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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO

MAUREEN BEAULIEU,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA MEN’S COLONY/STATE  
OF CALIFORNIA; MARTHA WALLACE;  
AND DOES 1 THROUGH 100  
INCLUSIVE,  
  
Defendants.

Case No.: CV 090177

RULING AND ORDER GRANTING, IN  
PART, AND DENYING, IN PART,  
DEFENDANTS’ MOTIONS FOR  
SUMMARY JUDGMENT AND  
SUMMARY ADJUDICATION

**I. INTRODUCTION AND SUMMARY**

Plaintiff is a psychology technician ("psych tech") who provides mental health services for inmates in the Mental Health Crisis Bed Unit at the California Men's Colony ("CMC"). After being diagnosed with ulcerative colitis, and after having had medical restrictions imposed by her doctor precluding overtime work, she was demoted. Plaintiff thereafter sued CMC and Martha Wallace, the immediate superior who demoted her.

The two defendants now move for summary judgment and summary adjudication. The gist of their motion is that mandatory overtime work is an “essential job function” requiring psych techs to work overtime, or to face the prospect of demotion or

1 termination. Defendants also raise an assortment of legal arguments, including  
2 plaintiff's entitlement to punitive damages, governmental immunity, and individual  
3 immunity under FEHA.

4 A cursory review of the applicable statute demonstrates that the factors to be  
5 considered in assessing what is an "essential job function" under the law are inherently  
6 fact driven. *See* Government Code §12926(f). Further, as the court of appeal aptly  
7 observed in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 285-86, "many  
8 employment cases present issues of intent, and motive, and hostile working  
9 environment, issues not determinable on paper. Such cases, we caution, are rarely  
10 appropriate for disposition on summary judgment, however liberalized it be."<sup>1</sup>  
11 Moreover, a brief review of the summary judgment papers reveals that many of the  
12 legal issues are straightforward and/or uncontested by plaintiff.

13 Given these considerations, it should have been readily apparent to counsel for the  
14 moving parties that summary judgment on the principal issue of the litigation was  
15 highly unlikely. Nevertheless, the Attorney General's Office filed papers containing  
16 multiple declarations, exhibits, and deposition excerpts. Measuring more than one foot  
17 thick, these motion papers go after every single aspect of every single legal and factual  
18 claim raised by the plaintiff. The defendants' blunderbuss discharged 26 issues for  
19 summary adjudication and scattered 157 material facts that are, allegedly, undisputed.  
20 In response to plaintiff's submissions, defendant let go 162 separate evidentiary  
21 objections.

22 As the Court will discuss more fully below, summary judgment on the "essential job  
23 function" issue is unwarranted. Nevertheless, the Court has waded through the morass,  
24 and discovered several kernels of merit hidden therein. Accordingly, summary  
25 judgment or adjudication as to those limited issues will be granted. However, there is  
26 something fundamentally wrong with the defendants' tactics. The Court must pause  
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28 <sup>1</sup> This apt observation applies to many other cases transcending the employment context. *See, e.g.,* Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2010) §10:319 et seq. (court has discretion to deny summary judgment motion that relies upon the subjective motivations of a party.)

1 here to discuss its concerns, and to suggest a better way of going about the business of  
2 pursuing summary judgment.

3 Counsel for the moving parties should realize that there are at least two  
4 "victims" when a motion like this one makes its way into the courtroom: (1) the  
5 opposing party, which is forced to conduct an expensive "trial on paper;"<sup>2</sup> and, (2) the  
6 Court and its research attorneys, who are forced literally to spend days plodding through  
7 the thicket of issues, and to research and rule on all of them, including voluminous  
8 evidentiary objections that often exceed the total number of objections raised at a  
9 lengthy trial. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283-284.<sup>3</sup>

10 In *Nazir*, 178 Cal.App.4th at 289-90, the Court of Appeal made note of the rising  
11 summary judgment problem as follows:

12 The deficiencies in summary judgment papers can appear  
13 in a variety of places, and the approaches taken by the  
14 courts to address the deficiencies can vary as well, limited  
15 only by the inspiration or creativity of the particular law  
16 and motion judge-and, of course, due process. There is no  
17 universal solution, no panacea, and we do not even attempt  
18 to offer suggestions. We write here only to confirm the  
19 existence of the inherent power, to remind trial courts of it,  
20 and to encourage them to use it when appropriate.

