Judge Benson – Law & Motion – Wednesday, January 4, 2023 @ 9:00 AM
TENTATIVE RULINGS

1. 21CV01207 Freitas, Christina v. Durham Recreation & Park District

EVENT: Defendant's Motion for Summary Judgment or in the Alternative Summary Adjudication

Defendant's Motion for Summary Judgment or in the Alternative Summary Adjudication is DENIED in its entirety.

The First Cause of Action for Retaliation Pursuant to Gov. Code § 12940 is Legally Viable

Preliminarily, it is important to note that the FEHA statutory scheme defines the term employer:

> As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:
>
> …
>
> (d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, *the state or any political or civil subdivision of the state*, and cities, except as follows:
>
> "Employer" does not include a religious association or corporation not organized for private profit.
>
> …
>
> Gov. Code § 12926(d) [Emphasis Added]

As noted, section 12926 clearly identifies public entities as employers, thus the contention that section 12940(a & h) would not apply to a public entity is without merit. Additionally, pursuant to *City of Moorpark v. Superior Court*, (1998) 18 Cal. 4th 1143, 1158, worker's comp. laws are not an exclusive remedy and do not preclude FEHA wrongful discharge remedies. Here, because the conduct complained of "falls outside the compensation bargain" (*Id* at p. 155), worker's comp. is not the exclusive remedy. The First Amended Complaint alleges Plaintiff was terminated because she filed a worker's comp claim. This alleged discriminatory conduct is conduct outside the "compensation bargain".

Consequently, the motion is DENIED as to the first cause of action.

Second Cause of Action – Disability Discrimination

As Defendant noted, in order to prevail on a disability discharge claim, an employee bears the burden of showing (1) that he or she was discharged because of disability, and (2) that he or she could perform the essential functions of the job with or without accommodation. (*Nadaf-Rahrov v. Nieman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, 962) The focus in this case is on the second element. It is undisputed that eventually

Plaintiff became physically unable to perform the essential functions of the maintenance position for which she was originally hired. It is essentially undisputed that Plaintiff suffers from a physical disability.

It is also undisputed that Plaintiff ultimately requested reassignment to a different position which was vacant at the time, namely the "Recreation Leader" position. The responsibility to reassign a disabled employee who cannot be otherwise accommodated does not require creating a new job, moving another employee, promoting the disabled employee, … but it nevertheless does entail affirmative action. *Spitzer v. Good Guys, Inc*, (2000) 80 Cal. App. 4th 1376, 1389) "Reasonable accommodation" in the FEHA means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. (*Nadaf-Rahrov, supra* at p. 974).

The two disputed issues here are 1) what the essential functions of the Recreation Leader position actually are; and 2) whether Plaintiff is able to perform those functions. Defendant has provided evidence that the Recreation Leader position requires "physical interaction" as well as running and jumping, see UMF 30. The evidence supplied by Plaintiff is Plaintiff's deposition which states, based on her personal observations, the Receration Leader position does not require those abilities. (Freitas declaration, 2:26-28; 3: 1 -6)

It is well settled that we do not weigh evidence on summary judgment. (*Forest Lawn Memorial-Park Assn. v. Superior Court*, (2021) 70 Cal. App. 5th 1, 8) Additionally there appears to be a triable issue of fact as to Plaintiff's restrictions – Plaintiff contends she is not limited to sedentary work, rather her limitations were only heavy lifting and repetitive bending. (Exhibit B, page 9 to the declaration of Freitas).

Consequently, a triable issue of fact exists regarding whether reassigning Plaintiff to the Recreation Leader position would have been a reasonable accommodation.

Plaintiff shall prepare and submit a form of order consistent with this ruling within 10 days.

2. <u>20CV02380 Rosales, Jeremy Steven v. City of Chico, et al.</u>

EVENT: Defendants' Motion to Set Aside and Vacate the Court's September 27, 2022 Order

The Court has decided to reconsider some of the matters pertaining to the admissibility of Dr. Haas' amended report sua sponte. Pursuant to *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108) this hearing is continued to February 1, 2023 at 9:00am. Plaintiff shall file and serve a brief in response to the Court's opinion set forth herein by January 13, 2023. Defendant shall file a responsive brief no later than January 24, 2023. The Court notes the briefing should be limited to issues addressed in this opinion as the Court will not consider any other extrinsic matters. It is the Court's expectation that any amended declarations and or exhibits filed by Plaintiff will be filed no later than January 13, 2023.

