DEPARTMENT SEVEN – JUDGE FRANKLIN R. TAFT
TENTATIVE RULINGS FOR HEARINGS SCHEDULED FRIDAY, JULY 27, 2007

TAYLOR v. CALIFORNIA DEPARTMENT OF CORRECTIONS
Case No. FCS027767

Demurrer to Third Amended Complaint filed by Defendant CDC

TENTATIVE RULING

The demurrer of defendant CDC to the third amended complaint is overruled in its entirety.

The third amended complaint alleges sufficient facts to state a cause of action for harassment/discrimination and also a cause of action for retaliation. Specifically, it alleges that, shortly after plaintiff filed her first DFEH complaint of discrimination and harassment and one day after she talked to her supervisor about it, defendants changed her job assignment in violation of union rules and also commenced an investigation of her that concluded one year later with no finding of any wrongdoing on her part.

In addition, the court finds that the filing of plaintiff's second DFEH complaint in April, 2005, was timely in that the job transfer and the investigation continued until December, 2004, which was well within the one year statutory period.

DANIELS v. HENNION
Case No. FCS029255

Motion to Withdraw as Attorney of Record

TENTATIVE RULING

The motion of Jonathan Brand, Esq., to withdraw as attorney for plaintiff Danyell Daniels is granted.

LOAN CENTER OF CALIFORNIA v. KROWNE
Case No. FCS029554

Anti-Slapp Motion to Strike

TENTATIVE RULING

The motion to strike is denied.

Defendants' speech is not protected by the federal Communications Decency Act. The statements made by defendant on its website are not merely a republication of a third party email. Much of the information is in defendants' own words, thus constituting creation and development of the defamatory statements by defendant. The words are not merely an "index", and are not the traditional editorial functions of a publisher.

Defendants' speech does concern a public issue, a matter of public interest. Although it may be contended that falsely stating a company has gone out of business should never be protected speech, the fact is defendant's website does address issues about the mortgage industry and lending practices, a public issue and matter of public interest.

However, as in the case of *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, and as allowed by CCP 425.16(b)(1), plaintiff has made a prima facie showing of its case for libel. Defendants did not attack plaintiff's remaining three causes of action separately. The prima facie showing is that defendants falsely stated LCC had gone out of business, that LCC was and is in business, that LCC was damaged by Washington Mutual and Credit Suisse withdrawing at least 3.5 million dollars in funds from LCC's accounts, and that Washington Mutual and Credit Suisse did this after viewing the false information published by defendants on defendants' websites.

LOPEZ v. WALGREENS CO., et al.
Case No. FCS027910

170.6 Challenge
Motion for Summary Judgment, or in the Alternative, Summary Adjudication filed by Defendants
Motion to Compel Production of Documents in Response to Demand for Inspection, Set Four, and Request for Sanctions filed by Plaintiff
Motion to Quash Subpoenas for Personal Records and Request for Attorney's Fees filed by Plaintiff
Motion to Compel Walgreen to Attend Deposition and Request for Sanctions filed by Plaintiff

TENTATIVE RULING

170.6 Challenge

Defendants' challenge of Judge Taft under CCP Section 170.6 is denied.

Motion for Summary Judgment, or in the Alternative, Summary Adjudication filed by Defendants

Defendants' motion for summary judgment, or in the alternative, summary adjudication of issues, is denied in its entirety. The court finds that defendants have not established, as a matter of law, that they are not liable under any of the causes of action alleged against them.

The court denies summary adjudication of plaintiff's causes of action for discrimination. The essential elements of a cause of action for discrimination are that (1) plaintiff was a member of a protected class, (2) plaintiff was performing her job satisfactorily, (3) plaintiff suffered an adverse employment action, and (4) circumstances suggest a discriminatory motive. (*Guz v Bechtel National, Inc*. (2000) 24 Cal.4th 317 citing *McDonnell Douglas Corporation v. Green* (1973) 411 U.S. 792). Defendants' motion is based on the contention that, as a matter of law, plaintiff cannot establish two of these essential elements, namely, that plaintiff was performing her job satisfactorily, and that the circumstances of defendants' adverse employment action against her suggest a discriminatory motive.

