

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 05/04/2016
JUDICIAL OFFICER: Kevin DeNoce

EVENT TIME: 08:20:00 AM

DEPT.: 43

CASE NUM: 56-2016-00476697-CU-OE-VTA
CASE TITLE: TAITAI VS CITY OF PORT HUENEME

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Other employment

EVENT TYPE: Demurrer (CLM)
CAUSAL DOCUMENT/DATE FILED: Demurrer, 02/23/2016

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you can send an email to the court at: Courtroom43@ventura.courts.ca.gov or send a telefax to Judge DeNoce's secretary, Hellmi McIntyre at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending a telefax, nor should you call to see if your telefax has been received. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

The court's tentative ruling is as follows:

The Court sustains the demurrer with leave to amend as to causes of action 1-6.

Discussion:

Judicial Notice of Plaintiffs' Gov't Tort Claims -

A plaintiff seeking recovery for tort from a public entity must file a tort claim with the entity under the California Tort Claims Act ("CTCA"). This allows the entity to evaluate the claim and make a determination as to whether it will pay on the claim. Failure to timely file a tort claim renders the complaint subject to demurrer. V.C. v. Los Angeles Unified School Dist. (2006) 139 Cal.App.4th 499, 509 (affirming trial court decision to sustain demurrer without leave to amend on the ground that V.C.'s failure to timely comply with the requirements of the Tort Claims Act barred her action). The court takes judicial notice of Taitai's tort claim of 5/5/15, Bear's tort claim of 5/11/15, and the joint amended tort claim that Taitai and Bear filed together on 5/18/15.

Are the causes of action concerning unemployment insurance subject to the Tort Claims Act? -

As a threshold issue, *Ps* argue that their claims are not subject to the CTCA. This is because Gov't Code §905(j) expressly exempts from the CTCA any claims arising out of the Unemployment Insurance Code. So even though *Ps* filed tort claims, they argue that they were not required to do so. Gov't Code §905(j) provides that all claims for money or damages against a local public entity must be presented to that entity except for "claims arising under any provision of the Unemployment Insurance Code, including but not limited to, claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deduction from wages in excess of the amount prescribed."

The court concludes that exemption set forth in section 905(j) does not apply to this case. Ps are asking for "money" related to the Unemployment Insurance Code, so the exemption might appear to apply to a case involving unemployment insurance, but the gravamen of this case is not that Ps were *denied unemployment benefits*, but that their efforts to seek unemployment benefits led to retaliation/harassment by the City. Ps argue in their opposition that, in fact, they are seeking unemployment benefits as well. This is true but the City is not the entity that would pay on those benefits. Rather it would be the unemployment insurance fund. As stated by the court in Nasrawi v. Buck Consultants LLC (2014) 231 Cal.App.4th 328, 339:

"Generally, 'the statutory exceptions specified in section 905 are given a strict construction.' (Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal.App.4th 1566, 1573 [23 Cal. Rptr. 2d 230] (Dalton).) Courts have construed the section 905, subdivision (f) exception specifically as applying only 'where an individual seeks money due under the terms of an existing pension system.' (Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan (2007) 150 Cal.App.4th 1487, 1497 [59 Cal. Rptr. 3d 587], citing Dalton, supra, at p. 1574.) Where, as here, plaintiffs allege 'tortious wrongdoing by [the] defendant['],' section 905, subdivision (f) is not implicated. (Dalton, supra, at p. 1574 [former utility district employees were required to file a claim pursuant to § 905 before asserting breach of fiduciary duty claim against district's retirement system].) Accordingly, plaintiffs were required to satisfy the claim presentation requirement."

By analogy, pension benefits are akin to unemployment benefits. The plaintiff in Nasarwi, similar to the Plaintiffs in our case, was not seeking payment of pension funds, but damages for wrongdoing with regard to the pension. The same could be said here: Ps seek damages for discrimination/harassment concerning their efforts to seek unemployment benefits. A tort claim was necessary because the claim against the City is not for the failure of the City pay unemployment benefits.

