Duzon v. Walmart, Inc. et al. 24CV07310
Hearing Date: April 30, 2025
Demurrer to Complaint

PROPOSED TENTATIVE

On December 26, 2024, plaintiff Laura Duzon filed a complaint against defendants Walmart, Inc. and Wal-Mart Associates, Inc., advancing eleven (11) causes of action, as follows: discrimination, retaliation, harassment failure to prevent discrimination and harassment, failure to engage in good faith interactive process, and failure to provide reasonable accommodation, in violation of the Fair Employment and House Act (FEHA, at Gov. Code, § 12900, et seq.) (first, second, third, fourth, fifth, ninth, and tenth causes of action, respectively); retaliation in violation of Labor Code sections 98.6, 1102.5, and 6310 (sixth, seventh and eight causes of action respectively); and the tort of wrongful termination in violation of public policy (eleventh cause of action). Briefly, plaintiff does not explain in the operative pleading when she was employed by defendants, for how long, or where. She claims generically that defendants "subjected Plaintiff to discrimination/harassment/retaliation on the bases of gender, sexual harassment, marital status, disability/perceived disability, request for and exercise of reasonable accommodation, opposition/refusal to perform/disclosure of discrimination/harassment/retaliation, opposition/refusal to perform/disclosure of workplace safety violations, opposition/refusal to perform/disclosure of Labor Code violations, and assertion of rights under the Labor Code." Plaintiff also alleges that defendant "subjected Plaintiff to inferior terms and conditions of employment, offensive comments, tropes, and stereotypes regarding [her] disabilities and need for accommodation, yelling, sexual activity and displays at the workplace, unwanted sexual touching/propositions/comments from Defendant's customers all of which Defendant failed to investigate, prevent, correct, and remedy." Finally, plaintiff claims that defendant further subjected plaintiff to increased scrutiny, termination, and failure to restate a discrimination[-]free work environment, which amounted to disparate impact and disparate treatment. It is noteworthy that all are legal conclusions, unmoored to any specific facts. After the complaint was filed, defendants filed a Notice and Petition of Removal to federal court. The federal court denied the order and remanded the action back to this court.

Defendant has filed a demurrer to all eleven (11) causes of action, claiming the complaint contains bare conclusions of law without factual support. It claims that statutory causes of actions must be pleaded with particularity, and plaintiff (according to defendant) has failed to allege "any information as to her dates of employment, her job title or duties, the person(s) who allegedly discriminated, harassed and/or retaliated against her, the dates and any basic information concerning the purported incidents of discrimination, harassment or retaliation, conduct in which Plaintiff engaged that she claims is protected activity, the person(s) to whom Plaintiff made any complaint or reported any incident, or an witness or document related to her claims." (Motion, p.8.) Plaintiff has filed opposition, claiming the complaint "is sufficient on its own according to pleading standards." Defendant filed a reply on April 22, 2025. All briefing has been examined.

The court will divide the causes of action into three separate categories for ease of treatment. The first category will be all statutory FEHA claims (first, second, third, fourth, fifth,

ninth and tenth causes of action). The second category will be all non-FEHA retaliation causes of action (sixth, seventh and eighth causes of action). The third and final category will be the state tort claim based on wrongful discharge in violation of public policy. Each category will be explored separately.

A) FEHA Causes of Action (First, Second, Third, Fourth, Fifth, Ninth, Tenth)

Plaintiff alleges discrimination, retaliation, and harassment, based on the same serial list of categories – gender, sexual harassment, marital status, disability, request for reasonable accommodation, disclosure of violations of the law, including workplace safety violations, Labor Code violations, and assertions of rights under the Labor Code, without factual nuance or support.

For FEHA discrimination, retaliation, and harassment, as alleged by plaintiff in the first (discrimination), third (retaliation), and fourth (harassment) causes of action, plaintiff must at the pleading stage allege a prima face case, and this is accomplished by pleading essential facts *with particularity* sufficient to acquaint defendant with the nature, source, and extent of her FEHA causes of action. (*Alch v. Superior Cou*rt (2004) 122 Cal.App.4th 4th 239, 381-382 [FEHA discrimination must be pleaded with particularity]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604 [where plaintiff's claims for harassment and retaliation are founded on FEHA, which in turn is based exclusively on statute not the common law, facts in support of each of the requirements of a statute upon which the cause of action is based must be specifically pled].)

