594, 601.) Where allegations are subject to different reasonable interpretations, the court must draw "inferences favorable to the plaintiff, not the defendant." (*Perez v. Golden Empire Transit Dist*. (2012) 209 Cal.App.4th 1228, 1238.)

Second, because all claims are based on violations of FEHA, a statutory scheme and not common law principles, plaintiff must specially plead all allegations of material fact. (*Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 604 [in a FEHA case, "facts in support of each of the requirements of a statute upon which a cause of action is based must be specifically pled"].) CA 2/6 has reiterated this point in the FEHA context, citing *Fisher*, albeit in an unpublished case. (*Hiraishi v. DeLeon* (Cal. Ct. App., Mar. 14, 2022, No. 2D CIV. B310395) 2022 WL 761930, at *3[If the cause of action is based in statute, the facts supporting each statutory requirement must be specifically pled]; see also *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 ["general rule [is] that statutory causes of action must be pleaded with particularity"].)

Second, because all claims are predicated on alleged FEHA violations, California courts look to the three-prong test derived from *McDonnell Douglass Corp. v. Green* (1973) 411 U.S. 792 in determining whether plaintiff has adequately alleged such violations. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354.) As the court explained in *Guz*, "[b]ecause of the

similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citations.]" (*Ibid.*) The *Guz* court continued that the *McDonnell Douglas* test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially." (*Guz,* at p. 354.) The test "places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. [Citations.]" (*Id.* at pp. 354-355.) "While the plaintiff's prima facie burden is 'not onerous' [citation], he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion ....' [Citation.]" [Citation.]' " (*Id.* at p. 355.) A complaint alleging violations of FEHA that fail to state a prima facie case under the *Guz/McDonnell Douglas* test is subject to demurrer. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202, fn. 7.) Put another way, plaintiff has the initial burden of pleading a prima facie case that the specific FEHA provision was violated. (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234-235; see also *Price v. Victor Valley Union High School District* (2022) 85 Cal.App.5th 231, 239.) Plaintiff has the burden at trial to show a prima facie case by a preponderance of evidence. (*Guz,* supra, at p. 355.) A prima facie case establishes a presumption of prejudice. (*Ibid*.)

If plaintiff meets its prima facie burden at trial, the employer then is permitted to rebut the presumption by presenting a legitimate, nondiscriminatory, nonretaliatory reason for discharging plaintiff. (*Guz, supra,* at p. 381.) If the employer defendant sustains this burden, the presumption disappears and the plaintiff is given the opportunity to challenge the employer's proffered reasons as pretexts for discrimination, or offer other evidence to show discrimination. (*Id*. at p. 356.)

ii) Defendant's Meet and Confer Obligation

Defendant has satisfied its meet and confer obligation. Counsel has submitted a declaration indicating there was correspondence between the parties in order to resolve the issues raised in the demurrer.

iii) Defendant's Special Demurrer Based on Uncertainty

Defendant initially contends that each of the five causes of action are fatally uncertain. Defendant is actually advancing a special demurrer based on uncertainty (as opposed to general demurrer for failure to state facts, discussed below). Demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond. (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 848, fn. 3; see Morris *v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 292.) Here, contrary to

defendant's contention, all five causes of action are not so incomprehensible that a defendant cannot reasonably respond. Defendant insists in reply without case support that "all of plaintiff's causes of action." Not so under the appropriate standard.

The court should overrule the special demurrer based on claims of uncertainty.

iv) Defendant's General Demurrer to Each Cause of Action

I will address defendant's general demurrer to each cause of action in seriatim.

a. Disability Discrimination (First Cause of Action)

A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1037.) As to the third element, the disability must be a substantial factor motivating the employer's adverse employment action. (*Ibid.*)

Defendant concedes that plaintiff has adequately alleged a disability (ADHD, depression and anxiety) (i.e., the first element). However, defendant claims the plaintiff makes conclusory allegations when she alleges in paragraph 20 of the operative pleading that "Defendant engaged in unlawful employment practices in violation of the FEHA by discriminating against Plaintiff and ultimately terminating her employment on the basis of her disability," because 1) plaintiff has failed to allege that defendant was aware of plaintiff's disability "prior to Defendant advising Plaintiff that they would part ways as she failed to follow Defendant's call off policy"; and 2) failed to state facts "to show that she requested that Defendant[s] make reasonable accommodations with respect to her disability." Further, according to defendant, plaintiff has failed to provide any "facts to meet the second element, that she could perform the essential duties of her job with or without reasonable accommodations . . . ." Defendant claims that because plaintiff could not go to work on October 15, 2022, the complaint "on its face shows she could not meet the essential requirement of her job with Defendant, even with accommodations." I will assume here that defendant is challenging the evidence offered to support both the second and third elements of plaintiff's prima facie pleading burden.

