

TENTATIVE RULINGS

FOR: August 4, 2017

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.-1111 Third St.)

In the Matter of Taylor Wessel

17PR000138

PETITION TO APPROVE COMPROMISE OF DISPUTED CLAIM – PERSON WITH A DISABILITY

TENTATIVE RULING: Hearing on the Petition is continued to September 1, 2017 at 8:30 a.m. in Dept. F to allow time for an amended petition correcting clerical errors to be filed. The amended petition should also address the differences between the previously filed petition in case number 16PR000193 and the instant petition. Petitioner may appear by Court Call at the next hearing.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Conservatorship of Shala O’Connell

26-25453

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the Conservator is acting in the best interest of the Conservatee. Based on the report of the court investigator, the Court determines by clear and convincing evidence that Conservatee can communicate a desire to participate in the voting process, and therefore orders Conservatee’s right to register to vote shall be restored, pursuant to Elections Code section 2209, subdivision (b). The case is set for a biennial review hearing in two years, on August 2, 2019 at 8:30 a.m. in Dept. 2. The court investigator shall prepare a biennial investigator report for the next hearing date.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Robert Day v. Pacific Retirement Services, Inc., et al.

16CV000777

MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

TENTATIVE RULING:

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendants' counsel is directed to contact the opposing party forthwith and advise the opposing party of Local Rule 2.9 and the Court's tentative ruling procedure. If defendants' counsel is unable to contact the opposing party prior to the hearing, defendants' counsel shall be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 2.9.

A. Evidentiary Objections

Plaintiff Robert Day's three evidentiary objections submitted with his opposition and his three supplemental evidentiary objections filed on August 1, 2017, are OVERRULED.

Defendants Pacific Retirement Services, Inc. (dba The Meadows of Napa Valley), Odd Fellows Homes of California, and Wayne Panchesson's 26 evidentiary objections submitted with their reply are OVERRULED IN PART AND SUSTAINED IN PART. The Court elects not to rule on objection number 1 to the Day declaration. (Code Civ. Proc., § 437c, subd. (q).) Objection numbers 2-4 to the Day declaration are overruled. The Court notes the objection number 3 is overbroad. Objection numbers 1-5, 7-17, and 22 to the Scolari declaration are overruled. The Court elects not to rule on objection numbers 6 and 19 to the Scolari declaration. (*Id.*) Objection numbers 18 and 20-21 to the Scolari declaration are sustained.

B. Summary Judgment

Defendants' motion for summary judgment of the first cause of action for age discrimination, second cause of action for age harassment, third cause of action for retaliation, fourth cause of action for disability discrimination, fifth cause of action for failure to prevent discrimination, harassment, and retaliation, sixth cause of action for wrongful termination in violation of public policy, and the claim for punitive damages is DENIED. Summary judgment may be granted only where it is shown the entire action has no merit. (Code Civ. Proc., § 437c, subd. (a).) Defendants have not shown the entire action lacks merit since the claims contain different elements.

C. Summary Adjudication

1. Issues One and Two

Defendants' motion for summary adjudication of the first cause of action for age discrimination (issue one) and fourth cause of action for disability discrimination (issue two) is DENIED. It is well established that discrimination cases involve both direct and circumstantial evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354.) Day asserts the Court need not employ the test from *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 because he produced direct evidence of age and disability discrimination. As explained in *DeJung v. Super. Ct.* (2008) 169 Cal.App.4th 533, 550, a statement by a potential employer that the hiring committee wants "somebody younger, maybe in their 40's," qualifies as direct evidence of an employer's discriminatory animus. When there is such direct evidence of discriminatory animus, "there is no need to engage in [the] burden-shifting analysis" (*Id.*)

The Court agrees with Day that the evidence he raises qualifies as the type of direct evidence to defeat this motion. Day presents direct evidence of age discrimination to establish triable issues of fact. (Plaintiff's Undisputed Material Facts ("PUMF"), Nos. 22, 29, 39, 43, 53 [Scolari Decl., Ex. G], 56 [Scolari Decl., Ex. C].) Day also presents direct evidence of disability discrimination to establish triable issues of fact. (*Id.*, Nos. 24-27.) This evidence indicates various supervisors made negative age and disability related remarks to Day requiring no inferences be made. (*Id.*, Nos. 7 [Wayne Panchesson, the Executive Director of the Meadows], 23 [James Hoevertsz, Vice President of Culinary Services].)

