SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: April 30, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website here:
https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1-2	23CV425697	Lara McCabe vs County of Santa Clara	The County's Demurrer and Motion to Strike are SUSTAINED and OVERRULED, in part. Scroll to lines 1-2 for complete ruling. Court to prepare formal order.
3,4, 10,11	22CV397909	Jun Ma et al vs Good Samaritan Hospital et al	Defendant Will Tseng, M.D.'s Motion for Summary Judgment is GRANTED. A notice of motion with this hearing date was served by electronic mail on January 25, 2024. Plaintiff did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Defendant submits two expert declarations opining that Dr. Tseng met the standard of care. There is no counter declaration. Summary judgment is therefore appropriate. "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Hanson v. Grode* (1999) 76 Cal. App. 4th 601, 607, citing *Munro v. Regents of University of California* (1989) 215 Cal. App. 3d 977, 984-985.) Defendant's motion to seal is also GRANTED. The medical records Defendant seeks to have sealed qualify for sealing under California Rule of Court, Rule 2.550(d). Court will prepare formal order. Moving party to prepare form of judgment.
5	21CV391498	Hugo Amaya et al vs The Permanente Medical Group Inc. et al	The Court ordered Plaintiff to post a $25,000 undertaking by order dated March 5, 2024. Review of the docket indicates Plaintiff failed to post such undertaking. However, Plaintiff appealed the Court's order sustaining Defendants' demurrers with leave to amend, a non-appealable order. Thus, the parties are ordered to appear and provide authority regarding the Court's ability to dismiss this case for failure to post an undertaking given the procedural status.
6	21CV383016	Swift Financial, LLC vs Xtelcom, Inc.	Plaintiff's motion to compel debtors' responses to interrogatories is GRANTED. A notice of motion with this hearing date was served on debtors by U.S. mail on March 27, 2024. Debtors did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. The interrogatories were personally served on the judgment debtors who have, to date, served no responses. The interrogatories seek information relevant to collection of the debt. Accordingly, the motion to compel is GRANTED. Sanctions are also appropriate on this record. However, since there was no opposition, the additional hours for a reply and hearing will not be incurred. The Court thus assesses $900 ($450 x 2 hours) in sanctions in favor of plaintiff, to be paid within 20 days of service of the formal order, which order the Court will prepare.

7	23CV409690	The People of the State of California et al vs Jose Sanchez et al	Defendant Jose Sanchez's motion to compel Plaintiff's further responses to requests for admissions (set one), form interrogatories (set one), and for sanctions ($7,050) is DENIED. First, Defendant's motion is untimely, and the Court therefore has no jurisdiction to hear it. (See, e.g., *Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84 Cal.App.5th 127.) Next, Defendant failed to meet and confer as required by the Code of Civil Procedure. Defendant's general February 15, 2024 letter followed by a persistent refusal to set a time to discuss the issues fails to demonstrate even a minimum attempt much less the kind of meaningful meet and confer contemplated by the Code before filing a motion to compel. Under Code of Civil Procedure section 2023.020, "the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as result of that conduct." (See also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 448 (failure to participate in meet and confer process in good faith is independent discovery abuse for which sanctions are authorized by statute).) This monetary sanction is mandatory regardless of how the court rules on the offending party's motion. (Code Civ. Proc. §2023.020.) The Court therefore assesses $2,800 (a reasonable $280 per hour times a more reasonable number of 10 hours for responding to this motion) in sanctions against Defendant and Defendant's counsel jointly and severally to be paid within 30 days of service of this formal order, which the Court will prepare.
8	23CV423468	Bucio vs Hyundai Motor America	Motion withdrawn.
9	21CV385524	City of Morgan Hill vs W. Rocke Garcia and Glenda Garcia et al	This matter is now assigned to Judge Geffon in department 8, who has scheduled a hearing for this motion.
12	22CV398426	Bank of America, N.A. vs Peter C O'Brien	The documents in the court file concerning this claim of exemption are incomplete. The parties are ordered to appear and provide the complete claim of exemption packet, so that the court can determine whether any funds other than those that are automatically exempt should also be excluded.
13	22CV398742	Richard Gardner et al vs Linming Jin et al	Plaintiff's motion for an order permitting discovery of defendants' financial condition is DENIED. After weighing the evidence submitted in support of and opposition to Plaintiff's motion, the Court finds there is insufficient factual support to find at this stage and on this record that Plaintiffs have a substantial probability of succeeding on their punitive damages claim. This ruling is without prejudice to Plaintiffs seeking this discovery at a later point in the proceedings. Court to prepare formal order.
14	24CV431598	Pedro Perez Rojas vs James Harmon	Plaintiff's motion for nun pro tunc order changing the filing date of the complaint to February 15, 2024 is GRANTED. Moving party to prepare formal order.

