

Dept. 4**Civil Law and Motion Tentative Rulings for Friday, February 13, 2025, at 8:30 a.m.**

If you wish to appear for oral argument, you must so notify the Court at (209) 533-6633 and (209) 588-2316, and all other parties by 4:00 p.m. on the court day preceding the hearing, consistent with CRC 3.1308. The tentative ruling will become the ruling of the Court if notice for oral argument has not been provided.

1. Henderson v. Terzich and Wilson Funeral Home

Hearing on: MSJ and Sanctions
Moving Party: Defendant
Tentative Ruling: See Below

This is a wrongful termination action. Before the Court this day is defendant's motion for summary adjudication/judgment, directed at the three remaining causes of action asserted by plaintiff, to wit: wrongful termination in violation of public policy (*Tameny*); retaliation (Labor Code §1102.5); and OSHA retaliation (Labor Code §6310). Also before the Court this day is a defense motion for sanctions against plaintiff due to his failure to permit depositions to proceed via Zoom. Finally, though technically set for hearing next week, defendant also has in the queue a motion to bifurcate which can be easily dispensed with at this time (there being no opposition, and the time for that having passed).

Pertinent Factual Background

On February 4, 2022, plaintiff commenced employment with defendant as a back-up, on-call attendant to assist the regular attendant when transporting a recently-deceased required additional assistance. The parties do not state whether plaintiff was an "employee" or an "independent contractor" in this position.

On September 29, 2022, a full-time office position opened up with the company. Plaintiff applied, and secured the job. His hours were 8:30 am – 5:30 pm. He was responsible for general maintenance, cleaning, dressing, attending to the bodies, and night recoveries. He received both an hourly rate (\$16) for his "day job" and a flat rate (\$100) for night recoveries. The parties do not state whether plaintiff was treated as an "employee" for both portions, but for present purposes it shall be assumed that he was.

On December 14, 2022, plaintiff tendered an oral "two-week notice" of his intention to resign. It is unclear to this Court whether his oral notice included resignation from both the \$16/hr "day job" and the \$100 "per vesper" job, but according to plaintiff he was only intending to resign from the former. (Plaintiff's text message to Brian on December 20, 2022, did specify that he was giving "two weeks on hourly," giving credence to plaintiff's position.)

On December 22, 2022, one of plaintiff's co-workers asked plaintiff to assist with moving a body. Due to the size and condition of the body, plaintiff declined. The co-workers was upset, and reportedly confronted plaintiff. According to the evidence presented, harsh words were exchanged, and only brief physical contact occurred in that small office. Both plaintiff and that co-worker were told to go home and cool off. They both complied.

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On December 24, 2022, plaintiff was informed by upper management that his resignation had been accepted and that he would be paid in full through the end of his resignation period (December 31, 2022). Thereafter, plaintiff went to the Sonora Police Department to report the altercation with his co-worker.

Although plaintiff declined to personally receive his final paycheck, he did in fact receive and negotiate that check. Plaintiff soon secured a new job with DoorDash.

Summary Adjudication/Judgment

The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. A defendant moving for summary adjudication may prevail on the motion in one of three ways: (1) by affirmatively negating at least one of plaintiff's essential elements; (2) by showing that plaintiff does not have, and cannot get, evidence to establish an essential element after fully exploring plaintiff's case through discovery; or (3) by presenting evidence as to each element of an affirmative defense upon which defendant bears the burden of proof at trial. To the extent adjudication turns on factual questions, the trial court assesses the evidence in light of the parties' respective burdens. The moving party's affidavits are strictly construed while those of the opposing party are liberally construed. Once the defendant's initial burden is met, the burden shifts to the plaintiff to show by substantial evidence that a triable issue of material fact exists as to the claim or defense. CCP §437c; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851-854.

Plaintiff's **first** cause of action is wrongful termination in violation of public policy. While an at-will employee may ordinarily be terminated for no reason at all, or even for one that is considered to be arbitrary or irrational, an employer is not permitted to terminate an employee for a reason which contravenes a well-established fundamental public policy. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172. This is commonly referred to as a *Tameny* claim. To establish a *Tameny* claim, plaintiff must ultimately prove by a preponderance of the evidence each of the following essential elements:

- (1) the existence of an employer-employee relationship;
- (2) some adverse employment action taken against the employee;
- (3) adverse action that is substantially motivated by purpose violative of public policy;
- (4) actual damages proximately caused by the adverse action.

