PARTIES/ATTORNEYS

Plaintiff	Michelle McMillan	James H. Cordes Angelica J. Caro
Defendant	NurseCore Management Services, LLC	James D. Miller Paula C. Clark

PROPOSED TENTATIVE

On April 28, 2025, plaintiff Michelle McMillan (plaintiff) filed a complaint against defendant NurseCore Management Services, LLC (defendant), advancing four causes of action: 1) failure to prevent sexual harassment and discrimination pursuant to the Fair Employment and Housing Act (FEHA); 2) sexual harassment in violation of FEHA; 3) retaliation in violation of FEHA; and 4) the common law tort of wrongful termination in violation of public policy. Briefly, plaintiff was employed by defendant starting in 2004. She "resigned due to health concerns related to her work schedule and commute" in April 20, 2024 On or about July 28, 2024, she was contacted by the Santa Maria location of defendant "about a potential return to NurseCore caring for an autistic client who has been receiving services from NurseCore for a year." Plaintiff accepted the assignment and began working on August 5, 2024. From the start, "the client exhibited inappropriate behavior," including touching, tapping, kicking, and calling plaintiff "my love Michelle," which escalated into more aggressive actions, including pulling her arm, wrist, shoulder, and hair, even while plaintiff was driving. The client followed her about. Plaintiff documented these aggressive actions. On August 12, 2024, plaintiff reported these issues to her supervisor, requesting that a male nurse be present during her shift "because the client's behavior improved around men." Plaintiff learned that the client had a "documented history of sexual harassment against multiple female employees," and yet defendant "continued to assign female caregivers to this client without adequate protections or warnings." On August 15, 2024, the client "pointed" to plaintiff's breasts, "mockingly asking 'what are those?' while laughing, and attempted to grab them." The client's behavior "escalated" the next day, growing increasingly aggressive, including placing his hands in plaintiff's pants, and laying on top of her. Plaintiff fled in tears, and went to her car. While in her car, plaintiff reported the incident to defendant, saying she would not return to work and asked for a different assignment. Plaintiff nevertheless made one final attempt to return inside. The client "launched himself" at her, "put his hand between her legs, grabbed her crotch, and attempted to grab her breasts." The nurse pulled the client away, and plaintiff ran outside to wait for her replacement. Plaintiff again reported the incident to defendant, who assured her a replacement "was on the way."

After August 16, 2024, defendant "offered [plaintiff] the opportunity to return to work with the client on the condition that he was medicated. Plaintiff declined. Defendant then offered plaintiff only a single shift in Orcutt California, which was "a significant departure from her established pattern of longer-term assignments." Plaintiff declined this assignment. "Following these limited offers, [defendant] ceased communicating with [plaintiff] about her employment status and did not conduct an interview with her regarding the sexual harassment incidents." "[Defendant] contacted [plaintiff] again in late September 2024, but by this time, she had already secured employment with another employer."

Defendant has filed two motions. The first is a demurrer, challenging the third cause of action for retaliation under FEHA and the fourth cause of action for wrongful termination tort under California law. The second is a motion to strike, asking the court to strike all references to punitive damages, which have been alleged as to all four causes of action. Plaintiff has filed opposition to each motion. Defendant has filed a reply to each opposition. All briefing has been reviewed.

The court will examine each motion separately. As for the demurrer, the court will detail the allegations in the complaint as to the two causes of action at issue, discuss the arguments advanced by both parties, outline the legal background that frames the issues, and then address the merits of the arguments advanced. As for the motion to strike, the court will detail the relevant allegations, describe the arguments advanced, and move straightaway to the merits. The court will finish with a summary of its conclusions.

A) Demurrer

1) Allegations in the Complaint

The two causes of action at issue are retaliation under the FEHA and wrongful termination in violation of public policy. As for retaliation, plaintiff contends "that the subsequent and harassing conduct of defendant and her eventual termination of employment were substantially motivated by her opposition to the sexual harassment discussed above [i.e., based on a client's (third party's] sexual harassing conduct]." (Emphasis added.) "As a direct and proximate result of the discriminatory conduct of Defendants, Plaintiff has suffered and continues to suffer extreme and severe mental anguish and emotional distress of the sort naturally associated with retaliation in employment."