21 *See also Reid v. Google, Inc.*, (2010) 50 Cal. 4th 512, 533-534 (raising the possibility of  
22 sanctions and "encourage[ing] parties to raise only meritorious objections to items of  
23 evidence that are legitimately in dispute and pertinent to the disposition of the summary  
24 judgment motion.")

25 The approach embraced by Department 9 over the past year is set forth on page  
26 2, paragraph IV. D. of its Standing Case Management Order:

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27 <sup>2</sup> Plaintiffs opposing papers raise 33 separate additional disputed material facts and 58  
28 evidentiary objections.

<sup>3</sup> Adding insult to injury, defendants request a statement of decision. This request is denied. A  
motion for summary judgment or a motion for judgment on the pleadings is not a trial of a question of  
fact. A statement of decision under CCP§632 is not required on a motion. 7 Witkin, Cal. Proc. 5th (2008)  
*Trial*, § 392, p. 460.



1 Plaintiff contends that the overtime requirement is not an essential function of  
2 her job and that the demoted position results in a 50 percent cut in pay. She further  
3 argues that reasonable accommodations could have been made that would have allowed  
4 her to remain in her position as a Coordinator. Plaintiff alleges that CMC and Martha  
5 Wallace violated provisions of the ADA and the California Family Rights Act for  
6 disability discrimination. She further alleges causes of action based upon Intentional  
7 Infliction of Emotional Distress and Wrongful Demotion in Violation of Public Policy  
8 that are the subject of this motion for judgment on the pleadings.

## 9 II. DISCUSSION

### 10 A. CMC'S MOTION FOR JUDGMENT ON THE PLEADINGS

11 The motion for judgment on the pleadings is directed to the Eighth and Ninth  
12 Causes of Action asserting common law claims for Demotion in Violation of Public  
13 Policy (8<sup>th</sup>) and Intentional Infliction of Emotional Distress (9<sup>th</sup>).

#### 14 1. *Governmental Entity Claim*

15 CMC first contends that the Eighth and Ninth causes of action are barred for  
16 failure to properly present a governmental entity claim pursuant to Government Code  
17 §905 et seq. Neither party cites controlling authority on this issue.

18 In *Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 711-  
19 712, the Court of Appeal held that exhaustion under the Tort Claims Act was not  
20 required because the government agency "had ample notice of appellant's claim through  
21 the EEOC and DFEH complaints, and had the opportunity to investigate and resolve the  
22 claim through the statutory procedures provided by these agencies. The [agency] has  
23 lost nothing but a technical defense by our conclusion that appellant was not required to  
24 file a government tort claim with them." *Murray v. Oceanside Unified School Dist.*  
25 (2000) 79 Cal.App.4th 1338 relies upon *Garcia* in holding that an action for relief under  
26 FEHA does not require the presentation of a governmental entity claim pursuant to  
27 Government Code §905 et seq.

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1           The eighth cause of action for demotion in violation of public policy is premised  
2 upon violations of Government Code §12940 et seq. (See Complaint ¶62) The ninth  
3 cause of action for intentional infliction of emotional distress arises entirely from  
4 plaintiff's claim of discrimination. (See Complaint ¶66) The remedies available for  
5 these two common law causes of action are largely duplicative of the remedies available  
6 under FEHA. (See generally Chin, et al., *Employment Litigation* (Rutter Group 2010)  
7 §17:335 et seq.)

8           Although neither *Murray* nor *Garcia* addresses the specific issue presented here,  
9 the rationale of those cases, that FEHA procedures provide the public entity sufficient  
10 notice of the nature plaintiff's claims, supports the conclusion that a common law claim  
11 arising from the same facts does not require administrative exhaustion. CMC has been  
12 afforded the opportunity to investigate and resolve the claim through the statutory  
13 procedures required by FEHA. Its motion for judgment on the pleadings based upon a  
14 failure to present a governmental entity claim is denied.

## 15                           2. Immunity of the Public Entity

16           CMC next asserts governmental immunity as to the eighth cause of action.  
17 Under the Government Claims Act (Gov.Code, § 810 et seq.), there is no common law  
18 tort liability for public entities in California; instead, such liability must be based on  
19 statute. *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897. Further, an  
20 individual who is not an employer cannot commit the tort of wrongful discharge in  
21 violation of public policy; rather, he or she can only be the agent by which an employer  
22 commits that tort. *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876,  
23 900.