See *Williams v. Sacramento River Cats Baseball Club, LLC* (2019) 40 Cal.App.5th 280, 287-288; *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 678-

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681; *Sistare-Meyer v. Young Men's Christian Ass'n of Metropolitan Los Angeles* (1997) 58 Cal.App.4th 10, 18.

Plaintiff's **second** cause of action is based on Labor Code §1102.5(b), which makes it an actionable wrong for an employer to retaliate against an employee who may disclose information to upper management or any government agency regarding a possible violation of law. This is commonly referred to as a "whistleblower" claim. To establish this claim, plaintiff must show by a preponderance of the evidence the following essential elements:

- (1) the existence of an employer-employee relationship;
- (2) that plaintiff had reasonable cause to believe that the employer was engaged in illegal activity;
- (3) the employer had reason to believe that plaintiff had, or soon will, report that activity to a person/agency with investigative and curative authority;
- (4) defendant's concern about plaintiff's reporting was a *contributing* factor for the adverse (aka retaliatory) action taken against plaintiff;
- (5) the adverse action was a *substantial* factor in causing plaintiff's harm.

See *Brown v. City of Inglewood* (2023) 92 Cal.App.5th 1256, 1265; *Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 718-720. If those elements are met, the defense is then burdened with the obligation to show by clear and convincing evidence that the adverse employment action would have occurred for legitimate, independent reasons even if the employee had not engaged in the protected whistleblowing activity. See Labor Code §1102.6; *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 715-716; *Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 378-379.

Plaintiff's **third** cause of action is based on Labor Code §6310, which makes it an actionable wrong for an employer to discharge, demote, suspend, or in any manner discriminate against any employee because the employee made a bona fide complaint about, or participated in, any proceeding within the investigative authority of Cal-OSHA. The scope of Cal-OSHA is broad: it covers all "work-related" injuries except those covered by Workers Compensation (§6310(a)(4)); it obligates employers "to do every other thing reasonably necessary to protect the life, safety, and health of employees" (§§ 6403(c), 6406(d)); and it promotes "freedom from danger to the life, safety, or health of employees as the nature of the employment reasonably permits" (§6306(a)).

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The parties first disagree as to whether plaintiff qualified as an employee on December 24, 2022, which is an essential element in all three of his claims. Under California law, an employee has a right to unilaterally rescind a two-week notice of resignation prior to the employer's acceptance. Civil Code §1586; *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1165. There is no evidence provided by the defense showing that plaintiff's resignation from December 14 was actually accepted prior to the December 22 altercation; in fact, the December 20 text message from plaintiff to Brian permits a reasonable inference that the boss (Jeff) was not yet even aware of the resignation prior to the December 22 altercation. By the same token, there is no evidence provided by plaintiff that he rescinded his resignation at any time before it was officially accepted on December 24. Since neither side adequately covered this issue, and since defendant is the party seeking affirmative relief on this motion, the penalty for that omission must fall on defendant.

Even if the evidence shows that defendant accepted plaintiff's resignation prior to December 22, which would have put his eventual damages at or near zero, there remains an unanswered question regarding the scope and meaning of that resignation. According to plaintiff, he only resigned from the "day job" (8:30 am – 5:00 pm), not the evening collection job. The evening collection job paid \$100/night, and only required plaintiff to be on-call to retrieve bodies. Since plaintiff was the lead attendant, he presumably had dedicated use of the company hearse and gurney. Assuming this to be true, the question is whether plaintiff qualified as an employee or an independent contractor for that on-call collection job. He must be an employee to have standing for any of his three claims, so if that night job made him an independent contractor, then his potential "employment damages" would have only been the final week of December 2022, and nothing more. Since neither side adequately covered this issue, and since defendant is the party seeking affirmative relief on this motion, the penalty for that omission must fall on defendant.