As for wrongful termination in violation of the public policy, plaintiff alleges that it is "injurious to the public and against the public good to permit an employer to terminate an employee in retaliation for reporting discrimination and sexual harassment to an employer. Such termination violates and circumvents existing and express polices of the State of California." "As a direct and proximate result of the discriminatory conduct of Defendants as alleged herein, Plaintiff has suffered and continues to suffer substantial losses in earnings and job benefits, and has suffered extreme and severe mental anguish and emotional distress of the sort naturally associated with wrongful termination of employment."

2) Arguments by Parties

It seems clear from the face of the complaint that plaintiff bases the retaliation and the wrongful termination in violation of public policy causes of action on her termination from defendant's employment. (¶ 40 in association with retaliation – "her eventual termination" were "substantially motivated by her opposition to the sexual harassment discussed above"]; ¶ 45 [in association with wrongful termination in violation of public policy, it is improper to terminate for reporting discrimination and sexual harassment to an employer].) According to defendants, as to

the retaliation cause of action, plaintiff "does not allege any protected conduct that supports this cause of action." Further, defendants argue that the complaint is "vague and ambiguous" regarding her "termination." That is, plaintiff claims (on one hand) that she was terminated, although defendant "contacted her" for employment in September 2024, when she (plaintiff) ultimately declined any offer of employment "because she had already secured employment with another employer." According to defendant, "Plaintiff's conclusory statements and contradictory facts fail to establish" causation and damages.

Defendant advances similar challenges to the wrongful termination in violation of public policy cause of action. Specifically, according to defendant, none of the elements of this cause of action are shown "if Plaintiff does not allege that Defendant terminated or discharged her. . . . Plaintiff does not allege facts demonstrating that Defendant terminated her in any manner or took any adverse employment action against her." Additionally, as a result, plaintiff fails to plead actual harm, as there is no showing she was "terminated," if she voluntarily took employment elsewhere.

Plaintiff in opposition insists that she has pleaded all elements of a retaliation cause of action with sufficient facts. She claims she has alleged protected activity (reported sexual harassment incidents, requested reasonable protective measures, and indicated she would work with the client no longer after reporting the measures proposed were insufficient).She claims she has alleged an "adverse employment action," in that she was only offered "two unacceptable alternatives" after she reported, and "Defendant materially altered [plaintiff's] employment terms immediately following her harassment complaints." That is, pursuant to the complaint, plaintiff could return to work with the same harassing client or a single, economically unreasonable shift, and thereafter, "defendant stopped communicating with plaintiff . . . ." This represents a "dramatic departure from Defendant's established practice," and following her complaints, which were left uninvestigated, "effectively" eliminated "the economic viability of the employment relationship . . . ." Further, according to plaintiff, "the causal connection" between the protected activity and her "termination" exists through "both proximity and dramatic shift in Defendant's treatment." Finally, according to plaintiff, she has adequately alleged harm. Plaintiff also alleges that all elements of the fourth cause of action for wrongful termination in violation of public policy has been alleged, based on the same allegation associated with the retaliation cause of action.

3) Legal Background

Government Code section 12940, subdivision (h) (under FEHA) "makes it an unlawful employment practice '[f]or any employer ... to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this

part.'" (*Yanowitz* v. *L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042.) "[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Ibid; Vines v. O'Reilly Auto Enterprises, LLC* (2022) 74 Cal.App.5th 174, 185; see also *Wawrzenski v. United Airlines, Inc.* (2024) 106 Cal.App.5th 663, 699.)

"Protected activity" includes "oppos[ing] conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA. It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA." (*Yanowitz, supra*, 36 Cal.4th at p. 1043.) The "reasonableness of the employee's belief 'has both a subjective and an objective component.' " (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 381; accord, *Vines v. O'Reilly Auto Enterprises, LLC, supra*, 74 Cal.App.5th at pp. 185-186.) "To meet his burden on this issue, '[a] plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.' [Citation.] The objective reasonableness of an employee's belief that his employer has engaged in a prohibited employment practice 'must be measured against existing substantive law.' " (*Dinslage*, at pp. 381-382; see *Vines*, at pp. 185-186.)

