

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

TENTATIVE RULINGS

EVENT DATE: 06/06/2016

EVENT TIME: 08:20:00 AM

DEPT.: 43

JUDICIAL OFFICER: Kevin DeNoce

CASE NUM: 56-2015-00466958-CU-WT-VTA

CASE TITLE: KIMBERLY KANDARIAN VS VENTURA COUNTY

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Wrongful Termination

EVENT TYPE: Motion for Summary Judgment

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication, 02/11/2016

The morning calendar in courtroom 43 will begin at 9 a.m. Cases including *ex parte* matters will not be called prior to 9 a.m.

Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by CourtCall, please call in between 8:35 and 8:45 a.m.

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, Christine Schaffels at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending a telefax. 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.

For general information regarding Judge DeNoce's rules and procedures for law and motion matters, *ex parte* matters, telephonic appearances, trial rules and procedures, etc., please visit: <http://www.ventura.courts.ca.gov/Courtroom/C43>

The court's tentative ruling is as follows:

Sustain Defendant's evidentiary objections to Opposing evidence on grounds stated.

Grant Defendant County of Ventura's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

Moving Defendant met its burden on this motion, and the burden shifted to Plaintiff to establish a triable issue of material fact. Plaintiff has not met her burden of establishing a triable issue of material fact. (CCP § 437c(p)(2).)

(Undisputed Material Facts Nos. 1-56; 71-74; 80-86.)

Grounds: Defendant Ventura County ("County") moves for summary judgment against Plaintiff Kimberly Kandarian on the grounds that there is no triable issue of material fact and County is entitled to judgment as a matter of law. Alternatively, if for any reason summary judgment cannot be had, the County moves for an order adjudicating the following issues in its favor:

Issue 1: Plaintiff's 1st cause of action for wrongful termination in violation of Gov. Code 12940(a), on the

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basis of Plaintiff's mental disability fails because the County had legitimate nondiscriminatory reasons for its actions, and PI cannot present substantial evidence that such reasons were pretextual.

Issue 2: PI's 2nd cause of action for County's failure to accommodate her in violation of Gov. Code 12940(m) fails b/c the County reasonably accommodated PI by granting her request for paid medical leave.

Issue 3: PIs 2nd cause of action for failure to accommodate her in violation of Gov. Code 12940(m) fails b/c PI failed to provide requested information sufficient for the County to evaluate her work restrictions and whether any accommodations could have been made to accommodate such restrictions.

Issue 4: PI's 3rd cause of action for the County's failure to engage in the interactive process in violation of Gov. Code 12940(n) fails b/c the County actively participated in a timely, good-faith interactive process but PI failed to provide information for the County to evaluate her claim, or identify her limitations or associated accommodations.

Discussion:

Some of the facts in the moving separate statement are undisputed and established. [Facts 1, 2, 5, 6, 7, 14, 18, 19, 23, 27, 18, 29, 49, 57, 59, 63, 70, 75, 76, 82, 83.] However, a majority of them are stated as "Disputed" in the opposing separate statement without citation to controverting evidence as required by CCP 437c(b)(3). CCP 437c(b)(3) provides:

"The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

Many of the "disputed" facts are based on the ground that the employee complaints about Plaintiff's conduct and the def County's consideration of the same are not "material" within the meaning of CCP 437c(b)(1). They are facts nos: 3, 4, 8, 9, 10, 11, 12, 13, 15, 16, 20, 21, 22, 24, 25, 26, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 50, 51, 54, 55, 56, 60, 64, 65, 77, 78, 79 80. However, a plaintiff's complaint determines materiality of fact for purposes of summary judgment. (See *Keniston v. American Nat. Ins. Co.* (1973) 31 Cal.App.3d 803, 812.) Plaintiff's complaint alleges the County investigated and proposed her termination based on a "veritable cornucopia of specious allegations and misdeeds that . . . are all false." (See Complaint, ¶¶ 18-21.) According to Def, the numerous complaints about PI's conduct prompted the County's investigation, and ultimate decision to terminate PI's employment. As such, these facts seem material.

The County proposed PI's dismissal from employment after the following took place:

- (1) Numerous complaints were lodged against Plaintiff from a variety of co-workers and subordinates. (See Undisputed Material Facts Nos. 1-9, 12, 21-25, 30-56.)
- (2) These complaints were always denied by Plaintiff as lacking merit. (Facts 4, 9, 11, 13, 20, 26, 60.)
- (3) There was substantial investment by the County to improve PI's management skills by enrolling her in management classes and attempting to assign her a mentor (Facts 10-11);
- (4) There was the issuance of a May 31, 2013 Letter of Expectations ("LOE") (Facts 14-16, 18-19.)
- (5) PI failed to conform to the LOE standards. (FACTS 20-22);
- (6) There was receipt of an additional complaint by PI's subordinate nurse, Suzanne Kennedy (Facts 23-24);
- (7) Kennedy's complaint was investigated and corroborated by the County after interviewing some six other co-workers (Facts 27, 29, 30-44);
- (8) This all culminated with a final unsolicited but substantiated complaint that PI forced her subordinates to view pornography wholly unrelated to the work of the communicable disease ("CD") office (Facts 45-55.)