24           There is no statute establishing the public entity's liability for demotion in  
25 violation of public policy. *Miklosy v. Regents of University of California* (2008) 44  
26 Cal.4th 876, 898-899. Accordingly, CMC's motion for judgment on the pleadings of  
27 the eighth cause of action, based upon the immunity of the State of California, is  
28 granted.

1 With respect to the ninth cause of action, CMC next contends that there is no  
2 statute making the entity directly liable for a common law intentional infliction of  
3 emotional distress claim. Since the employee is immune from such a claim pursuant to  
4 Government Code §820.2, the public entity is immune as well.

5 The provisions of Government Code section 815 provides as follows:

6 (a) A public entity is liable for injury proximately caused  
7 by an act or omission of an employee of the public entity  
8 within the scope of his employment if the act or omission  
9 would, apart from this section, have given rise to a cause of  
10 action against that employee or his personal representative.

11 (b) Except as otherwise provided by statute, a public entity  
12 is not liable for an injury resulting from an act or omission  
13 of an employee of the public entity where the employee is  
14 immune from liability. Government Code §815  
15

16 In turn, Government Code §820.2 provides immunity to public employees for  
17 their discretionary acts. The key question, then, is whether the conduct here  
18 encompasses a discretionary act.

19 Providing governmental immunity under section 820.2 is to be made with  
20 caution, on a case-by-case basis. *Johnson v State of California* (1968) 69 Cal.2d 782,  
21 798. This is a motion for judgment on the pleadings. Similar to a general demurrer, it  
22 addresses the legal sufficiency of the pleading.

23 The allegations surrounding the emotional distress claim are based upon a  
24 failure to reasonably accommodate the plaintiff's disability, and plaintiff's medical  
25 demotion.

26 The pleadings do not establish, as a matter of law, that the demotion involved a  
27 discretionary policy-type decision that Government Code §820.2 was intended to

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1 immunize. *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981 citing *Johnson v. State of*  
2 *California* (1968) 69 Cal.2d 782.

3 The motion for judgment on the pleadings related to the ninth cause of action for  
4 Intentional Infliction of Emotional Distress is denied.

5 The motion for judgment on the pleadings related to punitive damages against  
6 the public entity is conceded by the plaintiff and is granted.

7 ***B. CMC'S MOTION FOR SUMMARY JUDGMENT***

8 The cornerstone of CMC's argument is that a rule requiring mandatory overtime  
9 on the part of a psych tech is considered an "essential job function" as a matter of the  
10 undisputed record.

11 Courts have stated that the term "essential job functions" are those duties and  
12 responsibilities that the individual who holds the position must be able to perform, with  
13 or without the assistance of a reasonable accommodation. Marginal functions of the  
14 position are excluded. *See Dark v. Curry County* (9th Cir. 2006) 451 F. 3d 1078, 1087.  
15 Such issues are typically decided on a case-by-case basis. *D'Angelo v. ConAgra Foods,*  
16 *Inc.* (11th Cir. 2005) 422 F. 3d 1220, 1230; Chin, et al., *Employment Litigation* (Rutter  
17 Group 2010) §9:686. If the employee with a disability cannot perform an essential job  
18 function with or without accommodation, the employer can terminate the employee free  
19 of potential legal liability. *See Government Code §12940(a)(1) and(2).*

20 For purposes of FEHA, Government Code §12926(f) defines the term "essential  
21 function" to mean "the fundamental job duties of the employment position the  
22 individual with a disability holds or desires. "Essential functions" do not include the  
23 marginal functions of the position."

24 Subsection (1) makes clear that whether a job function is essential is inherently  
25 fact driven, and includes a variety of issues. Subsection (2) lists the sort of relevant  
26 evidence that goes into the equation:

27 (A) The employer's judgment as to which functions are essential.

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1 (B) Written job descriptions prepared before advertising or interviewing  
2 applicants for the job.

3 (C) The amount of time spent on the job performing the function.

4 (D) The consequences of not requiring the incumbent to perform the function.

5 (E) The terms of a collective bargaining agreement.

6 (F) The work experiences of past incumbents in the job.

7 (G) The current work experience of incumbents in similar jobs.