The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641; see also *Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 154.) A plaintiff can bring a claim for wrongful discharge even if she resigns, if her resignation amounts to a constructive discharge. (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 826.) This occurs when the resignation is "*employer*-coerced, [and] not caused by the voluntary action of the employee or by conditions ... beyond the employer's reasonable control." (*Turner v. Anheuser–Busch, Inc.* (1994) 7 Cal.4th 1238, 1248 (*Turner*).) A resignation is "employer-coerced" only if the "employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.* at p. 1251; accord, *Vasquez*, at p. 826.) " '[S]ingle, trivial, or isolated acts' " are generally not sufficient to support a finding of constructive discharge. (*Turner*, at p. 1247; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1056.) "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer

would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra*, 7 Cal.4th at p. 1251; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1022 [plaintiff must plead and prove a constructive discharge, meaning the employer intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in employee's position would be compelled to resign].) The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee. (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 319; see CACI 2432.)

4) Merits

With this background, the court initially rejects defendant's claim that the third and fourth causes of action are fatally ambiguous. Demurrers for uncertainty are generally disfavored (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822) because "under our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled . . . ." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.) The allegations in the operative pleading are not so confusing, ambiguous or unintelligible that they cannot be understood.

Additionally, the court rejects defendant's claim that plaintiff has failed to allege sufficient facts to demonstrate a "protected activity" for purposes of the retaliation cause of action (and as a corollary, rejects defendant's claim that plaintiff has failed to allege a violation of public policy for purposes of the wrongful termination in violation of public policy). Although plaintiff's language in the operative pleading is at times imprecise,[1] she has alleged "protected activity" as contemplated under the statutory scheme. While the "client" who engaged in the aggressive sexual misconduct was not an employee, but a customer, the Legislature, to encourage compliance with FEHA, has prohibited an employer from retaliating against any individual for opposing a FEHA violation (such as physical sexual harassment), perpetrated by customers, patrons, vendors, independent contractors, or others. This promotes the purpose of the statute by encouraging anyone with knowledge of a FEHA violation to oppose it with the protection of legal prohibition against retaliation. This interpretation is commensurate with the word "person" to include a customer within the definition of Government Code section 12925, subdivision (d); see also Gov. Code, § 12940, subd. (j)(1) [an employer may also be responsible for acts of nonemployees, with respect to harassment of employees, if the employer knows or should have known of the conduct and fails to take

[1] For example, in the third cause of action for retaliation alleges that "the subsequent offense and harassing conduct of Defendants . . . were substantially motivated by her opposition to the sexual harassment discussed above." The sexual harassment was made by the client, not representatives of defendant. Plaintiff claims defendant's (or its representatives) used the fact plaintiff reported the misconduct as a basis for retaliation or as the predicate for wrongful termination. The imprecision, while clumsy, is not fatal.

immediate and appropriate corrective actions].) Defendant employed plaintiff who was the alleged victim of the sexual harassment/misconduct by defendant's client; and there are sufficient facts to suggest defendant was aware of this harassment/misconduct, as it was reported by plaintiff to defendant. This is sufficient. (See, e.g., *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1182, fn. 6.) This conclusion also applies to the public policy determination attendant to the wrongful termination in violation of public policy cause of action.[2]

This being said, the court sustains the demurrer as to both causes of action at issue. Central to both causes of action is the fact plaintiff claims she was terminated, and that the reason for the termination was the fact she reported the client's sexual harassment. Accordingly, plaintiff's "discharge" is the essential adverse employment action critical to both causes of action.