Defendant's initial flaw is that it cites little to no case law to support any of its analysis. This is a potential violation of the California Rules of Court, rule 3.1113 (b), which states: "The memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." "Rule 3.1113 rests on a policy-based allocations of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from

any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide." (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc*. (2011) 197 Cal.App.4th 927, 934.)

In any event, on the merits, it would be true, as defendant claims, that ***if*** there were no facts offered to support the allegations in Paragraph 20, a demurrer would be appropriate. But that is not the case. While one can infer that defendant's representative Ms. Julie Packnett was unaware of plaintiff's disability when she first terminated plaintiff over the telephone, plaintiff alleges that, *during that very same telephone call*, she informed Ms. Packnett that she had a disability based on ADHD (depression and anxiety); that the disability was the reason she could not go to work on October 15, 2022; and that, according to plaintiff, this "put Defendant on notice of Plaintiff's disability . . . ." (¶ 11.) Further, according to plaintiff, defendant (despite this knowledge) *continued* her termination, even though (contrary to the termination notice provided by defendant to plaintiff), she did not "voluntarily quit" based on "job abandonment per attendance policy." Plaintiff also has pleaded that according to defendant's employee policies, there is no automatic dismissal for the failure to report to work properly for a first violation, as here. Employees in fact have "three strikes." According to the operative pleading: "For the first strike, the employee is issued a verbal/write-up warning, for the second strike, the employee is given their last warning before termination, and on the third strike, the manger will make a decision to terminate." (¶¶ 13-14.)

Case law and FEHA's implementing regulations are uniformly premised on the principle that the nature of activities protected demonstrate "some degree of opposition to or protest of the employer's conduct or practices based on the employee's reasonable belief that the employer's action or practice is unlawful." (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 382–383.) An employee's *unarticulated* belief an employer is engaging in discrimination is insufficient to establish protected conduct " 'where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' " (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1199.) At a minimum, the substance of the employee's grievances must disclose discrimination due to the plaintiff's protected class. (*Ibid.*) No doubt defendant has a viable claim that it fired plaintiff ***before*** it knew about her disability; [3] but for pleading purposes

[3] There is a consistent theme in defendant's motion that traverses each challenge to each cause of action – namely, that defendant (or defendant's representative, Ms. Packnett) did not know about the disability at the time Ms. Packnett fired plaintiff, following plaintiff's failure to follow a call policy, and thus, in each instance, no cause of action can be stated. While at summary judgment/trial this may be effective, for pleading purposes plaintiff alleges that she informed Ms. Packnett of her disability, requested an accommodation, and despite these requests and despite this knowledge, defendant continued with the termination. It is this alleged *continuation* (at least for pleading purposes) that overcomes defendant's arguments at this stage.

I do not mean to suggest by these observations that plaintiff will not have difficulty later in this lawsuit. Under the second stage of the burden-shifting requirement (i.e. once plaintiff has established a prima facie case), the

(i.e., for prima facie pleading purposes), it is enough to show that some discussion between plaintiff and Ms. Packnett occurred in which the former notified the latter of the disability and the latter still terminated plaintiff.

This point is reinforced by other allegations contained in the operative pleading. Plaintiff alleges that defendant had a "three strikes" employment policy concerning violations of work policies/protocols. The existence of these policies arguably creates a prima face inference that plaintiff's disability was a substantial factor in defendant's ***continued*** decision to terminate her – that is, if not initially, at least when it was discovered. It is possible to infer that plaintiff suffered an adverse employment action after plaintiff's failure to follow existing policy (as alleged in the operative pleading), suggesting prima facie evidence of a possible discriminatory motive. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004.) Plaintiff has therefore satisfied the "less than onerous" pleading requirements for the third element. While plaintiff's pleading is far from powerful, it is sufficient to withstand demurrer, particularly when one keeps in mind that the purpose of the "prima facie" requirement is to act as a filter and to remove the most patently meritless claims. (*Guz*, 24 Cal.4th at p. 379; see also *Diaz v. Fed. Express Corp*. (2005) 373 F.Supp.2d 1034, 1064 ["Although Defendant may have fired Plaintiff because of his absences . . . if the trier of fact believes that Plaintiff's absences were caused by that disability, Plaintiff will have established that Defendant's termination of Plaintiff was an adverse employment action taken because of Plaintiff's disability."].)