The Court concludes that the Labor Code causes of action are not exempt from CTCA were Ps' Tort Claims Untimely? *Ds argue* that the tort claims are not timely. In this case, Plaintiffs were told not to file for unemployment benefits in Spring 2014. Their claims accrued when this interference occurred. Yet, they did not file their government claim until May 5, 2015 (Taitai), May 11, 2015 (Bear) and May 18, 2015 (combined). This is well beyond the six month claim filing requirements. *Ps argue in opposition* that Ds have waived any timeliness defenses under the CTCA by failing to timely respond within 45 days of receipt of the government claims. Here, the City's response was dated June 30, 2015 and this is 47 days after the tort claims were presented. Ps also argue that the violations have been continuing, and they did not accrue just in May 2014. Additionally, it is alleged that Taitai was discriminated against in May 2015 and he timely filed a tort claim in November 2015.

The parties would appear to be in agreement that the wrongful conduct began in May 2014. The allegations in the complaint are a bit uncertain as to when exactly Taitai was first discriminated against, but paragraphs 41 and 42 do suggest that it was mid-May 2014. The time period seems to be the same for Bear. (See ¶46 "leading up to the summer of 2014". The season appears to be May through September. ¶28). The time period for filing a tort claim is six months after injury to the person. Gov't Code §911.2. Ps do not argue otherwise in their papers; nor do they argue that they had filed a request to file late claim. Gov't Code §911.4. Clearly, the tort claims all filed in May 2015 were filed long after six months had elapsed.

City cannot raise the timeliness issue because the evidence shows that City did not respond within 45 days to the tort claim. Gov't Code §911.3(b).

Did Ds waive the timeliness argument? A public entity cannot raise a timeliness defense if the entity fails to respond to the claim within 45 days. Gov't Code §911.3. Ps say that Ds were not timely, as they failed to respond within that time period. Ds argue that the copy of the tort claim shows 5-18-15. Ps have the better argument here. There is a proof of service attached to the amended claim that is submitted by Defendants as Ex 3 to their request for judicial notice. They say that the top of the document shows a receipt date of 5-18-15. That may be the case, but it is very difficult to make out the number on the copy; it is illegible. Even so, the better evidence is that the proof of service attached to the claim reflects overnight service on 5/14/15. Attached as Ex 5 to the Opposition is a tracking slip from Fed Ex that shows a delivery from P's firm on 5/15/15. The reference to the shipment is "Taitai/Bear." May 15th was a Friday. City probably did not open the package and stamp it received until Monday May 18th, assuming that is what the stamp says. So, the evidence suggests that Ps are correct and that D's response on June 30, 2015 was, in fact, late. See Phillips v. Desert Hospital Dist. (1989) 49 Cal.3d 699, 701-02 ("These sections [910.8, 911 and 911.3] (1) require a public entity to notify a

claimant of any insufficiencies of content or timeliness that prevent a claim as presented from satisfying the requirements of the act and (2) provide that failure to give such notice waives any defenses based on those insufficiencies."

Are there continuing violations? The court is not convinced that the allegations in this case were continuing in nature. With Taitai, he was allegedly discriminated against and told he would not be rehired if he tried to get unemployment. The fact that he may have had subsequent similar conversations with the City does not undercut that his action accrued at the time that of the initial conduct. With Bear, he promised to not seek unemployment insurance if he took the job. His alleged damages also accrued at the time he had to promise not to seek unemployment insurance in order to get the job.

Are the 5th and 6th causes of action within the scope of the Tort Claims? -

Ps 5th and 6th causes of action are for extortion and civil rights violation. The allegations underlying these causes of action are the same as appear in the rest of the complaint: the City's conduct wrongfully deprived Ps of exercising their rights to unemployment insurance.

The general rule is that there must be a connection between the allegations in the tort claim and the causes of action in the complaint. Ds argue that the 5th and 6th COAs were not included in the tort claims submitted by Ps. This is true, see Ex 1-3 to Request for Judicial Notice; none of the three complaints attached to the tort claims submitted by Ps (Taitai, Bear and then Taitati/Bear combined), include these causes of action. However, the facts underlying these additional causes of action are the same as for the other causes of action. "If the claim gives adequate information for the public entity to investigate, additional detail and elaboration in the complaint is permitted." Stockett v. Association of California Water Agencies Joint Powers Ins. Authority (2004) 34 Cal.4th 441, 449.

"Only where there has been a "complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim," have courts generally found the complaint barred. (*Blair v. Superior Court*, *supra*, at p. 226, 267 Cal.Rptr. 13.) Where the complaint merely elaborates or adds further detail to a claim, but is predicated on the same fundamental actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint."