These remarks were causally connected to the adverse employment action because the negative comments were made by at least two of the individuals who placed Day on the performance improvement plan ("PIP") and who eventually terminated the employment. (*Id.*, Nos. 5-7, 17, 21-22, 29, 32-35, 39, 43, 53, 56, 69, 71; see *DeJung, supra*, 169 Cal.App.4th at p. 550 ["Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue."].)

2. Issue 3

Defendants' motion for summary adjudication of the third cause of action for retaliation (issue 3) is DENIED. Day alleges defendants terminated his employment after he filed an age discrimination complaint. (Compl., ¶ 42.) "To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." (*Flait v. North Am. Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) Defendants argue Day cannot demonstrate a causal link between the protected activity and defendants' actions. "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." (*Morgan v. Regents of Univ. of Cal.* (2000) 88 Cal.App.4th 52, 70, quoting *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982) 686 F.2d 793, 796.) It is undisputed Day only raised a question of age discrimination after he was placed on the PIP. (Defendants' Undisputed Material Facts, No. 56-59.) The temporal proximity, however, between Day's complaint and termination of approximately four months is enough to establish a nexus between the protected activity and defendants' action in order to establish a prima facie case. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 334-35; see *Mariani-Colon v. Dep't of Homeland Sec.* (1st Cir. 2007) 511 F.3d 216, 224 ["In dispute is whether appellant has shown a causal connection between his allegations of discrimination and his subsequent termination. We conclude that the 'temporal proximity' between appellant's allegations of discrimination in June 2002 and his termination in August

2002 is sufficient to meet the relatively light burden of establishing a prima facie case of retaliation.”].)

Having established a prima facie case of retaliation, the burden shifts back to defendants to show they had legitimate reasons for Day’s termination. (See *Flait, supra*, 3 Cal.App.4th at p. 476 [presenting burden shifting test].) But even if defendants meet this burden, the evidence of pretext precludes adjudication of this claim because there is a triable issue as to whether defendants’ investigation into the age discrimination complaint was less-than-thorough and whether Panchesson and Hoevertsz stonewalled the investigation by failing to turnover relevant materials. (PUMF, Nos. 44-47, 48 [conflicting evidence as to whether Hudson interviewed Day], 50, 52-54, 56 [Ex. C], 57; see *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 280 [“An employer’s failure to interview witnesses for potentially exculpatory information evidences pretext.”]) This evidence shows Day complained of age discrimination, supervisors who decided to place Day on the PIP and eventually terminate him just so happened to fail to turn over relevant documents for the investigation, and following the less-than-thorough investigation, Day was terminated from his job.

3. Issue 4

Defendants’ motion for summary adjudication of the sixth cause of action for wrongful termination in violation of public policy (issue 4) on the ground the claim is duplicative of the discrimination and retaliation causes of action is DENIED. Because the first cause of action for age discrimination (issue one), the fourth cause of action for disability discrimination (issue two), and the third cause of action for retaliation (issue three) survive this motion, the motion as to this claim necessarily fails.

4. Issue 5

Defendants’ motion for summary adjudication of the second cause of action for age harassment (issue 5) is DENIED. There is a triable issue of material fact as to whether the negative age related comments made to Day were severe and pervasive to create a hostile working environment. (PUMF, Nos. 7, 22-23, 29, 39, 43, 53 [Ex. G], 56 [Ex. C].)

5. Issue 6

Defendants’ motion for summary adjudication of the fifth cause of action for failure to prevent discrimination, harassment, and retaliation (issue 6) is DENIED. There is a triable issue of material fact as to whether defendants took reasonable steps to prevent discrimination, harassment, and retaliation because on the less-than thorough investigation and Panchesson and Hoevertsz’s failure to turnover relevant materials for the investigation. (PUMF, Nos. 44-47, 48 [conflicting evidence as to whether Hudson interviewed Day], 50, 52-54, 56 [Ex. C], 57.)

6. Issue 7

Defendants’ motion for summary adjudication of the claim for punitive damages is DENIED based on the triable issues of material fact relating to the direct evidence of age and disability discrimination.