Another issue is the causal connection between the company's decision to accept plaintiff's resignation from the day job, and to terminate plaintiff from the night job, based upon the alleged safety issue with the co-worker. Defendant was certainly aware of the safety issue, and actually took action by sending that employee home for the day. Defendant took statements from those involved, though plaintiff refused to cooperate. Plaintiff contends that defendant's actions were substantially motivated by protecting the co-worker who started the fight and instead pushing plaintiff out the door. Plaintiff was already out of the "day" door, but there is a triable issue of fact here because defendant told plaintiff not to come and finish his work for that week, offering instead to pay him to stay home. This is the equivalent of paid administrative leave, which is an adverse employment action even if it had little overall effect. As for the night job, it does seem as though defendant removed him from this position for no

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reason other than the altercation with the co-worker and, perhaps, misinterpreting plaintiff's notice of resignation. By its very nature, this is a triable issue of fact.

Finally, the parties disagree as to whether plaintiff has alleged a violation of law, public policy or safety measure. All three causes of action are based upon the same premise, to wit: plaintiff was fired for complaining to upper management about being attacked by an unpredictable (and perhaps unstable) co-worker, making the workplace unsafe. Although neither side has cited *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, it seems to this Court that the analysis provided in that decision controls a large part of the analysis here. Stated as succinctly as possible: terminating an employee for complaining to upper management, and threatening to take the complaint to government agencies, about violent tenancies of a co-worker is actionable as a *Tameny* claim and/or a §6310 claim. It is two versions of the same claim, entitling plaintiff to only one compensatory award if the claim is otherwise stated. The wrongdoing alleged by plaintiff does not support a §1102.5 claim because a random adverse interaction with a co-worker, triggered by plaintiff's own refusal to perform a work function, is not a violation of law susceptible to whistleblower protection.

The §1102.5(b) cause of action fails as a matter of law, and defendant is entitled to summary adjudication of that claim in its favor.

For similar reasons, there is no legal basis for allowing a claim for punitive damages to reach the trier of fact in this case. A corporation can only act through its agents/employees, and as such a prayer for punitive damages against a corporation must be based on the acts of its agents/employees. Accordingly, as against any corporation, plaintiff must show by clear and convincing evidence that an officer, director or managing agent: (1) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others; (2) authorized the bad act; (3) ratified the bad act; or (4) was personally (ie, through controlling members) guilty of fraud, oppression or malice. Civil Code §3294(b); *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1148-1149. "Ratification may be proved by circumstantial as well as direct evidence. Anything which convincingly shows the intention of the principal to adopt or approve the act in question is sufficient. It may also be shown by implication: where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, else he will be bound by the act as having ratified it by implication." *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242. Generally speaking, continuing to employ someone after knowing about a tort they committed – without reprimand, sanction or penalty – is an implied ratification. *Flores, supra*, 161 Cal.App.4th at 386; *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617; *Green-field v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, 118–119.

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This heightened requirement applies anytime punitive damages are sought against a corporation. See *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 167-168; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 85. Here, the co-worker was reprimanded after the altercation with plaintiff by being sent home and made to complete a report about the incident. The fact that his reprimand was perhaps less onerous than the one given to plaintiff (reasonable minds might differ) is of little consequence because plaintiff only had a few days left on his “day job” and a limited shelf life for his alleged night job. Separately, an employer may be vicariously liable under the doctrine of *respondeat superior* for torts committed by employees: (1) in the course and scope of employment, (2) if there exists a reasonable relationship between the duties of employment and the conduct causing injury, and (3) the injury was reasonably foreseeable in light of the employer’s business or employee’s job responsibilities. See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298; *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 161; *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559–1560. Thus, “[a]n employer is liable for an assault and battery committed by an employee where the employment in some way involves the risk of force used against third persons, the act is connected with the employment, and the act is not motivated by independent personal malice.” Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 186, p. 237. See also, *Flores v. Autozone West, Inc.* (2008) 161 Cal.App.4th 373, 380-382. However, this job did not involve anything that might call for a hostile interaction between co-workers, and in fact would not have happened but for plaintiff’s admitted insubordination. Under either theory, the claim for punitive damages fails.