Stockett at 447. See also White v. Superior Court (1990) 225 Cal.App.3d 1505, 1511 (court allowed plaintiff to add additional causes of action that were not included in the tort claim finding that her "complaint and her claim were predicated on the same fundamental facts-Officer Sanford's alleged mistreatment of plaintiff. The causes of action for negligent hiring, training, and retention and for failure to train, supervise, and discipline merely sought to show direct responsibility of San Francisco for Officer Sanford's conduct. Plaintiff did not shift the fundamental facts about her injury.")

Are the 5th and 6th causes of action time barred? -

Once a public entity rejects a claim, the claimant has six months to file suit. Gov't Code §945.6(a). Where the public entity's rejection is consistent with Gov't Code §913, the six month period starts at the time that notice was personally delivered or deposited in the mail. City employee Michelle Ascencion declares that she sent the rejection letter on 6/30/15. (Ascencion Dec at 4(d)). Technically, the rejection letter was not sent under Gov't Code §913. This is because the reason for the rejection was procedural: failure to timely file the tort claim. That process is described at §911.3. Upon receipt of the §911.3 rejection, Plaintiffs should have sought leave to file a late claim pursuant to §911.4. For some reason they chose not to do so; perhaps the reason is that Ps knew that the City's response was late (as discussed above) and that the City waived their right to raise the defense of timeliness. Gov't Code §911.3. Had the Plaintiffs gone through the process of applying for relief to file a late claim, and had the City decided to reject the claim, the City would have rejected the claim consistent with Gov't Code §913, which advised the claimant of the six month period to file the action.

Ps filed their action on January 5, 2016; this was more than six months after the rejection letter. Ps take this issue on in their complaint, when they argue that they first sought relief in federal court and the pendency of that action tolled the time period that Ps had to file suit. This is an accurate statement of the law, and Ds do not contest it. Federal law at 28 USC §1367(d) tolls limitations periods "while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period."

Defendants argue that the federal complaint *did not include the 5th and 6th causes of action*; so there cannot be any tolling for *non-existent* causes of action. However, if the tort claim sufficiently puts the public entity on notice of the

issues to investigate it does not matter that the claimant adjusts his pleading slightly during the litigation. Having concluded that the tort claims are broad enough to cover the 5th and 6th causes of action, the failure of Ps to meet the six month deadline of §945.6 is unimportant in this action.

Haas and Nichols are Immune from Liability and therefore so is the City? -

Ds argue that City Manager Haas and Deputy City Manager Nichols are both immune from liability under Gov't Code §820.2 and so is the City. Immunity exists where the injury results from the employee's exercise of discretion as related to planning and policymaking. Naswri v. Bank Consultants, LLC, (2014) 231 Cal. App. 4th 328, 341. Ps argue in opposition that immunity cannot be resolved in the pleading stage of this action. The acts that the individual defendants took were retaliatory and discriminatory; they were not the exercise of discretion. Illegal retaliation and discrimination are not "policy decisions". Taylor v. City of Los Angeles Dept of Water and Power, (2006) 144 Cal. App. 4th 1216, 1238. Ds argue in reply that the issue of immunity must be resolved at the earliest stage of proceedings.

Ds are correct that immunity can be resolved at the pleading stages. They cite to Catsouras v. Department of California Highway Patrol (2010) 181 Cal.App.4th 856. But that is only where the issue is one that can be determined as a matter of law without factual inquiry. Id. at 893. ("In the case before us, however, the dispositive issues on demurrer-whether plaintiffs had a federally protected property interest in the photographs or a federally protected liberty interest in terms of their privacy-do not require a factual resolution. Consequently, [citation] does not preclude a determination of the application of the doctrine of qualified immunity."). It is simply too early in this litigation to make the determination that Haas and Nichols were acting within their discretion. The City *might* have made a well-reasoned policy decision to no longer hire employees who would seek unemployment benefits. But, the complaint says otherwise. At ¶35, Ps allege that Haas and Nichols began a campaign of identifying lifeguard employees who had exercised their rights to unemployment and discriminated and harassed them. At ¶42, Ps allege that Nichols told Ps that collecting unemployment was a motivating factor in not being rehired. Moreover, the critical distinguishing factor with Naswari is that the decision to file litigation or not cannot reasonably be said to violate law.