15	24CV432019	Yuying You et al vs Pingping Xiu et al	Plaintiff's petition to compel arbitration is GRANTED. A notice of motion with this hearing date personally served on defendant Wei Shen and served by substitute service on Pingping Xiu on March 23, 2024. Defendants did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. There is a binding arbitration agreement between the parties in paragraph 31B of the purchase contract. Code of Civil Procedure section 1281.2 states: "the court shall order a matter to arbitration if it determines that there is an agreement to arbitrate and (1) the agreement has not been waived or (2) the agreement has not been revoked." (See also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) "[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) There is a presumption against waiver, and "when allocation of a matter to arbitration. . .is uncertain, we resolve all doubts in favor of arbitration." (*Cinel*, 206 Cal.App.4th at 1389; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) There is no opposition, there is a binding arbitration agreement, and therefore this case is ordered to arbitration. A status conference is set for December 19, 2024 at 10 a.m. in Department 6. Court to prepare formal order.

Calendar Lines 1-2
Case Name: *Lara McCabe v. County of Santa Clara*
Case No.: 23CV425697

Before the Court is defendant County of Santa Clara's (the "County") demurrer to plaintiff Lara McCabe's first amended complaint ("FAC") and motion to strike portions contained therein. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from alleged workplace harassment and retaliation against Plaintiff. According to the FAC, Plaintiff has worked for the County since 2008. (FAC, ¶ 20.) In May 2018, Plaintiff transitioned to the Sheriff's office as a Management Analyst, on December 17, 2018, she was promoted to Senior Management Analyst, and on January 28, 2019, she was promoted to Program Manager II. (FAC, ¶ 21-22.)

Sheriff Laurie Smith was one of Plaintiff's supervisors. (FAC, ¶ 13.) In January 2020, the District Attorney investigated misconduct in the Sheriff's Department, which included purported violations by Smith, and Plaintiff cooperated in the investigation by providing information. (FAC, ¶ 24.) Afterward, Plaintiff alleges Smith became antagonistic towards her, made false accusations about her, tried to intimidate her, retaliated against her, and created a hostile work environment. (FAC, ¶¶ 27, 29, 30-32.)

Plaintiff testified before a criminal grand jury in November 2020, a civil grand jury in November 2021 and October 2022. (FAC, ¶¶ 31, 53, 57.) After her testimony in November 2020, Plaintiff alleges she found out Smith was making threatening remarks about her and other witnesses, and her immediate supervisor, Assistant Sheriff Tim Davis, who was aware of the remarks, advised Plaintiff to draft a letter to the County Counsel about her concerns. (FAC, ¶¶ 36-37.) Plaintiff was not moved to a different department and was unsuccessful in her attempts to find a new job with the County. (FAC, ¶¶ 45-49.) In January 2022, Plaintiff spoke with County Attorney Aryn Harris regarding her treatment and subsequently, her doctor placed her on two-week medical leave. (FAC, ¶ 55.) In July 2022, unbeknownst to Plaintiff, Smith had Plaintiff locate a document which was ultimately used for Smith's defense in her trial. (FAC, ¶¶ 56-57.) Smith retired in October 2022,

however, Plaintiff's harassment and mistreatment continued as her supervisors pointedly excluded her during meetings and work events to embarrass and isolate her. (FAC, ¶¶ 58-66.)

Plaintiff initiated this action on November 3, 2023. She subsequently filed her FAC on January 29, 2024, asserting: (1) unlawful retaliation in violation of public policy; (2) harassment and retaliation; (3) failure to prevent and investigate harassment and retaliation; (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. On March 4, 2024, the County filed the instant motions which Plaintiff opposes.

