
Attorneys for Plaintiff,
MARIA SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ARALIA

MARIA SMITH, Plaintiff, vs. DILLON CONSTRUCTION, JOHN LEE, and DOES 1-20 inclusive, Defendants. _____/	Case No. 654321 PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT DILLON CONSTRUCTION'S DEMURRER TO FIRST AMENDED COMPLAINT Date: Time: Dept. Complaint filed: Trial date:

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Plaintiff Maria Smith alleges that defendant Dillon Construction, her long-time employer, fired her without good cause after a back injury and a subsequent family medical leave to deal with complications of pregnancy. She pleads violations of FEHA ((1) disability discrimination; (2) perceived disability discrimination; and (3) retaliation); (4) violations of state and federal family leave acts; (5) breach of contract and its implied covenant of good faith and fair dealing; and (6) negligent infliction of emotional distress.

Facts alleged in First Amended Complaint

Smith joined Dillon Construction in 2___. In 2___ she was performing well as a warranty administrator when she hurt her back on the job. She sought medical care, missed three days of work, filed for worker's compensation, and returned to her office with medically prescribed work restrictions: no repetitive heavy lifting, no heavy pushing or pulling, and no reaching above the shoulders. These restrictions did not impair Smith's job performance.

When Smith was injured she was one month pregnant. Toward the end of her pregnancy she suffered complications and subsequently requested three months' family leave of absence to deal with these complications and their aftermath, as provided by law.[1]

Defendant John Lee, Smith's supervisor, rebuffed her for requesting leave and threatened to fire her if she left. After waiting several weeks, Smith took leave despite Lee's threat. The day before she began her leave, Lee again threatened her that, if she took leave, she would lose her job.

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[1]California Family Rights Act [CFRA], Gov't Code §§ 12945 to 12945.2; Family Medical Leave Act of 1993 [FMLA], 29 U.S.C. §§ 2601 to 2654. The two acts are similar as they apply to Smith's FEHA claims and to her third and fourth causes of action. Hereafter, references to FMLA should be understood as including the CFRA unless otherwise indicated.

The day before Smith's leave ended, Lee told her not to return to work because Dillon Construction could no longer accommodate her work restrictions. One month later he told her that her position had been filled, and Dillon Construction discharged her. She filed a timely complaint with the DFEH and received a right-to-sue letter.

ARGUMENT

1. Smith has exhausted her administrative remedies.

Smith filed a timely DFEH complaint and received a right-to-sue letter. Complaint ¶ 20. Dillon Construction, submitting copies of Smith's DFEH and EEOC filings with their motion as Exhibits A & B, respectively, argues that these filings leave the First Amended Complaint incurably defective because they do not "specify" Smith's charges against Dillon Construction. Not so. Smith's administrative complaints satisfy FEHA and CFRA / FMLA notice requirements.

The Court should reject this ground as to all causes of action because it rests on overly narrow standards for administrative complaints.

A. Courts use a liberal "like or reasonably related" test determine the permissible scope of FEHA and related causes of action.

FEHA mandates that its requirements "be construed liberally for the accomplishment of [its] purposes." Gov't Code § 12993(a); *City of Moorpark v Superior Court* (1998) 18 Cal 4th 1143, 1157. Similarly, within the Ninth Circuit, EEOC complaints must be construed "with the utmost liberality." *EEOC v. Farmer Bros.* (1994) 31 F.3d 891, 899; *Deppe v. United Airlines* (9th Cir. 2000) 217 F.3d 1262, 1267, fn. 22.

Neither FEHA nor analogous federal statutes delineate the standards for testing civil causes of action against administrative complaints, but California and federal courts concur that the purpose of the exhaustion requirement is to let the DFEH or the EEOC

investigate and try to conciliate discrimination disputes. This purpose is met when the scope of a civil action is not limited by the administrative complaint per se but rather by "the scope of the EEOC [or DFEH] investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 466. Accord, *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (applying this test, and *Sanchez* is the leading case in this area). A shorter name for the same standard is the "like or reasonably related" test. *Id.*, 36 Cal.App.4th at 1614.