1st and 2nd Causes of Action Fail to State Facts Against Haas and Nichols -

Ds argue that neither Haas nor Nichols can be individually liable for violations of Labor Code §98.6 or §1102.5. The employees themselves cannot be individually liable for the conduct. There is no case that these employees would be liable. They should be dismissed without leave to amend. Labor Code §98.6(a) says that no "**person** shall discharge an employee.....because of the exercise....of the rights afforded to him or her...." Labor Code §1102.5 states that "any employer or **anyone acting on behalf of an employer**, shall not adopt [policies that prevent employees from disclosing information to government]. Jacobson v. Schwarzenegger (C.D. Cal. 2004) 357 F.Supp.2d 1198 cited by Ps addresses whether individual employees would be immune because of the Government Code. The case simply does not take on the issue of whether §1102.5 applies to individuals.

In the present case, Plaintiff's Complaint alleges facts regarding the conduct of Defendants Hall and LaRocco, as well as Big Lots, and brings claims pursuant to California Labor Code Sections 98.6, 132a, and 1102.5. (Complaint ¶ 11.) Section 98.6 provides that "[a] *person* shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee ... because the employee ... engaged in any conduct delineated in this chapter." Cal. Labor Code § 98.6(a) (emphasis added). Further, the statute provides that "[a]n *employer* who violates this section is liable for a civil penalty ." Cal. Labor Code § 98.6(b)(3) (emphasis added). Defendants argue that the § 98.6 retaliation claims against Hall and LaRocco fail as a matter of law because that code section can only be used for a claim against the company-employer, not an individual supervisor. (Notice of Removal ¶ 15.) Defendant cites to Section 98.6(b)(1), (2), and (3), where it is stated that an "employer" is liable to an employee for violations of the provision. Defendants cite to no California cases interpreting § 98.6 in a way that supports their position, but instead cite only to the statute itself, emphasizing the word "employer." In similar circumstances, California district courts have relied on California cases interpreting other, similar non-Labor Code statutes. *See, e.g., Thompson v. Genon Energy Services, LLC*, 2013 WL 968224, at *4 (N.D.Cal.2013). In the absence of clear case law interpreting the issue of who may be held liable under § 98.6, in deciding whether Hall and LaRocco are proper defendants, the Court declines to preclude individual liability at this stage of the case.

Have Ps alleges liability under Labor Code §98.6 and §1102.5? -

In addition to the question of whether the individual defendants have liability under §98.6 and §1102.5, Defendants argue that Ps have not generally stated facts that support either cause of action. *With respect to §98.6*, Ds argue that there is no authority that violations of the Unemployment Insurance Code can form the basis of a §98.6 cause of action.

Ps fail to identify any protected activity under §98.6 for which they were retaliated against. The statute does not specifically state that it applies to public entities, and therefore does not apply to defendants. *Ps argue in opposition* that only certain public entities (like law enforcement) are exempted from the statute. City is a business entity to which the statute applies. *Ds in reply* say that Ps have not satisfied the prerequisite of identifying any aspect of the Labor Code which is at issue in this cause of action. The court is in agreement with the Ds on this issue. The statute clearly says that "no person shall discharge an employee or in any manner discriminate against any employee...because of the exercise of any employee...of any rights afforded him or her." Labor Code §98.6(a). Unlike other portions of that statute, the conduct at issue is not connected to the Labor Code. (See first phrase of (a) which prohibits employers from discriminating where an employee engaged in "conduct delineated in this chapter".). The "rights" protected by the statute are not defined by the Labor Code, *but* they are defined by case law. Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, 87 is on point:

"In this context, the reasonable conclusion is the Legislature also intended the phrase, "any rights," in the final portion of section 98.6, subdivision (a), to similarly refer to rights "otherwise protected by the Labor Code." Consequently, for Grinzi's claim to survive under this provision, she must allege her termination occurred because she exercised a right protected *by the Labor Code*. As discussed, Grinzi does not allege she exercised such a right."

Ps do not cite any Labor Code provisions that cover unemployment insurance. They cite Labor Code §90.5, §95, §98.3, §96, §98.7, but none of those statutes cover unemployment insurance. They cite to Unemployment Insurance Code §1237, but that statute provides that:

"(b) Any employee who believes that his or her rights under subdivision (a) have been violated **may file a complaint** with the Labor Commissioner, and with respect to that complaint shall be entitled to the same rights, remedies, and procedures as are applicable for a violation of Section 98.6 of the Labor Code".
Section 1237 says nothing about a civil action.