Nor am I persuaded by defendant's claim that there are no facts in the operative pleading to support the second element – that plaintiff was otherwise qualified to do the essential functions of the job, with or without reasonable accommodation. Defendant overlooks the allegations contained in Paragraph 7, which read in full as follows: "*Throughout her employment* [including the time plaintiff worked for defendant], Plaintiff performed her job duties in an efficient, competent, and successful manner." (See, e.g., *Green v. State of California* (2007) 42 Cal.4th 254, 260 [plaintiff must show that she can perform the essentials of the job without or without an accommodation].) While plaintiff could have done a better job of pleading, this court is required at the demurrer stage to view the plaintiff's complaint most favorably to plaintiff's viewpoint (where reasonable). (*The Inland Oversight Committee v. City of San Bernardino* (2018) 27 Cal.App.5th 771, 778-779.) With the aid of this presumption, the pleading language is sufficient to establish that "plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation." Accordingly, the second element also withstands demurrer.

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burden shifts to defendant employer to rebut the prima face presumption by showing the employer took its action for a legitimate, nondiscriminatory reason. If the employer meets that burden, the plaintiff must challenge the employer's proffered reasons as pretextual to support intentional discrimination or offers other evidence of a discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 355-356.) These later shifting standards will be addressed at summary judgment/trial, and may prove significant obstacles for plaintiff. But they are not impediments at the demurrer stage.

Overrule the general demurrer to the first cause of action.

b. Retaliation (Second Cause of Action)

To state a claim of retaliation under FEHA, a plaintiff must show (1) she engaged in a protected activity, (2) she was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action. (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 651, superseded by statute on other grounds as discussed in *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 245-246.)

Defendant claims a general demurrer should be sustained to this cause of action because 1) plaintiff alleges in a conclusory manner she was "engaged in a protected activity when she requested an accommodation relating to her disability"; 2) plaintiff fails to state "any facts showing what protected activity she engaged in, including whether she actually requested or used an accommodation related to her disability"; and 3) plaintiff fails to state what defendant did or how defendant retaliated against plaintiff regarding the protected activity. According to defendant, the operative pleading indicates that plaintiff only told Ms. Packnett of her "inability to come into work," and not here "inability to work due to her disability . . . ." With a final exhalation, defendant insists that plaintiff has "not pled sufficient facts to establish this cause of action, including the first and third elements . . . ."

Defendant (again) fails to cite to any cases in support of its claims. (See discussion above with regard to California Rules of Court, rule 3.1113(b).)

In any event, on the merits, I am not persuaded by defendant's contentions. Paragraph 11 of the operative pleading provides the substance of plaintiff's response on the telephone to Ms. Packnett. She informed her that she had a psychiatric disability (namely, ADHD, severe depression and anxiety). "which can impair [her] ability to function." She told Ms. Packnett "Terminating me for needing time to mentally recovery is unlawful in California." Critically, according to plaintiff, the substance of this conversation "effectively placed Defendant on notice of Plaintiff's disability, resulting in a mandate that it engage in the interactive process with her to determine if reasonable accommodation could be provided, before it finalized the decision to terminate her employment." In paragraph 12, plaintiff alleges that "despite this communication, Defendant made the callous decision to terminate Plaintiff's employment . . . ." Again, this is sufficient to overcome defendant's challenge that it fired plaintiff without any knowledge of her disability and thus her request for an accommodation.

Additionally, defendant ignores the import of the 2016 amendments to the section 12940, subdivisions (m)(2) (operative at the time of plaintiff's employment), which read as follows: It

is unlawful "for an employer . . . to retaliate or other discriminate against a person ***for requesting an accommodation under this subdivision***, regardless of whether the request was granted." Under this provision, requesting an accommodation for a known physical or mental disability *is* a protected activity under the FEHA. (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 246.)

