

Tentative Rulings –January 5, 2006

To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

Berry v. City of Jackson: 04CV3566

Petitioner's Motion for Attorney's Fees

Petitioner's Motion for Attorney's Fees is hereby continued, on the court's own motion, to January 19, 2006 at 3:15 p.m. in Department 2. Petitioner's Notice of Motion fails to comply with Amador County Local Rule 4.03. Petitioner to file and serve an amended notice, in compliance with Rule 4.03, no later than January 12, 2006.

McDaniel v. Douglas: 04CV3207

Defendants' Demurrer to First Amended Complaint

There is no tentative ruling in this matter pursuant to Amador County Local Rule 4.03, subdivision (F).

Agatha v. Amador County Superior Court Case #05-CV-3942 - Demurrer - Tentative Ruling

The Court rules as follows on defendants' demurrer.

The complaint alleges seven causes of action:

(1) Breach of mandatory duty against defendants Superior Court of California, County of Amador (Court), Judge Susan Harlan (Judge Harlan), the Judicial Council (Council), and the Commission on Judicial Performance (Commission);

(2) FEHA gender discrimination against Superior Court of California, County of Amador, the Judicial Council, Administrative Office of the Courts (AOC) and the Office of the General Counsel (OGC);

(3) FEHA retaliation against the Court, the Judicial Council, AOC, OGC, Judge Harlan, Judge Richmond, Hugh Swift and William Vickrey;

(4) Constructive wrongful termination against the Court, the Judicial Council, the AOC and OGC;

(5) Wrongful termination in violation of public policy against Court, Judicial Council, AOC and OGC;

(6) Breach of the implied covenant of good faith and fair dealing against Court, Judicial Council, AOC and OGC; and

(7) Intentional infliction of emotional distress against the Court, Judge Harlan, Judge Richmond, Hugh Swift, Judicial Council, AOC and OGC.

The Court notes that plaintiff has filed voluntary dismissals of the Judicial Council and the Commission on Judicial Performance as to the first cause of action. She has also filed a dismissal as to OGC and a dismissal of Hugh Swift as to the third cause of action.

Defendants have properly noticed and set forth a general demurrer as to each cause of action. Since several of the grounds in support of the demurrer apply to more than one cause of action, the Court will address the specific grounds in the same manner as the parties' points and authorities.

As a preliminary matter, the parties' requests for judicial notice are unopposed and are granted. The Court has considered the judicially noticed materials in reaching its decision.

Timely Tort Claim

Defendants demur to the first, fourth, fifth, sixth and seventh causes of action on the ground that plaintiff failed to file a timely claim pursuant to the Government Tort Claims Act. According to the allegations of the complaint, plaintiff submitted her letter of resignation to the Court on July 12, 2004, effective July 23, 2004 and she filed a government tort claim naming the various defendants on April 11, 2005. Government Code section 911.2 requires that a claim for personal injury be made within six months of the accrual of the cause of action. The record shows the claim was rejected on May 25, 2005 and plaintiff was sent the statutorily required notice that her claim was untimely. (Government Code section 911.3.)

Plaintiff does not dispute defendants' contentions that her claim was late. Rather, she contends that she complied by filing her claims with the DFEH within two months of her constructive discharge. Plaintiff relies on *Garcia v. Los Angeles Unified School District* (1985) 173 Cal.App.3d 701 in support of this contention. The reliance is misplaced. *Garcia* stands merely for the proposition that there is no need to file a separate tort claim where a Department of Fair Employment and Housing (DFEH) claim has been filed alleging violations of the FEHA. *Garcia* does not excuse the filing of a tort claim for personal injury claims that fall outside the FEHA. Well-established law states otherwise. Plaintiff is required to file a timely tort claim or seek permission to file a late claim. She has done neither. The failure to file a timely claim is a bar to the first, fourth, fifth, sixth and seventh causes of action. Defendants' demurrer on this ground is sustained.

As to the fifth (*Wrongful termination in violation of public policy*) and sixth (*Breach of the implied covenant of good faith and fair dealing*) causes of action, plaintiff concedes in her opposition that she cannot maintain these claims. She states that she will file a voluntary dismissal of these causes of action. In light of the concession, the demurrers to the fifth and sixth causes of action are sustained without leave to amend.

Lack of Employment Relationship

Defendants Judicial Council and AOC demur to the second through fifth causes of action on the additional ground that as a matter of law they are not plaintiff's employer. The Court agrees. Plaintiff's allegations regarding these defendants' status as her employer are entirely conclusory. The law states otherwise. Government Code section 71620(b) provides in pertinent part, "each trial court may appoint an executive or administrative officer who shall hold office at the pleasure of the trial court and shall exercise such administrative powers and perform such other duties as may be required by the trial court." The Court is plaintiff's employer as a matter of law.

Plaintiff's opposition fails to persuade the Court that she will be able to allege facts to support her claim that these defendants were her employer. Thus, the demurrer on this ground is sustained without leave to amend.

Defendant Vickrey's demurrer to the third cause of action on this ground is also sustained without leave to amend. William Vickrey is not plaintiff's employer or supervisor as a matter of law.

Failure to Exhaust Administrative Remedies and Statute of Limitations

Defendants Court, AOC and Judicial Council demur to the second (*FEHA gender discrimination*) cause of action and defendants Court, Judicial Council, AOC, Judge Harlan, Judge Richmond and William Vickrey demur to the third (*FEHA retaliation*) cause of action on the ground that plaintiff failed to exhaust her administrative remedies because her DFEH complaints were verified by her attorney instead of herself.