Plaintiff has alleges the following explanations related to the alleged pornography misconduct:

- (1) The "client" (of PI's employer) engaged in sex acts depicted in the subject video as already known and identified by PI's office (Supplemental Notice of Lodging, ¶2, PI's deposition, 322:23-323:1);
- (2) PI's accessing of the pornographic video was "accidental," which shows that she was not viewing it as part of a normal business practice (Supplemental Notice of Lodging, Ex. 33, PI's deposition, 321:12-16);
- (3) PI had access to the client's social media page but did not show her subordinates non-graphic images for identification purposes, instead choosing to show them pornography (*Ibid*);
- (4) PI did not show her subordinates pornography for identification purposes at any other time, which demonstrates that

such a practice was not a routine or standard practice used by PI;

(5) Neither subordinate employee who viewed the images with PI saw any business reason for viewing the pornography, and one of those employees, Theresa Kocontes, averred that she had not ability to identify the client from viewing the video (Castro Declaration, ¶10; Kocontes Decl., ¶5);

(6) The def County confirmed with state and local authorities that viewing pornography in the workplace is not standard practice for CD offices (Steffy Decl, ¶18; Supplemental Notice of Lodging, Ex. 32 (Steffy Deposition, 85:24-86:25); and

(7) PI's justification for viewing the video with her subordinates has changed substantively over time (Compare Notice of Lodging, Ex. 15 at 10_4-17:13 (Jan. 27, 2014); Notice of Lodging, Ex. 27, at 15-16 (Mar. 3, 2014); Supplemental Notice of Lodging (Ex. 38 at 13:13-15:27 (Nov. 30, 2014); Supplemental Notice of Lodging, Ex. 33 (Kandarian Deposition, 319:9-324:11) (Dec. 10, 2015); Klausner Decl., ¶4, subd. (J) (April 14, 2016); Separate Statement of Disputed Facts Nos. 98.)

Even assuming Plaintiff's alleged explanations for exposing subordinates to pornographic material, the County has established legitimate, nondiscriminatory reasons for terminating PI.

Plaintiff's wrongful termination claim in violation of Gov. Code 12940(a).

Gov. Code 12940(a) provides:

"It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, orto discriminate against the person in compensation or in terms, conditions, or privileges of employment."

On a motion for summary judgment, Plaintiff's claim for disability discrimination in violation of Gov. Code 12940(a) fails where the County establishes a legitimate, nondiscriminatory reason for the employment decision, in which case an inference of discrimination disappears. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804; *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 356.) In this regard, the County need only present nondiscriminatory reasons for the termination "that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Scotch v. Art Institute of California-Orange* (2009) 173 Cal.App.4th 986, 1005.) Critically, an employer's "true reasons [for termination] need not necessarily have been wise or correct" as long as its decision was not made "with a motive to *discriminate illegally*." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.)

Here, the evidence shows that the County considered Plaintiff's employment history, including numerous complaints from different witnesses over a period of years against Plaintiff. (Undisputed Material Facts Nos. 3, 8, 12, 22-26, 29, 30-55). They considered unsuccessful though substantial efforts by the County to correct Plaintiff's abrasive, hostile and controlling behavior toward her employees. (Undisputed Facts Nos. 10-12, 14, 16-19.) They were aware of Plaintiff's continual refusal to take responsibility for her actions or acknowledge the complaints could be legitimately made against her. (Facts Nos. 4, 9, 13, 20, 26, 60, 65.) The County utilized the expertise of an uninvolved Humans Resources directors, Teran, who together with Steffy conducted interviews of critical witnesses. (Facts 27, 29, 45, 50.)

Two witnesses reported that Plaintiff forced them to view pornography at work, and repeatedly belittled them for expressing discomfort. County contends that after this happened, it had reasonable grounds to terminate Plaintiff. (Facts 47-55.) Given Plaintiff's history of denying responsibility for her actions, County contends that it was reasonable for County to discredit Plaintiff's explanation that viewing the pornography was business-related. According to County, no one else – whether Plaintiff's subordinates, organizational superiors or even the State Dept. of Public Health – considered Plaintiff's justification for her actions to be reasonable. (Facts 48, 53, 61, 68; Slack Declaration, ¶ 10; Vargas declaration, ¶8.) County contends that Plaintiff's conduct not only violated the Letter of Expectation ("LOE") and Respectful Workplace Policy, but also violated numerous other County Policies, to which Plaintiff was subject. (Fact 19.)