Additionally, defendant fails to address plaintiff's claim in the operative pleading that the ***substance*** of the communication as a whole adequately put defendant on notice that plaintiff requested an accommodation, and the request for an accommodation was the protected activity and was the reason for his retaliation (resulting in termination). Defendant points to no requirement that plaintiff must speak with the precision of an Oxford don when requesting an accommodation, and common sense (and practical human experience) suggest that the English language is sufficiently commodious enough to provide notice short of express attestations. Indeed, there is enough evidence in the operative pleading to suggest that plaintiff informed defendant of her disability, and warned that it was impermissible to terminate her because of it. This seems sufficient to allow discovery to develop the real contours and substance of the conversation – in order to determine whether there was adequate notice in the conversation. While far from ideal, the allegations are sufficient (for pleading purposes) to support plaintiff's claim that she essentially requested an accommodation during the conversation. The first element has been adequately pleaded on a prima facie basis.

Nor am I convinced that the plaintiff has failed to plead the third element – a causal link between the protected activity and the adverse employment action -- largely for the same reasons there was a sufficient showing that disability discrimination was a substantial factor in the termination. Again, on a prima facie basis and under the circumstances pleaded, while there is evidence to show defendant fired plaintiff before knowledge of her disability, there is also evidence to show plaintiff was terminated outside the policies implemented by the employee handbook (in the of "three strikes"), with the notion that any disability and request for accommodation simply sealed plaintiff's termination (or at least it is possible that retaliation could be found). ***Is the case weak? Absolutely***. But, again, we are at the pleading stage, and all inferences and interpretations favor plaintiff.[4]

It is recommended that the court overrule the general demurrer to the second cause of action.

c. Failure to Prevent Discrimination/Retaliation (Third Cause of Action)

[4] The same obstacles that may confront plaintiff as detailed in footnote 3, *ante*, apply to this cause of action.

Section 12940, subdivision (k) creates liability for an employer who "fail[s] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." The term "discrimination" in this subdivision has been interpreted to include retaliation. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240, disapproved on other grounds in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173–1174.) A claim under section 12940, subdivision (k) has three elements: (1) the plaintiff was subjected to discrimination and/or retaliation; (2) the defendant failed to take all reasonable steps to prevent it; and (3) this failure caused plaintiff to suffer injury, damage, loss or harm. (*Caldera v. Department of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31, 43–44.)

As noted above, plaintiff has been able to meet the first element – she has stated a prima facie case of discrimination and retaliation, for the reasons discussed above. Defendant simply reiterates the arguments advanced as to those two causes of action – that defendant was not notified of the disability until after she was informed that she was terminated for failure to follow the call policy. There are sufficient allegations in the complaint to counter these arguments, and the analysis above applies equally well here.

As for the second element -- defendant must fail to take reasonable steps to prevent discrimination/retaliation -- defendant contends that plaintiff has not alleged "what steps Defendant failed to take or how Defendant failed to prevent the alleged discrimination and retaliation when defendant had no knowledge of Plaintiff's disability." But as noted above, there are sufficient allegations in the operative pleading to indicate that plaintiff did inform plaintiff about her disability during the telephone conversation – at least sufficient to put defendant on notice of the disability – and yet plaintiff nevertheless consummated or followed through with plaintiff's termination. The obvious "reasonable steps" in this calculus would have been efforts to accommodate plaintiff's disability. Defendant's argument elevates form over substance, mandating some formulaic talisman -- despite the fact that inferences of what defendant should have done seem patent and unmistakable. While plaintiff no doubt could have done a much better of job of pleading, there is no reason to require more under the circumstances given the clear and obvious inferences that can be drawn.

It is recommended that the court overrule the general demurrer to the third cause of action

d. Failure to Accommodate For Disabilities (Fourth Cause of Action)

FEHA provides separate causes of action for discriminating against employees because of their disabilities (§ 12940, subd. (a)) and failing to provide reasonable accommodations for the disabilities of employees (§ 12940, subd. (m)(1)). (*Nealy v. City of Santa Monica, supra,* 234 Cal.App.4th at p. 371.) The elements of an accommodation cause of action are similar but not identical to those for a discrimination cause of action. An accommodation cause of action does not require proof that the employee's disability resulted in an adverse employment action because the failure to accommodate violates the statute in and of itself. (*Jensen, supra,* 85 Cal.App.4th at p. 256.) Plaintiffs often pursue these two causes of action together. "[E]mployment discrimination cases, by their very nature, involve several causes of action arising from the same

set of facts." (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 486.) The elements of a failure to accommodate claim are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.)