8 1. *Fact 7 and Issue 1*

9 CMC's undisputed material facts (DMF 1-23) are claimed to be relevant to all  
10 issues presented for summary adjudication. Further, according to CMC's points and  
11 authorities, all of those facts establish that the employee's ability to work overtime is an  
12 essential job function of a psych tech.

13 Fact 7 asserts that the ability to provide mandatory overtime as an essential  
14 function of the psychiatric technician's position. The evidence in support of this fact  
15 consists of deposition testimony of supervisors and psych techs, who claim that the  
16 availability to work mandatory overtime is necessary to insure full coverage of shifts  
17 and patient safety. Several documents are also referenced (*see* State of California  
18 Exhibits 2, 8 and 9) asserting that the overtime requirement is an essential job function.

19 If CMC's evidence were credited, a reasonable juror could conclude that  
20 mandatory overtime is an essential job function by virtue of the factors set out in  
21 Government Code §12926(f)(2). However, it is unsurprising that plaintiff takes issue  
22 with many of these factual assertions.

23 Plaintiff states that she served as a Department of Mental Health Coordinator  
24 from 2007 through 2009, addressing higher levels of care for patients. At the time of  
25 her interview for the Coordinator position, plaintiff states that she was not told of  
26 mandatory overtime requirements, and that she was given no information indicating that  
27 overtime was an essential job function. Further, plaintiff states that she was only asked  
28 to work overtime on one occasion during the 3 1/2 years of her employment at CMC.

1 Moreover, she was given 8 separate position descriptions, and *none of them* described  
2 overtime as an essential job function. Plaintiffs' Exhibits 5-12 appear to be duty  
3 statements that identify job tasks. (*See also* Plaintiff's additional facts 2, 3, 4, 8)

4 Plaintiff also contends that mandatory overtime is not an essential job function  
5 (at least) for a person serving as a DMH Coordinator. She proffers Exhibit 19, and the  
6 deposition testimony of her immediate supervisor, showing that the coordinator  
7 function did not require overtime. (*See* Plaintiff's additional facts 5 and 6; Bayard  
8 deposition, page 16 line 9-16; Exhibit 19 (form by plaintiff's supervisor (Bayard)  
9 stating that plaintiff can be accommodated because the position of coordinator does not  
10 require overtime.)

11 Plaintiff additionally submits the declarations of colleagues who serve as psych  
12 techs. Debbie Ward (Exhibit 1) states that she was required to work overtime by  
13 coming in two hours early on only one or two occasions over the last couple of years,  
14 and that both times were within the last month. Shawn Cave (Exhibit 2) states that she  
15 has served as a supervisor, and that she is aware of a number psych techs who use  
16 FMLA/CFRA leave in lieu of mandatory overtime. Linda Durhan (Exhibit 3)  
17 characterizes the need for overtime as a very minor part of the job.<sup>4</sup>

18 The MOU (Exhibit 14) appears to state that Employees who are eligible for  
19 FMLA shall not have more than six mandatory overtime shifts charged against their  
20 FMLA entitlement in a month. The FMLA and the CFRA both allow an employee a  
21 leave of absence for a serious health condition that makes the employee unable to  
22 perform the functions of his or her position. *See* Chin, et al., *Employment Litigation*  
23 (Rutter Group 2010) § 12:356.

24 There is direct testimony from a similarly-situated employee, and a supervisor,  
25 that overtime is only rarely required. Exhibit 19 raises the question of whether overtime  
26 was an essential job function, and whether allowing plaintiff to continue to serve as a  
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28 <sup>4</sup> Sharon Humlicek (Exhibit 4; ¶2) states that she was allowed to use FMLA leave time for  
exemption leave in lieu of serving mandatory overtime. However, this declarant does not state that she  
was employed at CMC.

1 DMH Coordinator would have been a reasonable accommodation for her disability.  
2 Also, it is difficult to reconcile the contention that a psych tech cannot be excused from  
3 overtime for a medical disability because it is an essential job function, while there are  
4 provisions in the MOU that allow a psych tech to be relieved from mandatory overtime  
5 with the use of family medical leave benefits. The ability to use FMLA time in lieu of  
6 serving overtime is contested.

7 Utilizing the factors contained in Government Code §12926(f), a reasonable  
8 trier of fact, considering the evidence presented, could also conclude that mandatory  
9 overtime is not an essential job function for the Coordinator and psych tech positions  
10 held by plaintiff. Therefore, Fact 7 is contested.

