1. AUSTIN, ET AL. v. RALEY'S, PC20210237

(A) Demurrer to Complaint

(B) Motion to Strike Request for Punitive Damages in Complaint

This action arises from required face masking, physical distancing, and other safety-related mandates and regulations issued in response to the COVID-19 global health emergency. Plaintiffs Deanna Austin, Jennifer Brown, Melonie Woodworth, and Regina Weeks are employees of defendant Raley's grocery store in Placerville, California. Plaintiffs' complaint, filed May 3, 2021, asserts causes of action for (1) disability discrimination, (2) failure to provide reasonable accommodation, (3) retaliation, and (4) breach of the covenant of good faith and fair dealing. Pending is Raley's demurrer to the verified complaint and motion to strike punitive damages from the verified complaint.

A. DEMURRER TO VERIFIED COMPLAINT

1. Standard of Review

A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code of Civ. Proc. § 430.30(a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Comm'n on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213.) All properly pleaded allegations of fact in the complaint are accepted as true, but not the contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A judge gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*)

2. Preliminary Matters

Raley's request for judicial notice ("RJN") of the following is granted pursuant to Evidence Code §§ 452(b), (c), (h), and 453: November 30, 2020, California Division of

Occupational Safety and Health ("Cal/OSHA") Emergency Temporary Standards ("ETS") regarding COVID-19, codified at Cal. Code Regs., tit. 8, § 3205, et seq. (RJN, Ex. 1.)

3. Discussion

3.1 1st C/A for Disability Discrimination

Plaintiffs' first cause of action alleges that Raley's unlawfully discriminated against them based on their disability status, which arises from preexisting medical conditions and/or physical disabilities that face masking/face covering exacerbates.

The California Fair Employment and Housing Act ("FEHA"), Government Code §§ 12900, et seq., protects employees from discrimination based on a wide variety of grounds, and makes it illegal "[f]or an employer, because of … physical disability [or] … medical condition … of any person … to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov't Code § 12940(a).) "Although [Government Code] section 12940 proscribes discrimination on the basis of an employee's disability, it specifically limits the reach of that proscription, excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties." (*Green v. State of Cal.* (2007) 42 Cal.4th 254, 262.)

To establish a claim of disability discrimination under the FEHA, an employee must plead facts establishing that (1) she has a disability or medical condition; (2) she is qualified to perform the essential duties of her position, with or without reasonable accommodation; (3) she suffered an adverse employment action; and (4) the employer subjected her to the adverse action because of her disability. (*Id.* at pp. 257–258, 261–264; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 962, 976–978.)

Raley's demurs on the grounds that the 1st C/A fails to state facts sufficient to constitute a cognizable cause of action for disability discrimination, and the complaint

discloses facts that establish that the cause of action is barred by an affirmative defense based on the health and safety of plaintiffs and/or others.

The demurrer on the basis that the 1st C/A fails to state facts sufficient to constitute a cognizable disability discrimination claim is well taken. Plaintiffs have the burden of pleading factual allegations establishing they were qualified to perform the essential duties of their jobs, with or without accommodation. Plaintiffs have not met this burden.

Pursuant to regulations promulgated by Cal/OSHA, issued November 30, 2020, all nonexempt employers, which includes Raley's, were required to ensure, inter alia, that face coverings were worn by employees. (RJN, Ex. 1, § 3205(c)(7).) "Employees exempted from wearing face coverings due to a medical condition, … or disability shall wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it." (*Id.*, § 3205(c)(7)(B).)

Plaintiffs allege that due to their medical conditions they could not wear face coverings or face shields with a drape while working in the store. Given that limitation, the Cal/OSHA ETS direct that "[a]ny employee not wearing a face covering, face shield with a drape or other effective alternative, … for any reason, shall be a least six feet apart from all other persons unless the unmasked employee is tested at least twice weekly for COVID-19." (*Id.*, § 3205(c)(7)(C).)

In order to both accommodate plaintiffs' inability to wear face coverings of any type and to comply with the required physical distancing measures, Raley's offered to allow plaintiffs to work on the night crew when the store is closed. In their complaint, however, plaintiffs seek injunctive relief allowing them to return to their former work schedules, during store hours, with no mandatory face masking. In essence, plaintiffs request an accommodation that violates mandatory safety regulations; i.e., an essential function of the job. But, "[t]he law does not require an employer to accommodate a disability by foregoing an essential function of the position or by

reallocating essential functions to make other workers' jobs more onerous." (*Kilgore v. Tulare County* (E.D. Cal. 2012) 2012 WL 483085, at *11, quoting *Kvorjak v. Maine* (1st Cir. 2001) 259 F.3d 48, 57 [internal citation and quotation marks omitted];[1] *see also* Cal. Code Regs., tit. 2, § 11065(e) [defining "essential job functions"].)

Because plaintiffs have not adequately pleaded one of the essential elements of a disability discrimination cause of action—that each one is qualified to perform the essential duties of their position, with or without reasonable accommodation—the demurrer is sustained.

Additionally, Raley's demurs on the basis that the allegations of the complaint disclose that the 1st C/A is barred by an affirmative defense based on the health and safety of plaintiffs and others. (*See Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 169.) This assertion could also be framed as a demurrer on the basis that plaintiffs have not adequately pleaded a causal connection; that is, that Raley's actions were not taken because of plaintiffs' medical conditions.

Framed either way, the court finds Raley's demurrer persuasive. The complaint discloses facts that establish that Raley's actions were taken in response to the issuance of mandatory workplace safety regulations, not because of discriminatory animus towards any of the plaintiffs. (Compl., ¶¶ 24–25, 38, 52, 55.)