Defendant contends a general demurrer is appropriate because plaintiff "fails to allege real, specific facts and only makes conclusory statements. Plaintiff fails to state any facts to support her claim that Defendant had knowledge of her disabilities prior to her calling off work on October 15, 2022 and that Plaintiff requested accommodations with respect to her disabilities at any time prior to or on October 15, 2022. Further, Plaintiff['s] admission that her alleged disability prevented her from coming into work at all on October 15, 2022, is in direct contravention of second element of this cause of action, that she could have performed the essential functions of her job with reasonable accommodation."

Again, defendant fails to cite to any case law in support of its position. (See discussion above.)

In any event, on the merits, the first two arguments are essentially a reiteration of the arguments advanced with regard to the first three causes of action, and for the reasons discussed above, are not persuasive here.

As for defendant's argument challenging the supposedly amorphous predicate for the second element, which requires that plaintiff be able to perform the essential functions of the position (i.e., that is, because plaintiff could not show up for work on October 15, 2022 because of her disability, she could not perform the essential functions of the job) , defendant's arguments are unpersuasive. True, section 12096, subdivision (m) does not expressly limit the requirement of a job function to one involving a reasonable accommodation to qualified individuals with a disability. (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 954.)[5] But *Nadaf-Rahrov* interpreted this provision to mean that "an employer is liable under section 12940(m) for failing to accommodate an employee only ***if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job***." (*Id.* at p. 977, emphasis added; see also *Shirvanyan v. Los Angeles Community College District* (2020) 59 Cal.App.5th 82, 94. [same])[6]

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[5] The court will observe that for disability discrimination, plaintiff must demonstrate that he or she can perform the essential functions of the job ***with or without accommodations***. By contrast, for purposes of an accommodation violation, *Nadaf-Rahrov* concluded that plaintiff must show that she was qualified to perform the functions of a baker ***with an accommodation***. The parties overlook this distinction entirely.

[6] *Nadaf-Rahrov* (and *Shirvanyan*) disagreed with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360-361, & fn. 4, to the extent the latter (*Bagatti*) interpreted the provision as not requiring plaintiff to show in any way that a "qualified individual" was able to perform the essential duties of the job. *Nadaf-Rahrov* disagreed with *Bagatti*, as follows: "We conclude an employer is liable under section 12940(m) for failing to accommodate an employee *only* if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job." (*Nadaf-Rahrov, supra,* 166

It is therefore untrue – as defendant argues – that plaintiff's admission about her disability does not itself undermine her contention that she could perform the essential functions of the job as a baker because the element requires plaintiff to show that she do the essential job functions ***with a reasonable accommodation***. Defendant was required to accommodate plaintiff in her existing position as baker unless accommodation was not reasonable possible or would impose an undue hardship on its operations. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223.) Significantly, plaintiff alleges in paragraph 45 that "*with reasonable accommodation* she could have fully performed all duties and functions of her in an adequate, satisfactory, and/or outstanding manner." The pleading seems adequate to state a prima facie bases for a failure to accommodate cause of action.

It is recommended that the court overrule the general demurrer to the fourth cause of action.

e. Failure to Engage in Interactive Process (Fifth Cause of Action)

An employer's failure to engage in the interactive process that causes harm to a disabled employee or former employee is also independently actionable. (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971; S*hirvanyan, supra,* 59 Cal.App.5th at p. 89.) The elements of a claim for failure to engage in the interactive process include: (1) plaintiff was an employee of defendant or applied for a job with defendant; (2) plaintiff had a disability that was known to defendant; (3) plaintiff requested that defendant make a reasonable accommodation so that he would be able to perform the essential job requirements; (4) plaintiff was willing to participate in an interactive process to determine whether reasonable accommodation could be made; (5) defendant failed to participate in a timely good faith interactive process; and (6) defendant's failure to engage in a good-faith interactive process was a substantial factor in causing plaintiff harm. (§ 12940, subd. (n); CACI No. 2546; *Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 61-62.))

Defendant contends that plaintiff has failed to plead this cause of action because she has failed to allege any facts that defendant "was aware of the disability prior to her calling out on the date of the subject incident [element 2], that Plaintiff actually requested an accommodation [element 3], and that Defendant could have made reasonable accommodations given that Plaintiff was unable to come into work that day and called out just hours before her shift."

The first two challenges have been discussed and rejected above, and for the reasons articulated, should be rejected here.