As to the Court's present inclinations regarding Defendant's Motion for Summary Judgment, the Court provides the following.

The Problem with the Date

Not surprisingly, the Court has not found any authority on this unusual issue. It is clear to the Court that it would not have been possible for the amended report to have been executed on June 28 considering it was not until the August 3 hearing that Plaintiff's counsel requested leave to amend the report. To the extent this appears to be a clerical issue, the Court will again provide Plaintiff the opportunity to amend Dr. Haas' report. A clerical error relating to a verification should not be a basis for making a dispositive ruling, see *Finkbeiner v. Gavid*, (2006) 136 Cal. App. 4th 1417, 1422.

The No "Personal Knowledge" Issue

It is well settled that an expert may rely on hearsay evidence in offering an opinion, see *People v. Sanchez* (2016) 63 Cal.App.4th 665, 685.

While lay witnesses are allowed to testify only about matters within their personal knowledge (Evid. Code, § 702, subd. (a)), expert witnesses are given greater latitude. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) An expert may express an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. (Id at p.675) [Emphasis Added]

It logically follows if experts are permitted to rely on hearsay, they are permitted to rely on evidence outside of their personal knowledge. Thus, the Court finds Defendant's lack of personal knowledge argument unpersuasive based on the circumstances presented here. In any event, as discussed, the Court is not going to make a dispositive ruling on this issue without first providing Plaintiff the opportunity to amend what might be construed as a clerical error.

However, the Court does find persuasive Defendant's arguments relating to *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735. The Garibay decision was not premised on the expert's lack of personal knowledge, rather it was premised on the moving party's failure to separately admit evidence for which the expert relied in forming his opinion.

Here, Dr. Haas' report cites numerous documents he relied on in forming his opinion. However, with the exception of Plaintiff's deposition transcript and his written discovery responses, none of the other cited documents were admitted into evidence. (Recall the Court, in previous orders, sustained Defendant's objection to the body camera footage for failure to lay a proper foundation. While the Court did strike its previous orders as part of its September 27, 2022 order, nothing has changed in that no foundation has been laid concerning the body camera footage.)

In reviewing the report, although it begins by making a general reference to all the documents listed (presumably including the two admitted documents), closer review reveals the substance of Dr. Haas' opinion is based on evidence which was not admitted, such as police reports, body camera footage, etc. None of Dr. Haas' opinions cited Plaintiff's deposition transcript or Plaintiff's written responses to discovery. As a result, Dr. Haas' report relies exclusively on evidence which was not admitted. Without the evidence relied upon to form his opinion, Dr. Haas' declaration has no evidentiary basis, see Garibay, supra, at p. 742.

While the Court understands the documents Dr. Haas relied upon may be voluminous, it does not change the fact we cannot consider his declaration unless those documents are admitted into evidence.

The Court's September 27, 2022 order finding a triable issue of fact existed as to the reasonableness of the Officers' conduct was premised on the Court's reliance on Dr. Haas' expert opinion as evidence. As discussed, because it appears to the Court that Dr. Haas' expert opinion has no evidentiary basis, the Court is inclined to find that Plaintiff has failed to meet his burden of demonstrating a triable issue of fact regarding the reasonableness of the Officer's conduct. Consequently, the Court is inclined to grant Defendants' Motion for Summary Judgment.

3. <u>21CV02036 Eicher, Robert J et al v. Minto, James D et al.</u>

EVENT: Cross-Defendants' Combined Motion to Strike and Demurrer to First Amended Cross Complaint

Cross-Defendants' Combined Motion to Strike and Demurrer to First Amended Cross Complaint ("FACC") is sustained/granted with leave to amend. Cross-Complainants, if they so choose, shall amend within 20 days of this order.

The Court's ruling is on the grounds the FACC fails to sufficiently address CCP § 338(d). The only representation alleged in the FACC with a date attached to it is the lease itself. Further, the FACC does not articulate when Cross-Complainants discovered Cross-Defendants' position that they were not entitled to occupy the residence.