In order to meet PI's burden and establish a prima facie case, PI "must provide evidence that (1) she was a member of a protected class; (2) she was qualified for the position she sought or was performing competently in the position she held; (2) she suffered an adverse employment action . . . and (4) some other circumstances that suggests discriminatory

motive" (*Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1160-1161, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Additionally, Plaintiff "must prove by a preponderance of the evidence that there was a "causal connection" between [her] protected status and the adverse employment decision." (*Day, supra*, 930 F.Supp.2d at p. 1161, quoting *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1319.)

Plaintiff has not met her burden here. She has not shown evidence that suggests her termination was motivated by discrimination, nor has she provided any evidence of a causal connection between her alleged protected status and her termination. Plaintiff contends that County employees were aware that she had "ADD" and dyslexia because she casually mentioned it at some point during her 15-year career at the County. The evidence, however, shows that Plaintiff's colleagues did not perceive PI as disabled. Plaintiff acknowledged that she never sought accommodation for any disability until **after** the County began its investigation of her conduct. (See Notice of Lodgment, Ex. 1, p. 13:1-24.) Plaintiff's casual mention to her colleagues of an unspecified condition does not link her termination with her protected status. (See *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008.)

Plaintiff did not notify the County of her disability until after: (1) Plaintiff had been issued a formal Letter of Expectations to address performance issues; (2) Plaintiff had been repeatedly observed violating her agreement to adhere to the formalized expectations; (3) the County had received and begun investigating Suzanne Kennedy's complaint and complaints that preceded Kennedy's complaint; and (4) Plaintiff had been placed on a one-day leave and then refused to return to work. Temporal proximity does not raise a triable issue of fact "where the employer raise questions about the employee's performance before [s]he disclosed [her] symptoms, and the subsequent termination was based on those performance issues." (*Arteaga v. Brink's Inc.* (2008) 163 Cal.App.4th 327, 353.) The County could not have acted adversely to plaintiff on the basis of a disability that it did not know about. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236-37.)

The County proposed Plaintiff's dismissal only after (1) numerous complaints were lodged against her by a wide variety of co-workers and subordinates (Facts 1-9, 12, 211-25, 30-56); (2) which complaints were always denied by Plaintiff as lacking merit (Facts 4, 9, 11, 13, 20, 26, 60); (3) substantial investment by the County to improve Plaintiff's management skills by enrolling her in management classes and attempting to assign her a mentor (Facts 10-11); (4) issuance of a May 31, 2013 Letter of Expectations (Facts 14-16; 18019); (5) Plaintiff's failure to conform to the Letter of Expectation standards (Facts 20-22); (6) Receipt of an additional complaint by PI's subordinate nurse, Suzanne Kennedy (Facts 23-24); (7) investigation of the Kennedy complaint investigated and corroborated by the County after interviewing six other co-workers (Facts 27, 29, 30-44); (8) culminating with a final unsolicited complaint that Plaintiff forced her subordinates to view pornography wholly unrelated to the work of the communicable disease (CD) office (Facts 45-55).

Plaintiff submits the expert declarations of Michael Robbins (Facts 66-69) and Dr. Jeffrey Klausner (Facts 99-102) and excerpts of testimony from Rigoberto Vargas, Katie McKinney, and Jim Dembowski and the County's workplace investigation guidelines. (See Opposition, pages 7-8, citing Facts 66-69, 132-133). But Plaintiff does not raise a triable issue in the opposition.

Plaintiff contends that the investigation was not impartial, and appears to support this claim by pointing out that individuals she had previously criticized were involved in conducting it, including her supervisor, Megan Steffy. Plaintiff's expert, Robbins, claims that Steffy was biased and prejudged the evidence. (See Botterud Declaration, Ex. K.) But Robbin's opinions lack foundation and are speculative since he did not identify or review all of the relevant facts from which he drew his opinions. (See County's Objections to PI's evidence, Robbins Decl, Objections Nos. 10-41, and *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1234.)

The evidence shows that upon receipt of the complaint from Suzanne Kennedy, Steffy immediately involved Maria Teran. Teran was the uninvolved HR director for the County Health Care Agency, and a trained workplace investigator. She led the investigation with Steffy as a witness, questioned all of the witnesses, took notes and then transcribed her notes and destroyed the handwritten notes in accord with her practice. She reviewed and approved the questions Steffy asked PI when PI returned from her medical leave on 1/27/14. The opposition ignores that the County's investigative team consulted with Risk Management, Labor Relations, and County Counsel to ensure the process was fair and reasonable. (See Steffy Decl., ¶¶ 10-18, Supplemental Notice of Lodgment, Ex. 32 [Steffy Depo., 74:9-77:2; 178:9-181:8; Ex. 29, Teran Depo. 13:25-16:13; 19:2-22:9.]