Cal.App.4th at p. 975.) It is recommended that the court follow *Nadaf-Rahrov* and progeny, although I note the conflict has little bearing on the outcome here, for if *Bagatti* is followed, an employer would be liable for failing to accommodate the employee even though he or she could not perform the essential functions of the job – something that would wholly undermine defendant's argument as advanced in the motion.

The third argument – there are no facts to show that defendant could have made reasonable accommodations given that Plaintiff was unable to come into work that day – is not relevant to this cause of action. Elements 4, 5, and 6, require plaintiff to plead, respectively, that plaintiff was willing to participate in an interactive process to determine whether reasonable accommodation could be made, defendant failed to participate in a timely good faith interactive process, and defendant's failure to engage in a good-faith interactive process was a substantial factor in causing plaintiff harm. Actual accommodation is not required. Looking to the complaint, no doubt plaintiff has done a poor job of pleading these elements with precision. But their substance can be discerned inferentially. We have determined that there are sufficient allegations to show that plaintiff asked for an accommodation; we can discern that plaintiff was willing to engage in an interactive process and clearly defendant was not; and plaintiff alleges that defendant's failure to engage in the interactive process was proximate cause of plaintiff's harm. While not compelling, it is sufficient to withstand challenge.

It is recommended that the court overrule the general demurrer to the fifth cause of action.

B) Motion to Strike

Defendant asks the court to strike all requests for punitive damages (authorized pursuant to Civil Code section 3294, subdivision (a)). Plaintiff in the operative pleading asks for punitive damages against defendant, a corporate entity, as to all five cause of action. Defendant claims, essentially, that plaintiff has failed to allege malice, fraud, or suppression with regard to any corporate officer, director, or managing agent, as required under Civil Code section 3294, subdivision (b).

i) Relevant Legal Principles

Pursuant to Civil Code section 3294, subdivision (a), a plaintiff may recover punitive damages if she proves at trial by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294, subd. (a).) For purposes of awarding punitive damages, "malice" means "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) Oppression is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Despicable conduct" is conduct that is " ' "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." ' (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 330-331.) Such conduct has been described as having the character of outrage frequently associated with crime. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)" (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159.)" " 'Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of

others that his conduct may be called [willful] or wanton." [Citation.]' [Citation.]" (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 716.)

For a corporate defendant to be liable for punitive damages based on the acts of its employees, plaintiff must show that defendant "authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the. . . authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).) A managing agent is "more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.) That means "a plaintiff seeking punitive damages [must] show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*Id.* at p. 577.)

Plaintiff is required to plead specific facts to show defendant's conduct was committed with one of the required mental states, i.e., oppression, fraud, or malice. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041–1042.) And when a corporate defendant is involved, the allegations must show ratification by an officer, director or managing agent –in other words, that an officer, director or managing agent confirmed and accepted the wrongful conduct with knowledge of its outrageous behavior. (See, e.g., *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168.) As noted in *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159,168, when punitive damages are sought against corporate employer, facts must be alleged show corporate defendant's "advance knowledge, authorization or ratification." (See also *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29 [pleading must contain facts to support claim of oppression, fraud or malice].) And as one unpublished Court of Appeal opinion put it, "absent any allegations that employees at [the corporate defendant] have any responsibility for or authority over . . . corporate-wide policies and procedures, rather than day-to-day management duties at one facility, or allegations that individuals (whether or not identified by the [plaintiffs]) within [defendant's] leadership group were aware of and ratified the corporate funding and staffing policies that allegedly led to the abuse . . . , the trial court properly granted the motion to strike the claims for punitive damages and enhanced remedies under the Elder Abuse Act." (*Pagarigan v. Libby Care Center, Inc.* (Cal. Ct. App., July 20, 2009, No. B208733) 2009 WL 2138998, at *9.)

Punitive damages are recoverable under the FEHA. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221 [holding that in a civil action under FEHA, all relief generally available in noncontractual actions, including punitive damages, may be obtained]; *Mathews v. Happy Valley Conference Center, Inc.* (2019) 43 Cal.App.5th 236, 267].)