In summary, Raley's demurrer to the 1st C/A is sustained. Given that this is an initial complaint, leave to amend is granted.

3.2 2nd C/A for Failure to Provide Reasonable Accommodation

Plaintiffs' 2nd C/A alleges that Raley's failed to reasonably accommodate their medical conditions. Government Code § 12940 provides that it is an unlawful employment practice "[f]or an employer … to fail to make reasonable accommodation for the known physical or mental disability of an … employee." (*Id.*, subd. (m)(1).) "An

[1] "California relies on federal discrimination decisions to interpret the FEHA." (*Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 271.)

employer … has an affirmative duty to make reasonable accommodation(s) for the disability of any … employee if the employer … knows of the disability, unless the employer … can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 11068(a).) " 'Reasonable accommodation' may include … [¶] [j]ob restructuring, part-time or modified work schedules, [or] reassignment to a vacant position …." (Gov't Code § 12926(p)(2).) "It is a permissible defense to a claim alleging a failure to provide reasonable accommodation for an employer … to prove that providing accommodation to an … employee with a disability would have created an undue hardship." (Cal. Code Regs., tit. 2, § 11068(j).)

"The employer is not obligated to choose the best accommodation or the accommodation the employee seeks. [Citation.] Rather, ' "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." [Citation.] As the Supreme Court has held in analogous circumstances, an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citation.]' [Citations.]" (*Hanson v. Lucky Stores*, *Inc.* (1999) 74 Cal.App.4th 215, 228.)

For reasons already discussed in section 3.1, plaintiffs have not adequately pleaded that each one is qualified to perform the essential duties of their position, with or without reasonable accommodation. Furthermore, the allegations of the complaint establish that Raley's actions were taken in response to the issuance of mandatory workplace safety regulations. Violating mandatory safety regulations to accommodate plaintiffs' requested accommodation would create an undue hardship.

The demurrer to the 2nd C/A is sustained. Given that this is an initial complaint, leave to amend is granted.

3.3 3rd C/A for Retaliation

Plaintiffs' 3rd C/A alleges that Raley's retaliated against them for engaging in a protected activity; i.e., requesting reasonable accommodation.

The FEHA prohibits an employer from retaliating against an employee, including an at-will employee, "because the person has opposed any practices forbidden under ... [the FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under ... [the FEHA]." (Gov't Code § 12940(h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation 'drops out of the picture,' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

For reasons already discussed in section 3.1, the allegations of the complaint establish that Raley's actions were taken in response to the issuance of mandatory workplace safety regulations. Thus, plaintiffs' complaint fails to adequately plead one of the essential elements of a retaliation cause of action.

The demurrer to the 3rd C/A for retaliation is sustained. Given that this is an initial complaint, leave to amend is granted.

3.4 4th C/A for Breach of the Covenant of Good Faith and Fair Dealing

" 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' [Citation.]" (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) The covenant is a contract term, and " '[t]he precise nature

and extent of the duty imposed by such an implied promise will depend on the contractual purposes.' [Citation.]" (*Id.* at p. 684.) Thus, one essential element of a cause of action for breach of the covenant is that there is an underlying contract. (*Racine & Laramie, Ltd. v. Dep't of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031 ["The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation."].)

Here, the complaint fails to allege the existence of an underlying contract and a specific contractual obligation. Absent a contractual relationship, employment is presumed to be at-will. (Labor Code § 2922.)

Because plaintiffs fail to plead one of the essential elements of the cause of action, the demurrer is sustained. There does not appear to be a reasonable possibility that the 4th C/A can be cured by amendment, and plaintiffs have not sufficiently explained how the 4th C/A can be amended to cure the defects. (*See Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.) The demurrer to the 4th C/A for breach of the covenant of good faith and fair dealing is sustained without leave to amend.

B. MOTION TO STRIKE PUNITIVE DAMAGES FROM THE COMPLAINT

Finally, Raley's moves to strike those portions of the verified complaint seeking punitive damages; that is, paragraphs 86 and 96 and section (iv) of the prayer for relief.

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Mem. Hosp.* (1989) 216 Cal.App.3d 340, 342.) The grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code of Civ. Proc. § 437(a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Serv. v. Super. Ct.* (1992) 8 Cal.App.4th 1504, 1519.)

The basis for punitive damages is set forth in Civil Code § 3294: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (*Id.*, subd. (a).)

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.… [¶] 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.… [¶] 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Id.*, subd. (c).)

With regard to nonintentional conduct: "[M]alice is the basis for assessing punitive damages for nonintentional conduct; that is, acts performed without intent to harm.… Nonintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result." (*Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 381 [citations omitted].)

As currently pled, Raley's alleged conduct does not meet any of these standards. The motion to strike is granted with leave to amend.

TENTATIVE RULING # 1: DEFENDANT'S DEMURRER TO THE VERIFIED COMPLAINT IS SUSTAINED. LEAVE TO AMEND THE 1ST, 2ND, AND 3RD CAUSES OF ACTION IS GRANTED. LEAVE TO AMEND THE 4TH CAUSE OF ACTION IS DENIED. DEFENDANT'S MOTION TO STRIKE PUNITIVE

DAMAGES FROM THE VERIFIED COMPLAINT IS GRANTED WITH LEAVE TO AMEND. PLAINTIFFS MUST FILE AND SERVE THEIR FIRST AMENDED VERIFIED COMPLAINT NO LATER THAN 10 DAYS FROM THE DATE OF SERVICE OF THE NOTICE OF ENTRY OF ORDER.