But plaintiff was not "terminated" in the traditional sense – as plaintiff indicates in paragraphs 22 and 23 of the operative pleading. Throughout her complaint, plaintiff alleges that she joined defendant in June 2004, and worked continuously "***until*** April 30, 2024," when she left. (¶ 11.) She was then hired back on or about July 18, 2024, in order to care for a single autistic client in Santa Maria. "In the days following the" sexual harassment incidents with the autistic client, 1) defendant offered plaintiff the opportunity to return to work with the client on the condition he was medicated; plaintiff declined; 2) defendant offered plaintiff a single shift in Orcutt, "which was a significant departure from their established practice of offering her longer-term assignments"; plaintiff again declined "because the commute time and expense was not reasonable for a single shift"; and 3) defendant ceased communication until September 24 (no more than a month a later), when defendant offered her more work, "but by this time she had already secured employment with another employer." For the very first time ***in opposition***, plaintiff raises the specter that she was constructively terminated -- by hinting that "an 80% reduction in daily workdays coupled with a longer commute, effectively eliminated the economic viability of the employment relationship." (P. 5 of Opp.)

That is not enough to allege constructive termination. Constructive discharge or termination must be adequately pleaded. (*Turner, supra*, 7 Cal.App.4th at p. 1251.) It is mentioned for the first time in opposition. More substantively, the court is not disputing that the doctrine of constructive discharge was crafted to disabuse any employer's attempts to avoid liability by engaging in conduct causing the employee to quit. But constructive discharge occurs only when the employer's conduct effectively forces an employee to resign. An employee cannot simply "quit and sue," claiming she was constructively discharged. She must show that the conditions giving rise to the resignation were sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee

[2] Defendant in reply seems to concede that plaintiff has adequately pleaded a "protected activity" for the retaliation cause of action and an adequate public policy for the wrongful termination cause of action. (Reply, p. 3.)

to remain in the job to earn a livelihood and to serve her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee. One of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions. (*Atalla, supra,* 89 Cal.App.5th at p. 319.)

Nothing in the operative pleading comes close to satisfying these requirements. All plaintiff has alleged is the possibility of a constructive discharge. She has failed to allege any conditions that gave rise to her declining future employment that were egregious and coercive, meaning the employer's conditions were so intolerable that any reasonable employee would resign. Here, plaintiff severed her relationship with defendant in April 2024 – and was hired back in August 2024 to provide ongoing care on a single project. While plaintiff contends that she was later offered a single shift in Orcutt, and claims this "was a significant departure from [defendant's] established practice of offering her longer-term assignments," there is no allegation that any more protracted job opportunities existed. More to the point, plaintiff declined the job Orcutt "because of the commute time and expense . . .," which has nothing to do with the any intolerable conditions created by the employer. Plaintiff has manifestly failed to allege that defendant's conduct created conditions so intolerable that any reasonable employee would resign rather than endure such conditions. On this pleading, it appears plaintiff's geographic distance from Santa Maria and Orcutt, with elevated commuter expenses, played a significant role in her decision to seek employment elsewhere. If plaintiff wishes to rely on a constructive discharge theory as the critical element of either cause of action, more must be pleaded. It follows from this deficiency that plaintiff has not alleged harm or an adequate nexus between harm (termination) and the protected activity.

The court sustains the demurrer as to the third and fourth causes of action, with leave to amend.

B) <u>Motion to Strike</u>

1) Allegations in the Complaint

As to each of the four causes of action, plaintiff asks for punitive damages. The allegations are the same – "the outrageous conduct of Defendants, as described herein, was willful and done with fraud, oppression, and malice and with a conscious disregard for Plaintiff's rights to be free from sex-based harassment, and with the intent, design, and purpose of injuring her. Defendant authorized, condoned, and ratified the unlawful conduct by failing to take immediate and appropriate corrective action. . . ." (¶¶ 30, 37, 42, and 47.)

2) Arguments by Parties

Defendant claims that plaintiff fails to allege particular facts which impose punitive damages liability on defendant, offering only "generally conclusory allegations." Specifically, according to defendant, there are no allegations that anybody acted with malice, oppression or fraud. Further, to allege punitive damages against an employer, plaintiff must plead that the offending party was an officer, director, or managing agent of defendant, that has not been done. Plaintiff insists she has alleged a sufficient factual predicate for punitive damages against defendant.