Finally, a motion to strike is used to challenge any allegations involving punitive damages. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) In passing on the

correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) As with a demurrer, a motion to strike is limited to the allegations from the face of the complaint and on matters of which the court can take judicial notice. (Code Civ. Proc., §§ 436, 437.) A meet and confer declaration is required.

ii) Punitive Damages' Allegations and Merits of Motion to Strike

Each of the five causes of actions utilizes the exact same boilerplate language to support imposition of punitive damages, as follows: "Defendant has in place policies and procedures that specifically prohibited and required Defendant's managers, officers, and agents to prevent discrimination against and upon employees of Defendant. Managers, officers, and/or agents of Defendant were aware of Defendant's policies and procedures requiring them to prevent discrimination against and upon employees of Defendant. However, Defendant chose to consciously and willfully ignore said policies and procedures and therefore their outrageous conduct was fraudulent, malicious, and oppressive, and was done in wanton disregard of the rights of Plaintiff. . . . " (¶¶ 23, 30, 39, 48, and 55 of the complaint.)

Defendant has complied with the meet and confer obligations. That being said, the allegations in the operative pleading cannot withstand defendant's motion to strike. Plaintiff simply recounts the statutory language without any meaningful specific factual support. There are no specific factual allegations to suggest in any way that an officer, director or managing agent (someone with corporate discretionary policy authority) had actual knowledge of plaintiff's situation, knew plaintiff had a disability, knew that defendant failed to follow the appropriate procedure, and/or or ratified any conduct by a lower level employee in firing plaintiff. Plaintiff simply claims that defendant had employee policies and procedures, that a director, officer, and managing agent knew about these procedures, and then *leapfrogs* to the ultimate legal conclusion that the officer, director, and/ or managing agent engaged in "outrageous conduct" that was fraudulent, malicious, and oppressive. Knowledge of the procedures is insufficient. Plaintiff must allege that the officer, director and/or managing agent, with knowledge of procedures, was aware of plaintiff had a disability (or exercised protected activity), and either was personally involved or ratified that discharge with malice, oppression or fraud.

Plaintiff claims in opposition that the law recognizes an exception to the strict pleading requirement when defendant possess a greater degree of knowledge regarding the evidentiary facts at the pleading stage. In that case, less specificity is required . (See *Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 215.)[7] It is settled,

[7] Plaintiff cites *Burks v. Poppy Construction Co*. (1962) 57 Cal.2d 463, 474 for this proposition. *Burks* recognized that "[t]he distinction between conclusions of law and ultimate facts is not at all clear and involves at

however, that pleading conclusions of law does not satisfy the heightened pleading requirement. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6 [pleading in the language of the statute is not objectionable when sufficient facts are alleged to support the allegation].) Here, while plaintiff need not plead the identity of the officer, director, or managing agent (as defendant likely would be a far superior position to know that), there must be sufficient facts showing that an officer, director, and/or managing agent personally acted with malice, oppression or fraud and/or ratified that conduct. Plaintiff simply pleads that an officer, director and/or managing agent was aware of the corporation's employment policies, without any allegations that they were aware of plaintiff's disability, were aware plaintiff was terminated, or otherwise ratified the plaintiff's discharge with such knowledge. The court cannot infer fraud, oppression, or malice from these allegations in the operative pleading as it currently sits. More must therefore be alleged. Leave to amend is appropriate

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most a matter of degree**."** (*Id*. at p. 473.) The court listed examples of what it described as obvious conclusions of law that are termed " 'ultimate facts' " for pleading purposes: "(See *Peninsula etc. Co. v. County of Santa Cruz*, 34 Cal.2d 626, 629 [ ] [one is the 'owner' of property]; *Rannard v. Lockheed Aircraft Corp.*, 26 Cal.2d 149, 154 [ ] [act was 'negligently' done]; *May v. Farrell* (1928) 94 Cal.App. 703, 707 [ ] [employee was 'acting within the scope of his employment'].)**"** (*Burks*, *supra*, at pp. 473–474.) The rationale for the flexibility or uncertainty in the terms "ultimate fact" and "legal conclusion" is that **"**the particularity of pleading required depends upon the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff." (*Id*. at p. 474.) Less particularity is needed in situations where the defendant possesses knowledge of the facts equal or superior to the knowledge possessed by the plaintiff. (*Doheny Park Terrace Home Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1098-1099.) *Burks* addresses the rules attendant to sufficiency of factual statements *generally*, and did not address situations involving heightened factual specificity pleading requirements, which is required for punitive damages and fraud; *Burks* is only of marginal relevance. The case cited in the body of this memorandum (*Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 215) is the one cited as an exception int this specific context, and is thus more relevant.