11 *Since Fact 7 is deemed relevant by CMC to all other issues raised in the motion,*  
12 *it justifies denial of the motion in its entirety.*

13 CMC next asserts, in Issue 1, that plaintiff is not considered a person with a  
14 disability as a matter of the undisputed factual record. However, section 12926(k) of  
15 the Government Code defines "physical disability" as follows:

16 (1) Having any physiological disease, disorder, condition,  
17 cosmetic disfigurement, or anatomical loss that does both  
18 of the following:

19 (A) Affects one or more of the following body systems:  
20 neurological, immunological, musculoskeletal, special  
21 sense organs, respiratory, including speech organs,  
22 cardiovascular, reproductive, digestive, genitourinary,  
23 hemic and lymphatic, skin, and endocrine.

24 (B) Limits a major life activity. For purposes of this  
25 section:

26 (i) "Limits" shall be determined without regard to  
27 mitigating measures such as medications, assistive devices,  
28 prosthetics, or reasonable accommodations, unless the  
mitigating measure itself limits a major life activity.

1 (ii) A physiological disease, disorder, condition, cosmetic  
2 disfigurement, or anatomical loss limits a major life activity  
3 if it makes the achievement of the major life activity  
4 difficult.

5 (iii) “Major life activities” shall be broadly construed and  
6 includes physical, mental, and social activities and  
7 working. (Emphasis added)

8 The Attorney General's presentation of Issue 1 for adjudication is premised upon  
9 the erroneous contention that plaintiff's life activities are not “limited” because her  
10 condition is controlled by medication. Yet the statute plainly requires that “limits” be  
11 determined *without regard* to mitigating measures such as medication. And, Plaintiff's  
12 declaration, at paragraph 9, establishes her condition of ulcerative colitis, as well as the  
13 fact that this condition limits her major life activities.

14 Facts 24, 25 and 26 do not establish, as a matter of law, the absence of a  
15 disability as defined by Government Code §12926(k). Under the statute, plaintiff has  
16 presented evidence establishing that she is a person with a disability. As was true with  
17 Fact 7, issue 1 is controverted, which warrants denial of the entire motion for summary  
18 adjudication.

19 *3. Miscellaneous Disputed Facts and Issues*

20 At oral argument, the Attorney General adamantly maintained that the rulings on  
21 Fact 7 and Issue 1 were not outcome determinative, and the tentative ruling did not  
22 address all of the relevant issues raised in its motion. However, if plaintiff is a person  
23 with a disability, and if the overtime requirement is not an essential job function, then  
24 plaintiff's demotion would appear to be violative of FEHA. In any event, the Court will  
25 briefly summarize the other contested factual disputes necessitating trial.

26 The motion for summary adjudication of Issue 2 is denied. Fact 7 is repeated at  
27 fact 28 and is disputed.

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1           The motion for summary adjudication of Issue 3 is denied. Fact 7 is repeated at  
2 fact 35 and is disputed. Fact 33 appears to be disputed at least with respect to whether  
3 plaintiff continues to be permanently unable to work overtime.

4           The motion for summary adjudication of Issue 4 is denied. The question of  
5 whether mandatory overtime is an essential job function is central to the determination  
6 of whether there was a reasonable accommodation.

7           The motion for summary adjudication of Issue 5 is denied. The question of  
8 whether mandatory overtime is an essential job function is central to the determination  
9 of whether the parties engaged in an interactive process.

10           The motion for summary adjudication of Issue 6 is denied. Facts 47, 48 and 49  
11 are identical to facts 24, 25, and 26 stated in Issue 1. These facts fail to establish that  
12 plaintiff does not belong to a protected group.

13           The motion for summary adjudication of Issue 7 is denied. Fact 51 is disputed.  
14 Facts 52 through 54 address Wallace's subjective intent. The Court has discretion to  
15 deny a motion that relies upon the subjective motivations of a party. (*See Weil &*  
16 *Brown, Civil Procedure Before Trial (Rutter Group 2010) §10:319 et seq.*)

17           The motion for summary adjudication of Issue 8 is denied. Fact 56 is disputed.  
18 Facts 57 through 59 address Wallace's subjective intent. The Court has discretion to  
19 deny a motion that relies upon the subjective motivations of a party. (*See Weil &*  
20 *Brown, Civil Procedure Before Trial (Rutter Group 2010) §10:319 et seq.*)