"[F]or purposes of establishing the moving employer's initial burden of proof, it does not matter whether Plaintiff actually

did commit an integrity violation as long as [the employer] honestly believed he did." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) So, PI's justification for subjecting her subordinates to pornographic videos as "consistent with good public health practice," including the recent support of hired expert, Dr. Klausner, is not controlling. The evidences is that the County determined the Plaintiff engaged in inappropriate workplace conduct based on statements by two of PI's subordinates, PI's admission that she engaged in the behavior, and information from the State Dept. of Public Health and the Communicable Disease Office Manager from Santa Barbara County. Multiple sources reported that PI's behavior violated acceptable behavior and practice and violated the County's Personnel Rules and Regs, a number of internet access policies and the applicable Memo of Understanding governing PI's employment.

The evidence shows that the County followed its practices as explained by Jim Dembowski, the County's person most qualified to testify as to County workplace investigations. He testified that several steps set forth in the County's "Investigation Practices and Procedures" "are not rote" step-by-step policies to be followed, but, rather, are "guidelines," and an investigator's "tool," that can vary greatly depending on the circumstances of each case. Dembowski also testified that the guidelines inform the investigation, so the investigator, together with County Risk Management, Labor Relations and County Counsel, as appropriate, can work toward the goal to uncover the truth and get to the bottom of the story as quickly as possible. (Botterud Decl., Ex. L, pages 23-27; Supp. NOL, Ex. 40, pages 20:10-26:8.) The County's decision was not illogical, inconsistent, or baseless, based on these facts. (See *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997.)

Plaintiff's claims that Def County failed to engage in the interactive process and/or reasonably accommodate Plaintiff. Government Code section 12940(m) requires an employer to reasonably accommodate an employee with a disability. The elements of a cause of action for violation of this subdivision are: The elements of a reasonable accommodation cause of action under Fair Employment and Housing Act (FEHA) are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability. Cal. Gov't Code § 12940(m). (See *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.)

Only the third element above is addressed in this motion. Defendant has established that Plaintiff received the exact accommodation she requested: a leave of absence from August through January 26, 2014, and a reduced work schedule after January 27, 2014. (Facts Nos. 71-74, 80.) Also, Plaintiff admitted without objection in her written discovery responses that the County reasonably accommodated her disability from when she first requested an accommodation on August 16, 2013, through January 26, 2014. (Fact 74.) During this time, Plaintiff performed no work-related duties. Plaintiff also admitted there was nothing the County could have done to accommodate her disability after she reported back to work on January 27, 2014. (Fact 74.) Moreover, during this time, the County accommodated Plaintiff by granting her part-time disability leave according to her physician's release that she could work only part-time. (Fact 80.) From January 27, 2014, through the time she was terminated, Plaintiff performed no work-related duties.

Under Gov. Code 12940(n), an employer has an obligation to "engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known . . . disability . . ." (Gov. Code 12940(n).)

Among the elements of a cause of action for failure to engaged in the interactive process under section 12940(n), PI must prove the she was willing to participate in the interactive process to determine whether reasonable accommodation could be made which would allow her to perform the essential job requirements; that the County failed to participate in an interactive process to determine whether reasonable accommodation could be made; and that the County's failure to engage in a good-faith interactive process with PI was a substantial factor in causing harm to PI. (Judicial Council of Cal, Civil Jury Instructions, No. 2546.) It is the employee's obligation to identify a reasonable accommodation that the interactive process should have produced and that was objectively available when the interactive process should have occurred. (*Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1018, 1019.)

Plaintiff did not participate in the process as requested in that she did not identify the limitations and any resulting accommodations that her disabilities of dyslexia, ADHD, anxiety and depression required. (*Scotch, supra*, 173 Cal.App.4th at 1013; see also *Taylor v. Principal Financial Group, Inc.* (1996) 93 F.3d 155, 165.) The evidence shows that from the time the County received PI's initial August 16, 2013 notice of her claimed disability and request for accommodation until the time she was terminated on 5/2/14, the County continued to engage with Plaintiff. (Facts 81-84.) In an attempt to evaluate and accommodate PI's claimed disabilities, def County tried on some 33 occasions by email, phone and in-person meetings to obtain information from PI it needed to determine PI's limitations and whether and how those limitations could be reasonably accommodated so that PI could perform her regular duties. (Facts 83, 84.) While PI requested and received a part-time schedule to accommodate her return to work, PI never provided requested and necessary information identifying her limitations and associate requests to accommodate those

restrictions. (Facts 85-86.)