The like-or-reasonably-related test, based as it is on what facts a reasonable agency investigation of a particular charge would likely discover, encompasses various kinds of similarities and relationships. Some cases involve *uncharged incidents* based on the *same kind of discrimination*. See, e.g., *Oubichon v. North American Rockwell Corp.* (9th Cir. 1973) 482 F.2d 569, in which, while EEOC was investigating a charge of race discrimination based on a disciplinary suspension employer imposed on employee for joining a demonstration against it by the Congress of Racial Equality, the employer engaged in three more acts of racial discrimination. The plaintiff could seek relief for all these acts. Other cases involve *charged* incidents with *different but related kinds of discrimination*, such as race and national origin. See *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846: the plaintiff's uncharged national-origin discrimination claim (India) was reasonably related to his charged race-discrimination claim ("Asian"), since investigating the race-based charge would likely lead to discovering the uncharged national-origin-based discrimination. See also *Deppe v. United Airlines, supra*, 217 F.3d at 1267: where an EEOC charge alleged "perceived disability," a civil action could proceed on a related theory of "record of" such discrimination.

B. A reasonable investigation of Smith's DFEH complaint would have disclosed her disability and perceived disability discrimination claims arising from her back injury as well as those arising from complications of pregnancy.

Smith's administrative complaint charged gender and disability discrimination based on the following facts. Smith, by then a *ten-year employee*, sought leave because of pregnancy complications. Her supervisor, John Lee, threatened to have her fired if she went on leave. She went anyway. When her leave ended, Lee told her "he could not accommodate my work restrictions." Dillon Construction discharged her for a different stated reason: "abandonment of employment." Thus Smith charged two threats (against taking leave) and one discriminatory act (wrongful discharge). She also charged two potentially inculpatory explanations: burdensome work restrictions (Lee) and abandonment of employment (Dillon Construction).

These charges, though less specific than they might have been, were enough to launch an investigation that, if DFEH or EEOC had begun it, very likely would have led to facts underlying each of Smith's FEHA and FMLA /CFRA causes of action. Lee's explanation clearly points to discrimination based on some actual or perceived disability. Dillon Construction's explanation, though quite different, could be a pretext for the same types of discrimination as well as FMLA and CFRA violations. From the facts Smith gave DFEH, Dillon Construction's discharging her might also indicate retaliation for her taking FMLA leave.

To be sure, Smith's DFEH complaint focuses on Dillon Construction's denial of leave to deal with pregnancy complications and does not mention any work-related injury or other medical condition. Yet given the time-line, Lee's reference to "work restrictions" could hardly have been pregnancy-related. When Smith asked for leave because of pregnancy complications, Lee warned her, twice, not to go. If he wanted her to stay despite her medical condition when she took leave, he could have accommodated

her work restrictions when she returned. The best inference is surely that Lee was referring to *other* work restrictions. Smith might have specified her disability more clearly but Lee and Dillon Construction, at least, well knew what disability she meant. DFEH could not have known without asking, but they should have suspected—and very likely did suspect—an *additional, pre-existing, non-pregnancy-related* disability for which Smith was also charging discrimination. Even if they did not actually suspect such a thing, they could not reasonably have investigated Smith's charge and failed to ask her what she meant.

In sum, Smith's DFEH complaint, fairly read, charges disability or perceived disability discrimination arising from two causes: (1) pregnancy complications and (2) some additional condition, not specified but (a) pre-dating the pregnancy complications and (b) serious enough to require work restrictions, which Lee tried to use to justify his causing Dillon Construction to fire Smith.