II. Request for Judicial Notice

The County requests judicial notice of four items:

(1) Exhibit A: Plaintiff's "Claims Against the County of Santa Clara," dated April 14, 2023;

(2) Exhibit B: The County's "Notice of Return Without Action," dated May 19, 2023;

(3) Exhibit C: Plaintiff's "Claims Against the County of Santa Clara," dated August 16, 2023; and

(4) Exhibit D: County's "Notice of Rejection of Claim," dated September 22, 2023.

The Court is permitted to take judicial notice of these items. (See Evid. Code, § 452, subd. (c) [official acts of public agencies]; see also *Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 368, fn. 1 ["the court may take judicial notice of the filing and contents of a government claim, but not the truth of the claim"]; *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1752-1753 ["Evidence Code section 452, subdivision (c), permits the trial court to take judicial notice of the records and files of a state administrative board"].) However, judicial notice of these documents is limited to their existence only and not the trust of the statements contained therein. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.) Thus, the County's request is GRANTED.

III. Demurrer

A. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A

demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The County demurs to each cause of action on the ground it fails to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. Claims presentation requirement

"Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov. Code, § 911.2; *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239 (*Bodde*), but see Gov. Code, § 905 [itemized exceptions ...].)" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*).)

> Timely claim presentation is not merely a procedural requirement, but is, as this court long ago concluded, a condition precedent to plaintiff's maintaining an action against defendant" (*Bodde*, *supra*, 32 Cal.4th at p. 1240, quoting *Williams v. Horvath* (1976) 16 Cal.3d 834, 842), and thus an element of the plaintiff's cause of action. (*Bodde*, *supra*, at p. 1240.) Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to a

> general demurrer for not stating facts sufficient to constitute a cause of action. (*Bodde*, *supra*, at p. 1245.)

(*Shirk*, *supra*, 42 Cal.4th at p. 209 (internal quotations omitted); accord, *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 65 ["plaintiff suing the state or a local public entity must allege facts demonstrating either compliance with the claim presentation requirement or an excuse for noncompliance as an essential element of the cause of action"].)

"Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action." (Gov. Code, § 911.2 (a); see also *Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1118 (*Willis*) ["Claims for personal injury must be presented not later than six months after the accrual of the cause of action.").) "Accrual for purposes of the Act is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants." (*Willis*, *supra*, 48 Cal.App.5th at p. 1118.)

Plaintiff's claims arise from the alleged harassment, intimidation, and retaliation that occurred after she was interviewed by the District Attorney in January 2020 and continued after that. (FAC, ¶ 24.) Plaintiff did not present her claim to the County until April 14, 2023. (The County's RJN, Exh. A.) As a result, the County argues her claims cannot be based on any events prior to October 14, 2022, the date of her third grand jury testimony. (MPA, p. 13:12-15.) Plaintiff alleges her claims are timely under the continuing violation doctrine because the alleged conduct continued through the filing of action. (FAC, ¶ 68.)

Generally, a cause of action accrues "'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.'" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

> Although a cause of action typically "accrues" "'when [it] is complete with all of its elements'" (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797]), a cause of action will at times be deemed to accrue at a later date, such as when the plaintiff did not discover and had no occasion to discover the cause of action until that later date, when the defendant fraudulently concealed the existence of a possible claim until that

later date, or when the defendant committed multiple wrongs that ended on that later date (*Aryeh*, *supra*, 55 Cal.4th at p. 1192).

(*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 961.)

"The continuing violation doctrine aggregates a series of wrongs or injuries for the purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them." (*Aryeh v. Canon Business Solution, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*).) Consequently, the continuing violation doctrine "allows liability for unlawful…conduct occurring outside the statute of limitations if it sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*).) For the continuing violation doctrine to apply, a plaintiff must show the defendant engaged in "a pattern of reasonably frequent and similar acts [that] may, in a given case, justify treating the acts as an indivisible court of conduct actionable in its entirety, notwithstanding that the conduct occurred partially outside and partially inside the limitations period." (*Aryeh, supra,* 55 Cal.4th at p. 1198.) Therefore, if the continuing violation doctrine applies to Plaintiff's claims, her claims may be timely as a whole.