21           The motion for summary adjudication of Issue 9 is denied. The facts here repeat  
22 facts 56 through 59. Fact 61 is disputed. Facts 62 through 64 address Wallace's  
23 subjective intent. The Court has discretion to deny a motion that relies upon the  
24 subjective motivations of a party. (*See Weil & Brown, Civil Procedure Before Trial*  
25 *(Rutter Group 2010) §10:319 et seq.*)

26           The motion for summary adjudication of Issue 10 is denied. The facts here  
27 repeat facts 56 through 59. Fact 66 is disputed. Facts 67 through 68 address Wallace's  
28 subjective intent. The court has discretion to deny a motion that relies upon the

1 subjective motivations of a party. (See Weil & Brown, Civil Procedure Before Trial  
2 (Rutter Group 2010) §10:319 et seq.)

3 The motion for summary adjudication of Issues 11 and 12 are denied. The State  
4 argues that plaintiff is ineligible for CFRA coverage because she is permanently unable  
5 to perform an essential job function over a long term. However, this is not the law:

6 The CFRA extends leave of absence rights to employees  
7 suffering a “serious health condition” that makes the  
8 employee unable to perform the functions of his or her  
9 position. [Gov.C. § 12945.2(c)(3)(C); 2 Cal.C.Reg. §  
10 7297.0(o)] “Serious health condition” defined: With the  
11 exception of the pregnancy/childbirth exclusion discussed  
12 below, the definition of a “serious health condition” under  
13 the CFRA is the same as under the FMLA (*see* ¶ 12:263  
14 *ff.*). [2 Cal.C.Reg. § 7297.0(o)]

15 “CFRA's regulations provide that, for an employee to be  
16 entitled to a medical leave for her own serious health  
17 condition, the condition must cause her to be unable to  
18 work *at all* or unable to perform *one or more of the*  
19 *essential functions* of her position.” [*Neisendorf v. Levi*  
20 *Strauss & Co.* (2006) 143 CA4th 509, 516–517, 49 CR3d  
21 216, 221 (emphasis added) (citing 2 Cal.C.Reg. §  
22 7297(a)(2)(C))] Chin, et al., *Employment Litigation* (Rutter  
23 Group 2010) §12:356 -12:357

24 The federal appellate court’s observations about plaintiff’s claims and the FMLA  
25 in *Colins v. NTN-Bower Corp* (7<sup>th</sup> Cir. 2001) 272 F3rd 1007, are dicta, and are not  
26 binding on this Court. No state authority is presented to establish that an employee  
27 cannot qualify for CFRA coverage because their condition is chronic or permanent.

28 Issues 13-16 address plaintiffs claim for intentional infliction of emotional  
distress. The motion for summary adjudication of Issue 13 is denied. It is scarcely open  
to debate that the worker’s compensation exclusivity rule does not bar a suit for  
emotional distress damages resulting from unlawful discrimination. See Chin, et al.,  
*Employment Litigation* (Rutter Group 2010) §5:312.

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1           The motion for summary adjudication of Issue 14 is denied. Facts 73 and 74 are  
2           disputed. There are triable issues of fact concerning whether the conduct identified in  
3           plaintiff's evidence constitutes outrageous conduct.

4           The motion for summary adjudication of Issue 15 is denied. The facts relied  
5           upon in support of the motion to summarily adjudicate this issue rely upon evidence the  
6           subjective state of mind of the alleged tortfeasors. The Court has discretion to deny a  
7           motion that relies upon the subjective motivations of a party. (See Weil & Brown, Civil  
8           Procedure Before Trial (Rutter Group 2010) §10:319 et seq.)

9           The motion for summary adjudication of Issue 16 is denied. Facts 79 and 80 are  
10          disputed. There are triable issues of fact concerning whether severe harm was suffered.

11          Issue 17 is addressed in the motion for judgment on the pleadings. There is no  
12          liability on the part of a public entity for punitive damages. The motion for summary  
13          adjudication of Issue 17 is granted.