C. Smith's DFEH complaint plainly stated retaliation and FMLA claims.

In view of the like-or-reasonably-related test, Smith cannot understand Dillon Construction's (shorter) challenge to her retaliation and FMLA claims. Smith explains the FMLA violation: unlawful refusal to grant leave. She all but explains the retaliation claim: discharge in retaliation for taking leave despite Dillon Construction's refusal to grant it. She also states the facts that support this claim: two warnings from her supervisor that if she went on leave he would have her fired. Omitting the label "retaliation" from the DFEH complaint is immaterial, just as it would be if she had omitted it in this action. See, e.g., *Deppe v. United Airlines, supra,* 217 F.3d at 1267, in which the plaintiff alleged sufficient facts in his EEOC charge, and thus his judicial complaint for another theory of discrimination could proceed. Cf. *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3rd 1057: an action for race-based

harassment and other disparate treatment based on race could proceed despite being based on facts absent from the DFEH complaint, and even though the plaintiff could not prove disparate treatment based on the facts he alleged in his DFEH complaint.

Smith's DFEH complaint, liberally construed, satisfies the pre-conditions for all four of her FEHA causes of action. In order to reduce employment discrimination by providing cumulative remedies, both administrative and judicial, that employees can initiate and maintain with or without a lawyer's help, DFEH complaints should be liberally construed. The authorities on which Dillon Construction relies do not require, and their spirit does not permit, the cramped, crabbed reading of the FEHA and the FMLA that Dillon Construction gives them.

D. Smith's FEHA and FMLA allegations state a cause of action for wrongful discharge, which does not require exhaustion of administrative remedies.

The exhaustion rule does not apply to common law causes of action, including causes of action for wrongful discharge in contravention of public policy, whether or not a plaintiff brings or might have brought concurrent or successive civil actions based on allegations of the same or similar misconduct. *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88-89 (employees alleged they were discharged, actually and constructively, for refusing to give sexual favors). See also *Stevenson v. Superior Court* (1998) 16 Cal.4th 880, 887 (age discrimination; tort law enforces the public-policy exception to the at-will employment principle); *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1242 (retaliation for complaints against age discrimination).

The elements of a cause of action for wrongful discharge against public policy are (1) discharge, (2) causation (discharge for an unlawful reason), and (3) where such discharge contravenes a fundamental California public policy. Smith's First, Second, Third, and Fourth Causes of Action each plead these elements. Accordingly, even if a

demurrer to one or more of these causes is sustained, this Court should allow Smith to go forward with the same facts (injury or pregnancy-related discrimination, refusal to grant FMLA leave, and retaliation for taking such leave and/or for filing a worker's compensation claim) as a common law cause of action for wrongful discharge.

2. Smith has sufficiently alleged her Fifth Cause of Action (breach of contract and of the covenant of good faith and fair dealing) by pleading long employment and reasons given for discharging her.

Smith alleges that during her employment, she came to reasonably believe that she would not be discharged unless Dillon Construction, acting fairly and in good faith under its written or customary employment policies, determined that she had given cause for discharge. ¶ 42. She supports this assertion by pleading long employment and putative "good cause" reasons Dillon Construction gave when it discharged her. That it gave such reasons suggests Dillon Construction's consciousness of an implied-in-fact limitation on its right to discharge her at any time and for any (not unlawful) reason, or for no reason.

Citing Labor Code § 2922 and supporting cases, Dillon Construction states the undisputed rule that employment at will is presumed—a plaintiff cannot prevail on a contract claim based on discharge—unless the plaintiff proves otherwise. It is also true that to survive a demurrer a plaintiff must plead specific facts that, if proved, would permit a jury to find an implied-in-fact contract limiting a defendant's right to discharge a plaintiff without cause. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1151. But

> [t]here are no hard and fast requirements for pleading such an agreement. Rather, the courts look to "the totality of the circumstances," including length of employment (here eight-plus years), the personnel policies or practices of the employer, the employer's conduct reflecting assurances of continued

employment, including oral assurances, promotions and salary increases, practices in the industry and handbooks or guidelines.

