***Colleen Harmon v. County of San Luis Obispo,* 14CV-0645**

Hearing: Defendant's Demurrer to Second Amended Complaint; and Defendant's Motion to Strike

Date: November 8, 2017

Colleen Harmon (Plaintiff) was employed with the County of San Luis Obispo (Defendant) from 2000 to 2012, as a Software Engineer III. Plaintiff's FEHA action alleges discrimination and retaliation based upon sex and age arising out of her employment. Plaintiff further alleges claims for constructive termination because the retaliatory working conditions were so intolerable that she had no other option but to quit.

The third cause of action alleges constructive wrongful termination in violation of FEHA. Defendant previously moved for judgment on the pleadings on the third cause of action on the grounds it is immune from a common law claim for constructive termination in violation of public policy. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876) The Court granted the motion with leave to amend, but the dispositive issue in that motion was whether Plaintiff properly exhausted her administrative remedies.

On June 15, 2017, Plaintiff filed her second amended complaint and again alleged a third cause of action for constructive termination. Plaintiff alleges that Defendant constructively discharged her in violation of Gov. Code §§12940(h), (i), and (k), and 2 C.C.R. §11021(a).

Constructive discharge arises when 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." (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253)

In ruling on the prior judgment on the pleadings, this Court, citing to *McAllister v. Los Angeles Unified School District* (2013) 216 Cal.App.4th 1198, 1219, noted that *Miklosy* made it clear that a claim for wrongful discharge in violation of public policy may not be brought against a public entity. This is because there is no statute that imposes liability on the public entity for this common law tort. This conclusion is affirmed in the Rutter Group practice guide as follows: "Because a public entity is liable for its acts or omissions only as provided by statute (Gov.C. §815(a)), a *Tameny* claim generally does not lie against a public entity." (Chin, *Employment Litigation* (The Rutter Group 2016) §5:60)

Nevertheless, the Court in its prior ruling noted that Plaintiff characterized her cause of action as a statutory violation of Government Code §§12940(a), (h), (j), and (k), which is

applicable to a public entity. Likewise, Plaintiff argued her claims for violation of FEHA are statutorily based such that they are distinguishable from a common law *Tameny* claim in violation of public policy. As such, Plaintiff in opposition to this motion again contends that her third cause of action is statutory-based and not a common law claim.

Defendant properly clarifies that Plaintiff's third cause of action is for wrongful constructive termination based on statutory violations of public policy which is a common law *Tameny* claim. As emphasized by Defendant, the third cause of action is tethered to statutory violations which embody fundamental of public policy. (*Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095 *overruled on other grounds by Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66) The essence of Plaintiff's third cause of action is that she was wrongfully and constructively discharged from her employment. This is a *Tameny* based claim because employment relationships are generally terminable at will.

> Under the traditional common law rule, codified in Labor Code section 2922, an employment contract of indefinite duration is in general terminable at 'the will' of either party. Over the past several decades, however, judicial authorities in California and throughout the United States have established the rule that under both common law and the statute an employer does not enjoy an absolute or totally unfettered right to discharge even an at-will employee. In a series of cases arising out of a variety of factual settings in which a discharge clearly violated an express statutory objective or undermined a firmly established principle of public policy, courts have recognized that an employer's traditional broad authority to discharge an at-will employee 'may be limited by statute . . . or by considerations of public policy.' (*Tameny* at 172)

Plaintiff also argues that there are pre and post *Miklosy* cases that recognize a statutory claim for constructive termination against public employers. However, in reply, Defendant correctly distinguishes each of the cases cited by Plaintiff, such that there is no authority that overrides the conclusion reached above. To the contrary, the *Miklosy* court firmly concluded and stated that "section 815 bars *Tameny* actions against public entities." (*Miklosy v. Regents of University of California, supra,* 44 Cal.4th 876, 900)

The demurrer to the third cause of action for wrongful termination is sustained without leave to amend. Defendant shall file its answer within 30 days from the date of the order.

Alternatively, pursuant to CCP §581, Defendant moves to dismiss the amended complaint on the grounds it was not filed within the 30-day time limit ordered by the Court. (*Leader v. Health Indus. of Am., Inc.* (2001) 89 Cal.App.4th 603, 613) Here, Plaintiff filed the amended complaint on June 15, 2017, two weeks after expiration of the 30-day deadline. Plaintiff never moved for leave to file the late pleading. Defendant requests the Court exercise its discretion to dismiss the entire action or strike the third cause of action.

The ruling on the demurrer moots Defendant's request to strike the third cause of action. The Court will not dismiss the action despite Plaintiff's failure to timely file the second amended complaint. Plaintiff has good cause for the delay and the Court has discretion to accept the filing even without a noticed motion. (*Harlan v. Dep't of Transp.* (2005) 132 Cal.App.4th 868, 873)

The motion to strike is denied.