A court must consider whether the employer's actions were "(1) sufficiently similar in kind-recognizing…that similar kinds of unlawful employer conduct, such as acts of harassment…, may take a number of different forms; (2) have occurred with reasonable frequency; and (3) and have not acquired a degree of permanence." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1059 (*Yanowitz*), quoting *Richards, supra,* 26 Cal.4th at p. 823.) "Permanence" in this context means that an employer's actions make clear to a reasonable employee that any further efforts to end the alleged unlawful conduct will be futile, or the employer makes clear "to the employee in a definitive manner" than the employee's requests have been rejected." (*Richards, supra,* 26 Cal.4th at p. 823.)

Plaintiff's alleges the harassment began when she cooperated with the investigation in January 2020 and continued up through her filing the FAC. The Court agrees with the County that the alleged harassment that took place before Sheriff Smith retired is different than and cannot be part of a continuing violation with the harassment that allegedly occurred after Sheriff Smith retired. The Court also agrees that Plaintiff's allegations evince a permanence to both periods of alleged harassment.

Plaintiff alleges her repeated efforts to be transferred or to find another job were unsuccessful and she did not receive any support from her peers or supervisors. (FAC, ¶¶ 47-49, 52-53.) Plaintiff also alleges attempts to get help from her superiors to no avail. (FAC, ¶¶ 42, 47, 52.) As a result, the continuing violations doctrine is not applicable here, and to the extent Plaintiff's claims are based on events prior to October 14, they are untimely.

2. First Cause of Action: Unlawful Retaliation in Violation of Public Policy

Plaintiff's claim is brought pursuant to *Tameny v. Atlantic Richfield Company* (1980) 27 Cal.3d 167 (*Tameny*) and is based on violations of Labor Code sections 98.6, 230, 232.5, 1102.5, and 1102.6.

The County argues it may not be sued under *Tameny* because it is a public entity. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, ["[Gov. Code] section 815 bars *Tameny* actions against public entities"].) Plaintiff agreed to remove all *Tameny* references from the pleading. (Opp., 9:3-4.) However, she argues she has sufficiently alleged retaliation based on Labor Code section 1102.5.

> Section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to authorities. As relevant here, section 1102.5 prohibits an employer from retaliating against an employee for sharing information the employee "has reasonable cause to believe…discloses a violation of state or federal statute" or of "a local, state, or federal rule or regulation" with a government agency, with a personal with authority over the employee, or with another employee who has authority to investigate or correct the violation. (Lab. Code, § 1102.5, subd. (b).) "This provision," we have explained, "reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77.) An employe injured by prohibited retaliation may file a private suit for damages. (Lab. Code, ¶ 1105; *Gardenhire v. Housing Authority* (2008) 85 Cal.App.4th 236, 241.)

(*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 709.)

> The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate,

> nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. (See *Flait*, *supra*, 3 Cal.App.4th at p. 476; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453 (*Akers*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69.)
>
> [To] establish[] a prima facie case of retaliation … a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Akers*, *supra*, 95 Cal.App.4th at p. 1453.)

(*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.)

An "adverse employment action" is one that "materially affects the terms, conditions, or privileges of employment." (*Yanowitz, supra,* 43 Cal.App.5th at 1051.) An adverse employment action refers not only to "ultimate employment actions such as termination or demotion, but also… actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement." (*Id*. at 1054.) "Minor or relatively trivial adverse actions or conduct by employers… from an objective perspective, that are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable." (*Ibid.*)

Plaintiff alleges she engaged in protected activity when she testified. (FAC, ¶¶ 78-82.) Plaintiff alleges after Smith retired on October 31, 2022, the undersheriff, Ken Binder continued a hostile environment by stripping Plaintiff of duties and responsibilities, excluding her from meetings she would normally attend; and in late April 2023, during a meeting, specifically naming every individual except for Plaintiff. (FAC, ¶¶ 59-60.) On January 2, 2023, Jonsen was sworn in and he completely dismissed Plaintiff by ignoring her in group settings; removing her from organization groups; and on one instance, giving everyone in line who organized his swearing in ceremony challenge coins but Plaintiff. (FAC, ¶¶ 62-66.)