14          *C. WALLACE'S MOTION FOR SUMMARY ADJUDICATION*

15                 1. Issues 1 and 2: Fourth Cause of Action for Harassment

16                 Wallace contends that plaintiff cannot establish the elements of harassment  
17                 under FEHA. However, she asserts that Fact 8 is relevant to all issues. Fact 8 is  
18                 identical to Fact 7 in CMC's motion for summary adjudication. As discussed at length  
19                 above, that fact is disputed. Further, many of the facts relied upon to summarily  
20                 adjudicate this issue rely upon evidence of Wallace's knowledge and subjective state of  
21                 mind. (See DMF 30, 31, 32) The Court has discretion to deny a motion that relies upon  
22                 the subjective motivations of a party. (See Weil & Brown, Civil Procedure Before Trial  
23                 (Rutter Group 2010) §10:319 et seq.) The motion for summary adjudication of Issues 1  
24                 and 2 is denied.

25                 2. Issue 3: Fifth Cause of Action for Retaliation Based upon FEHA

26                 There is no individual liability for FEHA retaliation. *Jones v. Lodge at Torrey*  
27                 *Pines* (2008) 42 Cal. 4<sup>th</sup> 1158, 1173. The motion for summary adjudication of Issue 3 is  
28                 granted.



1           4. Issue 9: Punitive Damages

2           Wallace claims that she did not have any intent other than routine approval of a  
3 personnel matter. However, Facts 74 and 75 rely upon evidence of Wallace's  
4 knowledge and subjective state of mind. The Court has discretion to deny a motion that  
5 relies upon the subjective motivations of a party. (See Weil & Brown, Civil Procedure  
6 Before Trial (Rutter Group 2010) §10:319 et seq.) The motion for summary  
7 adjudication of issue 9 is denied.

8 **D. EVIDENTIARY OBJECTIONS**

9           The State of California makes numerous evidentiary objections to 81 separate  
10 items of evidence and declaration statements presented by the plaintiff. Martha Wallace  
11 makes identical objections to the evidence presented by the plaintiff. A separate order  
12 is not supplied as is required by Cal Rule of Court 3.1352(c). However, the Court will  
13 rule on certain objections containing evidence that was relied upon by the Court in  
14 ruling on these motions. *Reid v. Google, Inc.*, (2010) 50 Cal.4th 512, 532.

15           With respect to the declaration of Debbie Ward, Objection 2 as to the  
16 conclusions regarding the plaintiff is sustained. The other objections are overruled.

17           With respect to the declaration of Shawn Cave, Objection 4 is overruled. The  
18 declarant is a supervisor who presumably handled FMLA leave requests. Objection 5  
19 as to the conclusions regarding the plaintiff are sustained. The other objections are  
20 overruled.

21           With respect to the declaration of Linda Durham, Objection 8 is overruled as to  
22 overhearing Watkins yell over the telephone. The objections to paragraph 2, lines 13-  
23 14, are sustained. Objection 9 is sustained as to paragraph 3, lines 19-24 only. The  
24 other objections are overruled.

25           With respect to the declaration of Sharon Humlicek, Objection 12 is sustained  
26 because the declarant does not establish that she used FMLA in lieu of overtime at  
27 CMC. Objections 13 through 22 are overruled.

28           The Court has otherwise relied upon proper evidence.

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## CONCLUSION

The 1992 amendments to the California summary judgment statute were designed to follow the federal trend of liberalizing the trial court's ability to grant such motions in order to eliminate frivolous or marginal cases from the courts' dockets. However, the pendulum has now swung heavily in the other direction:

In the colorful language of Chief Judge Wald: "Its flame lit by *Matsushita, Anderson, and Celotex* ... summary judgment has spread ... through the underbrush of undesirable cases, taking down some healthy trees as it goes." (Wald, *supra*, 76 Tex. L.Rev. at p. 1941.) This, we cannot allow." *Nazir*, 178 Cal. App. 4<sup>th</sup> 285-86.

After wading "through bales of irrelevant information in an attempt to glean a kernel of substance," summary judgment papers like these can seem like "a deliberate, patent effort at obfuscation intended to overwhelm the trial judge charged with responsibility to determine fairly and impartially whether triable issues of fact exist." *Nazir*, 178 Cal.App.4th 283-84. Perception may not comport with reality, but tactics like this are on the rise, and "[i]t is a game the judicial system can no longer afford to play, if it ever could." *Id.*

This case is a "healthy tree" to the extent that there are important factual issues yet to be decided by the jury. Accordingly, it would be inappropriate to preempt the jury from exercising its traditional and vitally important role in the American system of justice.

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DATED: November 1, 2010

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CHARLES S. CRANDALL  
Judge of the Superior Court

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