Additionally, the Court finds the FACC has failed to sufficiently plead fraud as it has failed to state how Cross-Defendants knew their representations were false. Specifically, the FACC does not allege with specificity why the inclusion of the entire 10 acres was nothing more than an honest mistake.

Because fraud is the only cause of action supporting a claim of punitive damages, the motion to strike is granted on this basis as well. Cross-Defendants shall prepare and submit a form of order consistent with this ruling within 10 days.

4. <u>21CV02975 Miller, Michael v. City of Gridley</u>

EVENT: Defendant City of Gridley's Motion for Summary Judgment or in the Alternative Summary Adjudication

Defendant City of Gridley's Motion for Summary Judgment is Granted.

Plaintiff's request for judicial notice is Granted.

Defendant's evidentiary objections are sustained in part on the grounds Plaintiff's additional evidence does not comply with CRC 3.1350(f)(3). However, as to the photograph included in Defendant's moving papers and attached to the declaration of Angie Bright, the Court is considering that evidence as it does not constitute new facts under CRC 3.1350(f)(3).

The Primary Assumption of Risk ("PAR") Defense

As the parties agree, there are two components to the PAR defense, the nature of the sport or activity in question and on the parties' general relationship to the activity. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313.) These matters are legal questions to be determined by the court. (*Id*)

Plaintiff and the City do not dispute that softball is a sporting activity for the purposes of PAR. However, the City contends it has no general relationship with Plaintiff for purposes of PAR. It is undisputed that the organized league for which Plaintiff was playing when the injury occurred paid a $35.00 permit fee to the City to conduct softball games on the premises. (UMF 4) Commercial operators of sports and recreational facilities owe a duty of care to their patrons. (*Harrold v. Rolling JRanch* (1993) 19 Cal.App.4th 578, 586)

Not surprisingly, the Court has not found authority in addressing whether a local government agency who charges a $35.00 permit falls into the category of commercial operator and whether the softball league would falls under the category of a patron. Additionally, the Court finds no authority delineating a minimum amount of consideration required in order to be categorized as a patron.

In considering the case law on the topic, the Court finds that the terms "commercial operator" and "patron" have been used by the courts in a very broad sense. In other words, it appears these terms could apply to any entity who charges another money for use of its property. As a result, the Court finds a "general relationship" existed between the parties for purposes of PAR.

However, this finding is only the beginning of the PAR analysis. The next step is to determine whether the City increased the risks inherent in the sport of softball, see *See Luna v. Vela* (2008) 169 Cal.App.4th 102, 112, 113. However, as the City has noted, a predicate issue is whether the soggy condition of the field which caused Plaintiff's injury was an "inherent risk".

The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin v. The Haunted Hotel, Inc*., (2015) 242 Cal. App. 4th 490, 501) Judges may rely on their own or *common experience with recreational activity* in deciding inherent risk questions. Since the existence of the primary assumption of the risk is dependent upon the existence of a legal duty, and since duty is an issue of law to be decided by the court, the applicability of that defense is amenable to resolution by summary judgment. (Id) [Emphasis Added]

Under the circumstances presented, this is not a baseball field that is held out to be a pristine, well-manicured field. It is the Court's experience that a public parkin a small rural town which is accessible to the general public is typically subject to heavy use and is imperfect. (that is not a criticism of the park system, it is simply a reality that public parks do not have the same budgets as professional teams, universities, etc.) This finding is supported by the photograph included in Angie Bright's declaration. The photo depicts a typical public baseball field and conditions one would expect to find at a public park. This is not a controlled environment such as one would encounter at a professional baseball field, or even a collegiate or high school field. Thus, it is important to consider this is not simply a question of risks inherent to softball, rather this is a question of conditions inherent to softball at a public park in the winter.

Additionally, the Court finds the declaration of Angie Bright persuasive. She references the photograph and notes based on her extensive experience that similar conditions are typical especially in the winter months. (Declaration of Angie Bright, 3, 11-12) This is consistent with the Court's general experience that it is not uncommon to find areas, especially in public places, which are oversaturated due to irrigation problems. As a result, the Court finds under the circumstances presented in this case, the conditions on the field that lead to Plaintiff's injury were an inherent risk to playing softball on a recreational/public field in December.