It is true, under these standards, that less specificity is required in pleading matters of which the defendant has superior knowledge. (*Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, 611.) But it simply is untrue, as plaintiff argues in opposition, that the essential facts are within defendant's knowledge alone – quite the contrary in fact. Plaintiff can plead what was said and done to her, by whom, and under what circumstances, which she manifestly has not done. Courts are not bound to respect a pleader's "legal characterization" of events or transactions when no underlying facts are given to support plaintiff's conclusory legal language. (*O-Grady v. Merchant Exchange Productions* (2019) 41 Cal.App.5th 771, 776-777.) That is the case here. Plaintiff's allegations as to all three FEHA claims are characterized by conclusory language or wrongdoing, steeped exclusively in statutory language and unmoored to any specific factual support. More must be provided.

The following causes of action suffer the same factual deficiencies: failure to prevent discrimination (second cause of action); failure to prevent harassment (fifth cause of action); failure to engage in good faith interactive process (ninth cause of action); and failure to provide for reasonable accommodations (tenth cause of action). As was true above, plaintiff utilizes conclusory language without factual support. Again, more must be pleaded.

The court sustains the general demurrer as to the first, second, third, fourth, fifth, eighth, ninth, and tenth causes of action, *with leave to amend*. Plaintiff bears the burden of show there is a reasonable possibility that the defects can be cured by amendment. (*Engel v. Pech* (2023) 95 Cal.App.5th 1227, 1235 [courts ask whether there is a reasonable possibility that the defect

in the operative pleading can be cured by amendment].) That standard has been met, and plaintiff will be afforded an opportunity to do so.

B) Retaliation under Labor Code section 98.6 (Sixth Cause of Action), section 1102.5 Seventh Cause of Action), and 6310 (Eighth Cause of Action)

These three causes of action at issue involve retaliation in violation of three different whistleblower statutes. "Both Labor Code sections 98.6 and 1102.5, subdivision (b) prohibit an employer from discriminating or retaliating against and employee for filing a complaint of disclosing information about a safety violation. Labor Code section 6310 protects an employee from discharge or other discrimination by the employer for filing a complaint about workplace safety." (*St Myers v. Dignity Health* (2019) 44 Cal.App.5th 301, 311.) All three causes of action have similar requirements, and all require an adverse employment action. To establish a prima facie case under each, plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) a causal link between the two. (*Ibid*.) The scope of "protected activity" is defined by the statute under which the plaintiff relies. (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592 ["An employee engages in activity protected by [section 1102.5] when the employee discloses ' "reasonably based suspicions" of illegal activity.' "]; *Garcia-Brower v. Premier Automotive Imports of CA, LLC* (2020) 55 Cal.App.5th 961, 972 ["Section 98.6 prohibits an employer from retaliating against an applicant or employee because the applicant or employee exercised a right afforded him or her under the Labor Code."].) An adverse employment action is one that "materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386.) With respect to the causal connection, the employee is not required to show that retaliation was the " 'but for' cause of the employment decision" but must show that retaliation was at least a "substantial motivating factor" for the decision. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 230, 232.)

Plaintiff has failed to allege ***any*** facts to support each element of all three statutes. For example, in the sixth, seventh, and eight causes of action, plaintiff simply incorporates by reference all aspect of the chain pleading allegations, underscored with the following conclusory statement for each cause of action -- "Defendants' actions constitute retaliation in violation" of the statute at issue. Nothing else is added, other than the perfunctory claim that this amorphous violation proximately caused loss. In the chain pleading portion of the complaint, plaintiff simply references the following as potential protected activity: "opposition/refusal to perform/disclosure of workplace safety violations, opposition/refusal to perform/disclosure of Labor Code

violations, and assertion of rights under the Labor Code." Nothing further is added. This is not enough, and plaintiff's opposition provides no meaningful argument in riposte.[1]