The County relies on *Williams v. Lorenz* (2018) 2018 U.S. Dist. LEXIS 142967 and *Doe v. Department of Corrections and Rehabilitation* (2009) 43 Cal.App.5th 721 to argue these allegations are insufficient to support Plaintiff's claim. However, these cases considered evidence, which goes beyond the scope of demurrer. Here, Plaintiff alleges these actions impacted her job performance.

(See *Yanowitz, supra,* 43 Cal.App.5th at p. 1054.) Therefore, Plaintiff alleges sufficient facts to state this claim, and the demurrer to the first cause of action is OVERRULED.

3. Second and Third Causes of Action: Harassment and Retaliation; and Failure to Prevent and Investigate Harassment and Retaliation

Plaintiff's second and third causes of action are based on the Fair Employment and House Act ("FEHA") and *Tameny, supra*, however, it appears Plaintiff agreed to remove reference to the FEHA and *Tameny*. (See Opp., p. 4:8-10 ["Plaintiff presented a draft of the second amended complaint removing the second and third causes of action for FEHA and *Tameny* allegations, leaving Plaintiff with her Labor Code retaliation claim"]; 9:3-6.) Thus, the demurrer to the second and third causes of action is SUSTAINED without leave to amend.

4. Fourth Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) For the purposes of the tort, "extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Generally, the question of whether the conduct at issue is in fact extreme and outrageous is a question of fact to be determined beyond the pleading stage. (*Spink v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004.)

Government Code section 815, provides, "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. (b) The liability of a public entity established by this part… is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." (Gov. Code, § 815, subds. (a) & (b).

Plaintiff alleges Defendants' conduct under this claim violate statutory whistleblower protections. (FAC, ¶ 123.) Plaintiff alleges violation of Section 1102.5. This is sufficient to provide a statutory basis for this claim. The Court addressed the timeliness argument above. The County does not offer any other arguments as to this claim. Plaintiff's allegations are therefore sufficient, and the demurrer to the fifth cause of action is OVERRULED.

5. Fifth Cause of Action: Negligent Infliction of Emotional Distress

"The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but a tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490.)

The County argues this claim fails because common law cause of action cannot be asserted against a public entity. (See Gov. Code, § 815.) Plaintiff fails to allege a statutory basis for this cause of action. Thus, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

The County contends Plaintiff has abandoned this claim as to the County. (Reply, 3:17-18.) However, the opposition states Plaintiff will seek leave to name Smith individually as to this claim, not that it will abandon the claim as to the County. (Opp., p. 14:4-5, 19-20.) To the extent Plaintiff is given leave to amend on the instant motion, she can only amend her claims within of the scope of this order. (See *Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015; *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456 ["Following an order sustaining a demurrer… with leave to amend, the plaintiff may amend his or her complaint only has authorized by the court's order"].) If Plaintiff would like to add additional parties, she must file a motion for leave to amend.

IV. Motion to Strike

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281, internal citations omitted.)

B. Analysis

The County moves to strike:

(1) Paragraphs 24-56;

(2) Paragraphs 62-66; and

(3) Plaintiff's requests for punitive damages.

1. Paragraphs 24-56

As the Court stated above, Plaintiff's claims are untimely to the extent they are based on conduct and events prior to October 14, thus, Plaintiff is not entitled to relief as to those claims. However, unlike in *Willis, supra,* where the defendant sought to strike only 5 paragraphs pertaining to conduct for which the plaintiff did not timely present a government claim. (*Willis, supra,* 48 Cal.App.5th at p. 1128.) Here, the County moves to broadly strike allegations over 30 paragraphs that involve background facts about Plaintiff's action, some of which are relevant to Plaintiff's timely claims. Thus, the motion to strike is DENIED.

2. Paragraphs 62-66

The Court considered and rejected the County's arguments as to these paragraphs for reasons stated above. Thus, the County's motion to strike paragraphs 62-66 is DENIED.

3. Punitive Damages

Plaintiff agreed to amend the complaint to "*only* seek punitive damages against her former supervisor [Smith]." (MTS Opp., p.6: 17-18.) Thus, the County's motion to strike punitive damages is GRANTED with 20 days leave to amend.