Foley, 47 Cal.3d at 682; *Gould*, 31 Cal.App.4th at 1151.

Furthermore, Dillon Construction misapprehends the contract promise Smith says it broke: not that Dillon Construction must have *objective* good cause for discharging her and would do so at its peril, but only that it would treat her in the even-handed good-faith manner that its stated and implied-in-fact policies promised. Smith alleges sufficient facts to support this narrower claim and the demurrer to it should be overruled. If the court sustains the demurrer, it must grant Smith leave to amend unless it is convinced that she cannot state facts constituting any cause of action against Dillon Construction. See *Alcorn v. Ambro Engineering* (1970) 2 Cal.3d 493, 497; *Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 187.

3. Because emotional distress damages are recoverable for FEHA violations, the demurrer to the Sixth Cause of Action should be overruled.

Smith acknowledges that negligent infliction of emotional distress is negligence, not an independent tort, and cannot ordinarily be pleaded without more. But since Smith has pleaded FEHA causes of action, for which she can recover emotional distress damages even if Dillon Construction inflicted distress without intending to do so, the distinction does not matter here. See *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1491-1492 (summary judgment on causes of action for intentional *and negligent* infliction of emotional distress should not have been granted).

Dillon Construction's fallback defense, Worker's Compensation Act exclusivity, is wholly misplaced. The Act does not preclude a cause of action for emotional distress arising from injury discrimination (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th

1143, 1155); age discrimination (*Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1658); or indeed for any other claims that are "based on [an] employer's violation of fundamental public policies of this state. [S]uch misconduct cannot be considered a normal part of the employment relationship and the plaintiff's remedy is not confined to worker's compensation." *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1100 (retaliation for refusal to give false information to agency investigating co-worker's sexual harassment claim); *Cabsuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112-113 (retaliation for complaining in employee meeting about health and safety issues).

4. Worker's Compensation exclusivity does not apply to FEHA, FMLA, or contract claims, or to negligence claims that relate to FEHA or FMLA causes of action.

For reasons already set forth in the preceding sections, the Worker's Compensation Act does not preclude any of Smith's causes of action. As Dillon Construction recognizes, FEHA, Worker's Compensation, and common law claims are cumulative, not mutually exclusive, and its concerns about double recovery under Labor Code § 132a and civil causes of action, where the two overlap, is excessive.

It is settled law that "equitable principles preclude double recovery for employees." *City of Moorpark, supra,* 18 Cal.4th at 1158; see also *Richards v. Owens-Illinois* (1997) 14 Cal.4th 985, 994 (to prevent double recovery, damages awarded against third-party tortfeasors must be reduced by the amount of worker's compensation benefits received). As the supreme court has made plain in a different context, avoiding double recovery is a binding but familiar principle that does not preclude (single) recoveries in the successive proceedings.

In actions that may arise subsequent to a UCL fluid recovery order, just as

> California courts are served by legal and equitable principles empowering them to craft remedies in light of relief previously awarded, so too they are bound by others forbidding them to permit any kind of double recovery. *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 160.

5. Abatement is not appropriate because the WCAB proceedings cannot afford the relief sought in this action.

It is long-settled law that abatement on the ground of another action pending, even if it is between the same parties and *on the same causes of action*, is not appropriate where the first action cannot afford the relief sought in the second. A WCAB proceeding, as a matter of law, is not on the same causes of action (strictly speaking, the term "cause of action" in a WCAB proceeding is inapposite; the correct term is "claim" and its scope is different) is *never* on the same cause of action as a civil suit, and cannot afford civil damages or other remedies. Thus abatement on this ground is never appropriate as to civil suits that follow WCAB proceedings.

CONCLUSION

None of Dillon Construction's demurrers has merit; they should all be overruled. To the extent that any are sustained, Smith should be granted leave to amend.

Dated: _____

Respectfully submitted,

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Attorney for Plaintiff