3rd and 4th COAs against Haas and Nichols Fail to State Facts -

Ds argue that Haas and Nichols could not have intentionally and negligently interfered with the existing economic relationship between Ps and EDD. There is no such tort. The tort addresses interference in the commercial context. The claims cannot rest on disruptions of relationships with a governmental entity. The economic relationship only extends to commercial dealings, not expectancies relating to governmental services. There are no allegations that the City refused to provide paperwork to EDD or otherwise actually interfered with Ps applying for unemployment benefits with EDD. True, City told Bear and Taitai that they could not apply for unemployment insurance *and* work for the City, but the City didn't stop the Plaintiffs from seeking unemployment benefits. It is clear from the complaint that before each season commenced applicants had to submit paperwork with the City to resume their work as lifeguards. (¶¶39). It is clear throughout the complaint that the lifeguards were going to "resume" their work with the City. (¶¶39 41, 42). It is also clear that neither Bear nor Taitai were full time employees with the City; that is the very reason that they sought unemployment benefits. Thus, neither plaintiff can claim that the City interfered with their right to have employment with the City. An expectation of economic benefit is insufficient. Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal.App.4th 212, 243. Plaintiffs worked for City at its discretion, there were no contracts or (alleged) promises that City would hire Plaintiffs. Moreover, City's conduct did not deprive Ps of obtaining work as lifeguards. The conduct forced Ps to chose what they wanted (unemployment or lifeguard work), but it did not stop Ps for choosing either.

Bear's 5th COA for Extortion Fails to State Facts -

Ds assert that CA law does not recognize a civil extortion claim. An essential element to the claim is that the party being extorted must actually pay money demanded to the party alleged to have committed the extortion. Another element is that there be a threat of civil or criminal prosecution. Neither element is satisfied in the complaint. Ps argue that extortion lies where a person wrongfully attempts to obtain property through the use of force or fear or under color of right. "The threat to report a crime may constitute extortion even if the victim did in fact commit a crime. The threat to report a crime may in and of itself be legal. But when the threat to report a crime is coupled with a demand for money, the threat becomes illegal, regardless of whether the victim in fact owed the money demanded." Mendoza v. Hamzeh (2013) 215 Cal.App.4th 799, 805.

Neither Haas nor Nichols are alleged to have demanded money or threatened to report the Plaintiffs to the authorities. Ps argue that the threat of extortion does not actually have to produce an exchange of money. But the case that Ps cite on that issue is very different from this case. Cohen v. Brown (2009) 173 Cal.App.4th 302, 318:

"The record before us supports the trial court's conclusion that Brown's actions with respect to the filing of the State Bar

complaint constitute extortion. The *Flatley* court noted that (1) the threat made by an extortionist does not have to succeed in producing an exchange of money in order to constitute extortion; (2) the action that is threatened unless money is paid may itself not be an illegal action but instead, it is the coupling of the threat of that action with the demand for money that constitutes the illegality; and (3) it is immaterial to the crime of extortion that the purpose of the threat is to collect money justly due the extortionist."

Even if there is no money actually changing hands, there still must be a threat demand of money. Haas and Nichols did not demand money.

6th COA fails to state sufficient facts under CC §52.1 --

Ds say that there can be no action for CCP §52.1 relief without violence of intimidation by threat of violence. Speech alone is insufficient for this cause of action. CC §52.1 provides that:

"(a) If a person or persons, whether or not acting under color of law, interferes by *threat*, *intimidation*, or *coercion*, or attempts to interfere by *threat*, *intimidation*, or *coercion*, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars (\$25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a).

(j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the **speech itself threatens violence** against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, **violence will be committed** against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (emphasis added).

Case law establishes that Ds are correct on this point. Cabesuela v. Browning-Ferris Industries of California, Inc. (1998) 68 Cal.App.4th 101, 111 ("From the foregoing, it is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence."); superseded by statute on other grounds as described in Francis v. State of Cal. (2004) 2004 WL 1792627, at *10. Ps case for the proposition that violence is not required - Cole v. Doe 1 thru 2 Officers of City of Emeryville Police Dept. (N.D. Cal. 2005) 387 F.Supp.2d 1084, 1103 – is not on point. The construction of a traffic stop, detention (including use of handcuffs), and search' as being akin to violence or the threat of violence is distinguishable from this case. Here, we have no allegations other than that Haas and Nichols used words in discussing the issues with Ps.