The *Tameny* and §6310 claims survive by a relatively thin margin, largely because the defense failed to affirmatively negate employment status, causation, or damages (despite the claim from plaintiff’s counsel that economic damages are not at issue). However, this Court would be remiss if it failed to point out that even if plaintiff were to prevail on the merits of his claims, the parties are in the wrong jurisdiction because the most that plaintiff could hope for is zero dollars on the “day job” (he was paid through the end of his resignation) and perhaps a month for the “night job” before the protected activity protection would give way to ordinary at will status (since defendant had to replace plaintiff for the day job, it was likely that defendant would give that replacement first dibs for the night job too). That puts plaintiff’s damages somewhere in the small claims’ range, even without accounting for the fact that plaintiff quickly secured alternate employment and mitigated his damages.

Pursuant to CCP §403.040, a trial court has authority to conduct a pretrial hearing at any time (provided there is notice to all sides) to fairly evaluate the amount in controversy, and to reclassify the action “limited” or “unlimited” if the circumstances so warrant. *Williams v. Superior Court* (1989) 216 Cal.App.3d 378, 386 n.6. The governing standard for reclassifying unlimited to limited jurisdiction is found in *Walker v. Superior Court* (1991) 53 Cal.3d 257,

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279. There, the Supreme Court stated the trial court must conclude that resolution of the action will “necessarily” fall short of the jurisdictional minimum before transferring a case from limited to unlimited jurisdiction, analogizing the “necessarily” test to the “‘legal certainty’” test utilized in the federal courts. *Id.* at 270. The trial court looks to the possibility of a jurisdictionally appropriate verdict, not to its probability. *Maldonado v. Superior Court* (1996) 45 Cal.App.4th 397, 402; see also *Ytuarte v. Superior Court* (2005) 129 Cal.App.4th 266, 270 [it must appear to a “legal certainty” that verdict in excess of minimum jurisdiction is virtually unattainable to support reclassification to limited jurisdiction]; *Stern v. Superior Court* (2003) 105 Cal.App.4th 223, 233 [same]. This Court will entertain briefing on the issue if either party is so inclined, but it is this Court’s tentative impression that reclassification to limited is an appropriate move at this time.

Discovery Sanctions

Pursuant to CCP §2025.250, the deposition of defendant and its current employees “shall be taken at a place that is, at the option of the party giving notice of the deposition,” within 75 miles of defendant’s main office. Defendant’s main office is just off Lyons Street near downtown Sonora.

Due in large part to Sonora’s relative remoteness, attorneys from “big city” law firms often seek to set local depositions at the outer reaches of the 75-mile radius to bring themselves as close as possible to an airport or main highway. The predicable options tend to be east, such as Stockton, Modesto, or Merced. In this case, plaintiff’s counsel selected Tracy, CA – an unconventional location just barely within the 75-mile radius. In his deposition notice, he requested four persons (separated by roughly 1 hour) for January 6, and three persons (separated by 90 minutes) for January 7. Counsel included therein the following warning: “some depositions may occur simultaneously and taken by different attorneys.” See 3:8-9. The deposition notice also included a request to produce at the deposition several distinct categories of documents.

Defense counsel and four individuals from the Sonora office traveled on January 6 to the court reporter’s office in Tracy for the noticed deposition. To the alleged surprise of defense counsel, counsel for plaintiff elected to appear at the deposition, and question the witnesses, via Zoom. Defense counsel objected, and took issue with counsel’s alleged gamesmanship by failing to inform defense counsel that everyone could appear via Zoom.

As a result of COVID, the Legislature enacted a number of remote options for discovery. Critical here are CCP §2025.310 and CRC 3.1010, which collectively provide for the rule that everyone *except* the person being deposed is allowed to participate in the deposition via remote

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technology. That means that the court reporter can be remote, the attorney asking questions can be remote, and the parties watching the deposition can be remote. Even the attorney defending the deposition can be remote. Only the deponent has to be a designated location. See CRC 3.1010(c). The only catch is this: the attorney taking the deposition can appear via remote technology if, but only if, he or she (1) provides written notice of that intent with the notice of deposition; and (2) makes all arrangements for any other party to participate in the deposition in an equivalent manner. See CRC 3.1010(a).