Plaintiff's causes of action for discrimination are based on various adverse employment actions allegedly taken against her by defendants. These include termination, but they also include unwarranted interrogations, suspension, and failures to provide benefits. In their motion, defendants address plaintiff's termination only. They do not address the other alleged adverse employment actions. Under CCP Section 437(f)(1), summary adjudication may be granted only if it disposes of an entire cause of action. Even assuming defendants' contentions regarding plaintiff's termination were true, they are not sufficient for summary adjudication of the discrimination actions because they do not dispose of the entire causes of action, and the court therefore denies summary adjudication of the discrimination causes of action on this ground.

With regard to plaintiff's termination, defendants contend that plaintiff was terminated because she was violating Walgreen's "1506 policy" regarding unsellable merchandise. From this, defendants contend that plaintiff was not performing her job satisfactorily at the time of her termination, and the circumstances of her termination do not suggest a discriminatory motive. In support of these contentions, defendants submit evidence of two employee statements who indicated that plaintiff did not sufficiently instruct them as to the 1506 policy. They also submit the declaration of District Manager KEITH DRUYOR, which states that records he reviewed indicated that the Fairfield store had a higher level of "1506 activity," and also that merchandise of a type and quantity claimed to be "1506 merchandise" "did not appear" to qualify as "1506

merchandise," without further explanation. The court finds this evidence to be insufficient to establish as a matter of law that plaintiff was not performing her job satisfactorily at the time of her termination or that there were no circumstances suggesting a discriminatory motive for her termination.

Defendants contend that, on summary judgment, plaintiff has the burden of establishing a prima facie case of discrimination, citing *Guz v Bechtel National, Inc*. (2000) 24 Cal.4th 317. In *Guz*, the court discussed the *McDonnell Douglas* case, which established a three-stage process for the burden of proof for discrimination cases *at trial*. First, plaintiff must establish a case of prima facie discrimination (the four essential elements of discrimination). Upon such a showing, a presumption of discrimination is created. The burden then shifts to defendant to establish that it had a legitimate, non-discriminatory reason for the adverse employment action. If defendant does so, the burden shifts back to plaintiff to establish that this defendant's proffered reason for the adverse employment action is a pretext for discrimination.

In *Guz*, the court considered how this test should be applied in a motion for summary judgment. It noted that California courts are split as to whether plaintiff must establish a prima facie case when defendant, as the moving party, has the burden of proof on summary judgment under CCP Section 437c. The *Guz* court further noted that it was not required to resolve this issue because defendant Bechtel "proceeded directly to the second step of the *McDonnell Douglas* formula." (*Guz*, supra, p. 357). Unlike defendants in the present case, Bechtel submitted "extensive evidence," which the court found "credible on its face," to indicate Bechtel laid off plaintiff because of economic reasons, not reasons related to age discrimination. The court further found that the burden then shifted back to plaintiff to establish that the economic reasons proffered by Bechtel were a pretext for discrimination, and plaintiff did not meet this burden. Therefore, the court in *Guz* affirmed summary judgment for Bechtel.

Later appellate court cases have made clear the burden of the defendant as the moving party in an employment discrimination case. As the court noted in *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th138, 149,

Of course, we must keep in mind that the *McDonnell Douglas* test was originally developed for use at trial, not in summary judgment proceedings. "In such pretrial proceedings, the trial court will be called upon to decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment *unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing*. In short, by applying *McDonnell Douglas's* shifting burdens of production in the context of a motion for summary

judgment, 'the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.' " (*Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal. App. 4th at p. 203, italics added.)