As an example, one very recent federal district court found that an amended pleading adequately stated a retaliation claim under section 1102.5 by pleading as follows: "Plaintiff's amended complaint adequately pleads a causal link and establishes that her patient abuse reports were a contributing factor in her termination. One, she pleads that her termination happened three weeks after her second patient abuse report, that there were no intervening circumstances in that timeframe that could contribute to her termination, and no prior performance issues were documented. (SAC ¶ 85.) Two, she pleads that around the time she made her second patient abuse report, Hampton falsely accused plaintiff of failing to document a patient-related assessment. (*Id.* ¶¶ 56, 57.) Three, she pleads that Hampton was the individual who effectuated her termination, and that she did so without required approvals. (*Id.* ¶86.) These facts, taken as true, allow the court to draw the reasonable inference that the there is a causal link between plaintiff's report of forced insulin administration to House Supervisor Ashley. (*Id.* ¶ 40.)" (*NEFRETIRI ABAT, Plaintiff, v. ALAMEDA HEALTH SYSTEM AND JACQUELINE HAMPTON Defendants.* (N.D. Cal., Mar. 26, 2025, No. 4:24-CV-01739-YGR) 2025 WL 1024114, at *3; see also *Sherman v. Pepperidge Farm, Inc.* (C.D. Cal., Apr. 28, 2023, No. 822CV01781JWHADS) 2023 WL 5207458, at *6 [strictures of § 1102.5(b) require a plaintiff to pinpoint "a statute, rule, or regulation" that may have been violated by the disclosed conduct].) Plaintiff's complaint falls far short of the factual specificity necessary to survive pretrial challenge under this authority. More must be pleaded.

The court sustains the demurrer with leave to amend as to the sixth, seventh and eighth causes of action, for the same reasons discussed above.

***C) Tameny* Cause of Action (11th Cause of Action)**

Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 establishes the existence of a separate state tort for wrongful discharge in violation of public policy. That is, when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action. (*Id.* at p. 170.) The tort must be tethered to fundamental polices delineated in statutory or constitutional provision. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 74.) FEHA provisions may provide the policy basis for a common law tort claim for wrongful termination in violation of public policy. (*Prue v. Brady*

[1] For example, plaintiff cites to *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822 and *AJ Fistes Corp. v. GDI Best Contractors, Inc.* (2019) 38 Cal.App.5th 677 in support of the claim that sufficient allegations have been made to withstand the demurrer. Neither case is apposite, for neither addressed the requisite factual pleading standards to support a FEHA cause of action (or any other cause of action at issue in this matter). Significantly, *Chen* and *A.J. Fistes* stand for the proposition that a special demurrer for uncertainty is generally disfavored. (*Chen, supra,* at p. 822; *A. J. Fistes, supra,* at p. 695.) The court, however, is examining the pleading deficiencies through the prism of defendant's ***general*** demurrer, not a special demurrer for uncertainty.

Co./San Diego, Inc. (2015) 242 Cal.App.4th 1367, 1383.) Where that occurs, the tort claim is tethered to the FEHA cause of action. (*Ibid*.) The court must look to the substantive provisions regarding the nature and scope of the FEHA allegations in determining the nature and scope of viable common law tort cause of action for wrongful termination in violation of FEHA's policy against discrimination.

Here, the only reasonable reading of plaintiff's eleventh cause of action is that it is tethered to plaintiff's alleged FEHA violations. Though it is a non-statutory cause of action, it nevertheless is the functional equivalent of a statutory FEHA claim. And because plaintiff has failed to state a viable FEHA claim, plaintiff has failed to state a viable *Tameny* cause of action.

The court sustains the demurrer with leave to amend as to the eleventh cause of action, for the same reasons discussed above.

Summary:

The court sustains the general demurrer as to all eleven (11) causes of action for failure to state sufficient facts in support of each. The claims are simply too conclusory, unmoored to any factual predicate, to survive pretrial challenge. Plaintiff has 30 days from today's date to submit an amended pleading.