Having read both the emails and deposition transcripts, this Court generally agrees with defense counsel that Attorney Freiman demonstrated a lack of professional courtesy or decorum. This is especially noteworthy during the deposition when Mr. Freiman erroneously tried to silence opposing counsel from making an objection, and then tried to convince the court reporter to stop reporting. While the former is simply unprofessional, the latter represents a direct violation of CCP §2025.470. It is also worth noting that Attorney Freiman had every indication when he set the depositions that switching over to Zoom was a realistic potential for him, and yet the Rules of Court did not allow him to make that 11th-hour switch without consent or judicial intervention. The Rules are rather explicit that if the deposing counsel wants to preserve the option to take a deposition via Zoom, that option must be stated in the deposition notice. Since he did not do that, he was not entitled to the last-minute switch and was obligated to either endure the drive or work out something with opposing counsel. There is no evidence proffered to show that Attorney Freidman ever actually booked a flight to Oakland or reserved a rental car to get to Tracy, suggesting no intention of ever going live. Rather than agree to have the depositions take place in Sonora (where the parties and the case exist) and appear via Zoom for questioning, Attorney Freidman made everyone except himself and his client drive out to Tracy for no apparent reason.

Despite all this, defendant's motion for sanctions is wildly overstated. First, there is no evidence provided by defense counsel that had she been given the option, she would have remained in Sacramento and defended the depositions via Zoom. Perhaps she would have, but since she offered to come to Sonora to defend the depositions (a further drive), this Court reasonably surmises that if the deponents had to go to Tracy, defense counsel was going either way. Second, deponents had to go to Tracy either way because §2025.250 expressly gives the deposing party the absolute right to select the location, and nothing in §2025.310 or CRC 3.1010 changes that. Defense counsel could have, and probably should have, run a motion for a protective order, but that would have been the only way to avoid the deponents having to go to Tracy. Third, defendants have not shown the incursion of costs associated with Attorney Freiman's appearance via Zoom, such as a longer deposition or the like. Fourth, there is no mention of what happened on January 7 – did everyone appear via Zoom, and would that have been an option on January 6? It is not at all clear from the papers filed.

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Although the sanction claim is exaggerated, Attorney Freiman has engaged in a misuse of the discovery process by (1) using a discovery method in a manner that does not comply with its specified procedures (Zoom deposition without proper notice); (2) employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense (Zoom deposition without making arrangements for others), and (3) failing to respond or to submit to an authorized method of discovery (interfering with reporting of deposition). See CCP §2023.010. The direct costs associated with these transgressions appear to be *de minimus*; however, these are clear violations, and there were costs associated with having to brief these issues and bring them to the Court's attention. Given a reasonably regional hourly rate of \$400, and a reasonable investment of 5 hours to assemble this motion and any follow-up thereto, this Court imposes a monetary sanction on Attorney Freidman of \$2,000 – payable to defense counsel within 10 days.

Bifurcation

Trial courts have plenary power to provide for the orderly conduct of proceedings before it. CCP § 128(3). This power is both inherent and statutory. For example, CCP § 1048(b) authorizes a trial court to try separately proceedings to avoid prejudice, for convenience, or to permit greater expedience and economy:

"The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury."

In addition, CCP § 598 provides that, within the same trial, the court may, "when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby," and on motion heard no later than 30 days before the trial date, order that an issue ***or any part thereof*** shall precede the trial of any other issue or any part thereof.

Although it is generally left to the parties to present their cases in the manner they feel best supports their contentions, bifurcation, regulation and prioritization can be ordered if doing so will expedite/simplify things. However, if such an order results in duplication of effort, the order may be subject to reversal. See *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1283.

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Here, defendant seeks an order bifurcating the trial into two phases: liability on the two remaining claims; and thereafter adjudication of the punitive damages claim. Since this Court has already found that defendant is entitled to summarily adjudicate the punitive damage claim in its favor, there is no need for bifurcation.

In Conclusion

MSA – *Tameny* (Denied)

MSA – §1102.5 (Granted)

MSA – §6310 (Denied)

MSA – Punitives (Granted)

Discovery Sanction – Granted (\$2,000)

Bifurcation – Moot

Trial date to remain.

Defendant to prepare Notice of Ruling and Proposed Order.