Plaintiff does not argue that her attorney could properly verify the complaint. Instead, she contends that the lack of plaintiff's own verification is a "technical defect" excusable under the reasoning of *Sandhu v. Lockheed Missiles* (1994) 26 Cal.App.4th 846.

Defendants contend without citation to any specific on point authority that a charge verified by the complaining party is a jurisdictional prerequisite to filing a lawsuit. Thus, plaintiff has failed to exhaust her administrative remedies.

The demurrer on this ground is overruled. The Court has no quarrel with defendant's contention that the statute requires a verified complaint. However, the Court is not persuaded that the failure of plaintiff to personally verify the DFEH complaint is fatal to the bringing of the action. This is not analogous to untimely filing of the DFEH claim, established by case law as barring the lawsuit.

Generally, even where, as here, verification is required by statute, the failure to verify is not a jurisdictional defect. There is well-established law relating to both administrative proceedings and pleadings in general that the failure to verify is a mere defect that is curable by amendment even when submitted after the statute of limitations has run on the time to file the original complaint. (See e.g. *United Farmworkers of America v. Agricultural Labor Relations Board* (1985) 37 Cal.3d 912)

Review of the claims filed with the DFEH demonstrates that the claims give defendants sufficient notice to permit investigation. In light of the remedial nature of the statute, the lack of proper verification is a technical defect that policy dictates should not be permitted to bar plaintiff's lawsuit against her employer the Superior Court of the State of California, County of Amador and Judges Harlan and Richmond.

Governmental Immunity

Defendants contend that plaintiff's fourth through seventh causes of action fail as a matter of law under Government Code section 815. As stated above plaintiff has conceded the fifth and sixth causes of action. As to the fourth and seventh causes of action, plaintiff contends that defendants are liable as employers for the actions of their employees under Government Code section 815.2.

The fourth cause of action is a common law constructive discharge claim. It is currently pled against the Court, AOC, and Judicial Council. Only the employer can be held liable for constructive discharge. As stated above the AOC and Judicial Council were not plaintiff's employers as a matter of law. As to the Court, in the circumstances here Government Code section 815.2 does not save this claim. There can be no vicarious liability for employee conduct that is not actionable. (See e.g. *Palmer v. Regents of the University of California* (2003) 107 Cal.App.4th 899)

The demurrer to the fourth cause of action on the ground that it is barred by Government Code section 815 is sustained. The Court is not persuaded that such a claim may be pled against the defendants named. The demurrer to the fourth cause of action is sustained without leave to amend.

Defendants' demurrer to the seventh cause of action for intentional infliction of emotional distress is overruled on this ground. Government Code section 815.2 applies.

Workers Compensation Exclusive Remedy

Defendants demur to the seventh cause of action for intentional infliction of emotional distress on the ground that it is barred by the exclusive remedy of the Workers Compensation Act. The demurrer on this ground is overruled. The emotional distress claim is derivative of plaintiff's claims for unlawful discrimination and harassment under the FEHA. Unlawful discrimination is not a normal incident of employment. The Workers' Compensation Act does not preempt a claim for intentional infliction of emotional distress based on discrimination. (See e.g. *Fretland v. County of Humboldt* (1999) 69 Cal.App4th 1478, 1484)

Hugh Swift demurrer

Defendant Hugh Swift demurs to the seventh cause of action on the ground that the complaint alleges no facts against him that state such a cause of action. The demurrer is sustained. Since plaintiff asserts in her opposition that she is able to sufficiently plead such a claim the demurrer is sustained with leave to amend.

Conclusion

(1) The demurrer for failure to state a cause of action to the first (*mandatory duty*) cause of action is sustained without leave to amend as to the Judicial Council [*the Court notes the AOC is not named in the caption of this cause of action.*].

Leave to amend is granted limited to defendants Superior Court of the State of California, County of Amador and Judge Harlan if plaintiff believes that she is able to plead facts that would excuse the untimely filing or permit late filing of the tort claim.

The Commission has been dismissed.

(2) The demurrer for failure to state a cause of action to the second (*FEHA discrimination*) cause of action is sustained without leave to amend as to defendants Judicial Council and AOC.

The OGC has been dismissed.

It is overruled as to the Court.

(3) The demurrer to the third (*FEHA retaliation*) cause of action is sustained without leave to amend as to Judicial Council, AOC and Vickrey.

OGC and Swift have been dismissed.

The demurrer is overruled as to Judges Richmond and Harlan and the Court.

(4) The demurrer to the fourth (*constructive discharge*), fifth (*wrongful discharge, Tamenny*) and sixth (*breach of the covenant of good faith and fair dealing*) causes of action is sustained without leave to amend as to all defendants.

(5) The demurrer to the seventh cause of action is sustained as to all defendants for failure to file a timely tort claim. Leave to amend is granted limited to the Court, Judge Harlan, Judge Richmond and Hugh Swift if plaintiff believes she can state a cause of action against these defendants and that she is able to plead facts that would excuse the untimely filing or permit late filing of the tort claim.

Plaintiff shall file and serve a first amended complaint in compliance with this ruling no later than January 27, 2006. Defendant shall file a response no later than February 17, 2006.