In the present case, the court finds that defendant has failed to meet its burden of proving that plaintiff cannot establish all of the essential elements of a prima facie case for discrimination. For this reason as well, the court denies summary adjudication of any of the discrimination causes of action.

The court denies summary adjudication of plaintiff's claims of wrongful termination and intentional infliction of emotional distress. In failing to establish as a matter of law that defendants did not discriminate against plaintiff in taking adverse employment actions against her, defendants also failed to establish as a matter of law that they did not terminate plaintiff in violation of public policy, as required for wrongful termination, and did not engage in outrageous conduct against plaintiff with intent to cause emotional harm, as required for intentional infliction of emotional distress.

The court denies summary adjudication of plaintiff's claims for harassment. To prevail on this motion, defendants must establish as a matter of law that their treatment of plaintiff did not create conditions of employment that were sufficiently severe and/or pervasive to create an environment that was hostile to plaintiff. Defendants have not done this. The evidence indicates that plaintiff was interrogated extensively and threatened with termination even before they completed their investigation of allegations that she was wrongfully allowing others to open the store for her in the morning. The evidence further indicates that, although plaintiff did allow another employee to open the store for her, doing so had been approved by her previous District Manager, and also that other store managers did this without repercussion. Given this evidence, there is a question of fact as to whether defendants' conduct toward plaintiff created a hostile work environment for plaintiff.

The court denies summary adjudication of plaintiff's claim for retaliation. In their motion, defendants addressed allegations of retaliatory treatment of plaintiff up until October 3, 2005, only. Yet much of defendants' allegedly retaliatory treatment of plaintiff occurred after plaintiff complained of discrimination and after she made a request for leave due to her pregnancy after October 3, 2005. Defendants did not address this. Therefore, they have not established as a matter of law that they are not liable for retaliation.

The court denies summary adjudication of plaintiff's claims for failure to accommodate and violation of the Family Leave Act, the evidence indicates that plaintiff submitted a health care certification form approved by a doctor that stated plaintiff needed medical leave for a certain period and a modified work schedule for an additional period, and that defendants never responded to this.

Thus, there is a question of fact as to whether defendants failed to accommodate plaintiff and provide her with the leave required under the Family Leave Act.

The court denies summary adjudication of plaintiff's claim for false imprisonment, as noted in CACI 1400 and *Fermino v. Fedio, Inc*. (1994) 7 Cal.4th 701, a case upon which defendants rely, a claim for false imprisonment may be based on confinement by means of unreasonable duress. Defendants did not address in their motion plaintiff's claim that she was confined by means of unreasonable duress during her extensive meetings with defendants. Therefore, defendants have not established as a matter of law that they are not liable for false imprisonment.

The court denies summary adjudication of plaintiff's claim for wages and penalties. Defendants submit the declaration of Eugene Slade in support of their contention that they timely paid all amounts due to plaintiff. However, it is not clear from the statements of Slade that defendants did, in fact, pay all of the wages and benefits to which plaintiff was entitled as of January 27, 2006, and that these amounts were not due earlier. Therefore, defendants have not established as a matter of law that they are not liable for further payments to plaintiff.

The court's rulings on the parties' objections to evidence are set out in the forms submitted by the parties, which are attached to this order and incorporated by reference herein.

The court, on its own motion, strikes the further separate statement of facts, the further declaration of plaintiff, and the further declaration of attorney Candice Clipner filed on July 3, 2007, as plaintiff had no authority to submit such evidence.

Motion to Compel Production of Documents in Response to Demand for Inspection, Set Four, and Request for Sanctions filed by Plaintiff

Plaintiff's motion to compel production of the original notes taken by Walgreen employee Debbie Schenkhuizen at the meeting of October 3, 2005, requested in Demand for Inspection, Set No. Four, is granted. Defendant is to produce the original notes as requested for inspection and non-destructive testing. Defendant is to cover the portion of the notes that are protected by the attorney-client privilege in a reasonable manner that will not interfere with the inspection.