Further, the Court finds imposition of liability under the aforementioned circumstances would result in chilling participation in softball at public parks as local government may well elect to eliminate the activity altogether, see *Nalwa v. Cedar Fair, L.P.* (2012) Cal.4th 1148, 1157)

As a result, the City owed no legal duty to Plaintiff. Consequently, the City's motion is GRANTED. All future hearings are vacated. The City shall prepare and submit a form of order consistent with this ruling within 10 days.

5. <u>22CV02389 In re: Golden, Julia Claire</u>

EVENT: Change of Name (Adult)

The Court is in receipt of the proof of publication and will sign the decree provided.

6. 22CV02508 In re: Hansen-Thompson, Karen

EVENT: Change of Name (Adult)

The Court is in receipt of the proof of publication and will sign the decree provided.

7. 22CV02657 In re: Cazares, Larry Hernandez

EVENT: Change of Name (Adult)

There is no proof of publication on file. Upon the filing of the proof of publication, the Court will sign the decree provided.

8-9. 22CV01951 Belveal, Tracy v. Bodenhammer, Stephon et al.

EVENT: (1) Defendants' Stephen Bodenhammer and Carl Ort's Motion to Compel Responses to Form Interrogatories, Special Interrogatories, and Demand for Production and For Monetary Sanctions Against Plaintiff Tracy Belveal and Her Counsel

(2) Defendants' Stephen Bodenhammer and Carl Ort's Motion to Have Deemed Admitted Requests for Admission and for Monetary Sanctions Against Plaintiff Tracy Belveal and Her Counsel

Both Defendants' Motions to Compel Responses to Requests for Admissions and Form Interrogatories, Special Interrogatories, and Production of Documents is Granted with the following modification. Attorney fees are awarded in the amount of $1,000 per motion, for a total of $2,000. The Court will sign the proposed orders with these modifications.

10. 20CV02347 Silano, Joel M. v. FCA US, LLC et al.

EVENT: Motion for Leave to Substitute Plaintiff

The Motion for Leave to Substitute Plaintiff is GRANTED. The Court will sign the proposed order. The Court finds Defendant's arguments concerning standing would be more appropriately addressed separately.

11-12. 19CV01153 Chase, Shelby v. Peterson, Jacob

EVENT: (1) Motion to Strike Answer of Jacob Peterson and Enter Default Judgment in Favor of Plaintiff (Continued from 12/7/22)

(2) Case Management Conference

Motion to Strike Answer of Jacob Peterson and Enter Default Judgment in Favor of Plaintiff is GRANTED in part. The Answer of Jacob Peterson is stricken. A status conference is set for March 1, 2023 at 10:30am. Meanwhile, the Court will permit Plaintiff to seek a default judgment pursuant to CCP § 585(d). Plaintiff shall prepare and submit a form of order consistent with this ruling.

13-14. 19CV01154 Chase, Lida v. Peterson, Jacob

EVENT: (1) Motion to Strike Answer of Jacob Peterson and Enter Default Judgment in Favor of Plaintiff (Continued from 12/7/22)

(2) Case Management Conference

Motion to Strike Answer of Jacob Peterson and Enter Default Judgment in Favor of Plaintiff is GRANTED in part. The Answer of Jacob Peterson is stricken. A status conference is set for March 1, 2023 at 10:30am. Meanwhile, the Court will permit Plaintiff to seek a default judgment pursuant to CCP § 585(d). Plaintiff shall prepare and submit a form of order consistent with this ruling.

15-16. 22CV00689 Wright, Luke v. Hutton, Eric et al

EVENT: (1) Plaintiff's Counsel's Motion to Be Relieved (Continued from 12/28)

(2) Case Management Conference

Plaintiff's Counsel's Motion to Be Relieved is GRANTED. The Court will sign the proposed order.

17. 21CV00322 Wade, Clyde v. Wallace, Robert M et al.

EVENT: Motion to Reclassify Case to Civil Unlimited

Motion to Reclassify Case to Civil Unlimited is GRANTED. The Court will sign the proposed order.