3) Merits

The court will not grant defendant's motion to strike on the ground that plaintiff failed to allege malice, oppression or fraud. Plaintiff in the allegations recounted above has alleged that defendant intended to injure plaintiff, which is an alternative basis for malice, oppression or fraud, and is sufficient by itself to survive challenge. (*G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29 ["When the plaintiff alleges an intentional wrong, a prayer for exemplary damage may be supported by pleading that the wrong was committed willfully or with a design to injure"]; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041 [same]); *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1055 [a claim for punitive damages may be supported by pleading that the wrong was committed with design to injure].)[3]

Nevertheless, the court grants the motion to strike. Plaintiff has manifestly failed to comply with the requirements of Civil Code section 3294, subdivision (b). Plaintiff must allege specific facts with respect to a corporate employer, that the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation. Pursuant to *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 576–577, the term "managing agent" includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determinate corporate policy. The "mere ability to hire and fire employees" does not render a supervisor employee a managing agent. Rather, it is the discretion an employee wields in their decision-making and the extent to which their decisions inform corporate policy that are determinative. Corporate policy has been defined in this context as encompassing "the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167-168 .)

Plaintiff claims her allegations meet this standard, citing paragraphs 14, 16, 19 and 22 of the operative pleading. Plaintiff mentions two individuals in the pleading – Lora Aladdin, "Branch Director of Santa Maria," and Patricia Parker-Bundy, "Client Service Specialist." We

[3] Defendant in reply overlooks this line of authority (i.e., allowing punitive damages based on allegations that defendant's acts were done with the intent or design to injure the plaintiff).

are not told what their duties are, other than hiring and firing, which is not enough. (*White, supra*, 21 Cal.4th at p. 575 [a managing agent is more than a supervisor or someone with hiring and firing powers; a "managing agent" must also have "substantial authority over decisions that ultimately determine corporate policy].) There are no allegations that either of these employees has "substantial authority over decisions that set . . . general policies and rules" in any of these four paragraphs. In *White,* for example, a regional director of eight stores was deemed a managing agent. In *Tilket v. Allstate Ins. Co*. (2020) 56 Cal.App.5th 521, 554, the director of human resources was deemed a managing agent, as he helped guide application of company policy, and formulated operational corporate policy. And in *King v. U.S. Bank National Assn*. (2020) 53 Cal.App.5th 675, a human resources generalist overseeing the commercial banking division of the bank was a managing agent. *Nothing* in the plaintiff's complaint indicates in any way that these two individuals have similar power or status as the managing agents in these cases. *Nothing* indicates they exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy, notably as defendant has multiple locations in multiple states. (*White, supra,* at p. 572.) To align with *White,* and progeny, more facts must be alleged.

The court grants the motion to strike with leave to amend.[4]

C) Summary

- The court sustains defendant's demurrer on the ground that plaintiff has not adequately alleged an adverse employment action as to the third and fourth causes of action. To the extent plaintiff relies on a ***constructive termination*** rationale, that basis has not been adequately pleaded. It follows from this that plaintiff has failed to allege sufficient causation and harm. The court rejects all other grounds advanced by defendant in support of the demurrer, as detailed in this order. Leave to amend is granted.

- The court rejects defendant's claim that plaintiff has failed to allege a proper factual basis for punitive damages, as she has alleged that defendant (and defendant's representatives) acted with an intent or design to injure plaintiff, which is sufficient to survive a motion to strike. That being said, the court grants the motion to strike because plaintiff has failed to allege a sufficient factual basis for corporate employer liability under the standards enunciated in Civil Code section 3294, subdivision (b). Plaintiff has failed to allege that either Lora Aladdin or Patricia Parker-Bundy are managing agents as that term is utilized in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563 and progeny. Leave to amend is granted.

[4] In reply, defendant argues the court should "strictly limit" plaintiff's ability to amend. The court rejects this argument. Plaintiff is afforded the opportunity to plead sufficient facts to support punitive damages on a managing agent theory.

- The court allows plaintiff 30 days from today's hearing to file a first amended pleading. Plaintiff is further directed to file a "redlined" version of the amended complaint.