Plaintiff is awarded $840.00 in sanctions as the court finds that defendant Walgreen's opposition to the motion to compel is without substantial justification. The sanctions are to be paid within twenty (20) days of the date notice of this order is served.

Motion to Quash Subpoenas for Personal Records and Request for Attorney's Fees filed by Plaintiff

Plaintiff's motion to quash the subpoenas served by defendant Walgreen on the four different Kaiser entities is granted in part. The court finds that the subpoenas are overbroad and seek information protected by the plaintiff's right of privacy. The court orders that only those records relating to plaintiff's pregnancy from June 1, 2005, to February 24, 2006, and those records relating to plaintiff's claim of emotional distress from June 1, 2005, to the present need be produced in response to the subpoenas.

Plaintiff is awarded $1,000.00 in sanctions as the court further finds that defendant Walgreen's opposition to this motion to quash is without substantial justification. The sanctions are to be paid within twenty (20) days of the date notice of this order is served.

Motion to Compel Walgreen to Attend Deposition and Request for Sanctions filed by Plaintiff

Plaintiff's motion to compel the depositions of the persons most knowledgeable and to compel production of the documents requested in the deposition notice is granted. The fact that a person's deposition has already been taken as a percipient witness or a "natural person" does not preclude the taking of his deposition a second time if he or she happens to be the person most knowledgeable on a subject set out in the deposition notice. In addition, the court finds that defendant's objections to the requests for production contained in the deposition notice to be without merit.

Plaintiff's request for sanctions on this motion is denied as the court finds that defendant's opposition to this motion was not without substantial justification.

THOMAS-VILLARONGA v. CALIFORNIA DEPT. OF CORRECTIONS, et al. Case No. FCS023358

(1) Motion by Plaintiff to Compel Compliance with Inspection Demand, Set Three (2nd Ed.), Nos. 14 and 15;
(2) Motion by Plaintiff to Quash 21 Deposition Subpoenas for Production of Business Records;
(3) Motion by Plaintiff to Compel Responses to Supplemental Discovery Pursuant to the Court's Order Extending Discovery on October 23, 2006;
(4) Motion by Plaintiff to Compel the Deposition of CALIFORNIA DEPARTMENT OF CORRECTION AND REHABILITATION and Production of Documents;
(5) Motion by Plaintiff Compelling Compliance with Inspection Demand, Set Five, Nos. 1 and 16, 3-10, 11-12, 14-15, and 13;

(6) Motion by Plaintiff for Order Precluding Testimony and Evidence and Monetary Sanctions

TENTATIVE RULING

All 6 motions are continued on the court's own motion to September 19, 2007, at 8:30 a.m. in Dept. 7 in Vallejo. In addition, the court hereby vacates the current trial call date of August 3, 2007, and the trial management conference on July 26. The court hereby sets a trial setting conference for September 19, 2007 at 8:30 a.m. in Dept. 7, to coincide with the new hearing date for all of these motions.

PARRISH v. KATHLEEN McINERNEY OLSON, INC., dba OLSON REALTY; STEPHEN ROBERT RIDGE dba PRUDENTIAL CALIFORNIA REALTY, DWIGHT COTTON
Case No. FCS023872

Demurrer to Second Amended Complaint

TENTATIVE RULING

The demurrer is overruled. The plaintiff did not learn of the involvement of the new named defendants until the October, 2005, deposition of Robert Knapp. Thus, plaintiff knew these defendants were involved in the sale, but did not know their connection to the negligence until said deposition. See *Oakes v. McCarthy Co.* (1968) 267 Cal. App. 2d 231, 253. The second amended complaint relates back to the first amended complaint.

FORD MOTOR CREDIT COMPANY, LLC v. VACAVILLE FORD MERCURY, INC.
Case No. FCS029702

OSC re Preliminary Injunction

TENTATIVE RULING

Parties to appear.