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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAMES PAYNE, Plaintiff and Appellant, v. FARMERS INSURANCE CO., INC., et al., Defendants and Respondents.	B256061 (Los Angeles County Super. Ct. No. BC506811)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Reisner & King, Adam J. Reisner; Benedon & Serlin, Douglas G. Benedon and Kelly R. Horwitz, for Plaintiff and Appellant.

Gordon & Rees, Steve Ronk, Stephanie Alexander and Jennifer Ghozland for Defendants and Respondents.

James Payne (Payne) appeals from a judgment entered after the trial court sustained without leave to amend a demurrer to his first amended complaint by defendants Farmers Insurance Company, Inc. and Farmers Insurance Group, Inc. (collectively Farmers). Payne alleged that Farmers violated Labor Code[1] section 432.7 by improperly utilizing criminal records information in determining the conditions of his employment and then wrongfully terminated his employment. The trial court found that since Payne's arrest for driving under the influence resulted in a conviction, he could not allege a violation of section 432.7. The trial court further found that since Payne's wrongful termination claim was derivative of his flawed section 432.7 claim, it too failed as a matter of law. Because Payne could not allege facts that would obviate his conviction, the trial court dismissed Payne's amended complaint with prejudice. We affirm.

BACKGROUND

I. Payne's arrest, termination, conviction, and probation

According to Payne's amended complaint, as of September 2010, he had been employed by Farmers as one of its claims representatives for approximately eight years. Payne's position with Farmers did not require him to drive.

On September 4, 2010, Payne was arrested for driving under the influence. At the time of his arrest, Payne was "on his own time and operating his own vehicle."

On September 30, 2010, Payne was questioned by Farmers and allegedly "forced . . . to disclose" his arrest. Several weeks later, on November 5, 2010, Payne was "placed on modified duties pending a resolution of the charges against him."

On September 8, 2011, a little more than a year after his arrest, Payne was notified that his "driving privileges with Farmers Insurance ha[d] been temporarily revoked pending adjudication of the charges"—that is he was prohibited "from operating any

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

vehicle associated with Farmers Insurance." In addition, Payne was notified that he had "ninety (90) days to resolve the charges against [him]."

On November 21, 2011, Farmers advised Payne that he was required to provide proof of an acceptable driving record in order to have a company vehicle assigned to him. Payne was told that if he did not find another position within the company, which did not require use of a company vehicle, and/or notify Farmers that the charges against him were dismissed, then his employment would be terminated. According to Payne, he applied for several positions at Farmers for which he was qualified, but was not offered those positions, or even granted any follow-up interviews. On February 24, 2012, Payne's employment with Farmers was terminated.

On June 25, 2012, Plaintiff entered a plea of nolo contendere to his arrest for driving under the influence. Based on his plea, the court found him guilty and put him on probation for 36 months or until June 2015.

On November 19, 2013, approximately half way through his probation, a hearing was held on Payne's motion for early termination of his probation and dismissal of the charges. The court denied the motion without prejudice, stating that it "will reconsider after defendant has been on probation for 2 years."

On August 26, 2014, more than two years into his probation, a hearing was held on Payne's renewed motion for early termination of his probation. The court granted the motion and set aside the conviction, entering a plea of not guilty and dismissing the case.

II. Payne's lawsuit

On April 23, 2013, less than a year after his conviction, but more than year before his conviction was expunged, Payne filed his initial complaint against Farmers, alleging a violation of section 432.7 and wrongful termination in violation of public policy based on the public policy embodied in section 432.7, subdivision (a).[2] Farmers demurred.

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[2] In both his original complaint and in his first amended complaint (the pleading at issue in the appeal), Payne also alleged that he was wrongfully terminated in violation of the public policy embodied in Insurance Code section 670, subdivision (a). On appeal,

On October 25, 2013, instead of opposing the demurrer, Payne elected to file an amended complaint. In his first amended complaint (FAC), Payne asserted the same two causes of action as in his initial pleading. Payne's core allegation was that Farmers improperly used information about his arrest as a condition of his employment.

Farmers demurred to the FAC, arguing in principal part that Payne's conviction precluded both the cause of action based directly on section 432.7 and the derivative cause of action based on the same statute. Payne opposed the demurrer on two principal grounds: first, his conviction occurred after he was terminated; and second, his conviction would "likely" be expunged. He also argued that this common law wrongful termination claim was properly alleged because he "complained and protested" to Farmers about its allegedly illegal treatment of him. In addition, Payne requested that if the trial court was "inclined to sustain the Demurrer in any part," it should "stay the proceedings pending resolution[] of Plaintiff's expungement" motion.

On March 27, 2014, the trial court, after hearing oral argument from the parties, sustained Farmers' demurrer without leave to amend. With regard to the sufficiency of the FAC, the trial court found that the protection of section 432.7 only extends to situations where "information concerning an arrest or detention . . . did not result in a conviction . . . . I've taken judicial notice of the fact that [Payne's arrest] did result in a conviction." The trial court found that Payne's conviction applied with equal effect to both of Payne's causes of action. With regard to Payne's argument regarding a possible future expungement of his conviction, the trial court noted that expungements are "not guaranteed," that there is no "right . . . to an expungement," and that in any event the law does not require employers to wait to see whether an expungement is granted: "employers have a right to act when their employees have been arrested and convicted of offenses. . . . [¶] . . . [¶] I just don't think it's the law we have to wait—that an employer has to wait and see what happens and see if a person successfully completes probation

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however, Payne has elected not to challenge the dismissal of his wrong termination claim based on the Insurance Code.

and a judge grants a [Penal Code section] 120303 or 120304 motion at some point in the future before they can take any action against him."

At the hearing, Payne requested leave to amend his complaint to add a whistleblower claim. The trial court rejected Payne's request on two principal grounds: (1) Farmers did not violate section 432.7: "Once we decide they acted lawfully ultimately there is no whistle to blow"; and (2) to the extent that there was a whistle to blow, Payne never blew it—that is, Payne did not contact any government state agency regarding Farmers' allegedly illegal conduct.

Judgment was entered in favor of Farmers on April 14, 2014. On April 30, 2014, Payne timely appealed from the judgment.

DISCUSSION

I. Standard of review

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc*. (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213.) Accordingly, in considering the merits of a demurrer, "the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 604.)

If, as here, the trial court sustained the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid*.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid*.)

II. The FAC does not allege facts sufficient to state a cause of action

Former section 432.7[3]—the basis for the FAC's two causes of action—in pertinent part, provided as follows: "No employer, . . . , shall ask an applicant for employment to

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[3] Section 432.7, subdivision (a) was amended in 2013 adding the italicized language to provide that an employer may not "seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, . . . , any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program, *or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.45, and 1210.1 of the Penal Code*." (§ 432.7, as amended by Stats. 2013, ch. 721, § 1.) This amended version of the statute did not go into effect until January 1, 2014—that is until after Payne was arrested, terminated, and convicted, as well as after Payne filed suit and filed the pleading at issue here, the FAC. The 2013 amendment to section 432.7, subdivision (a) is silent with respect to whether the revised statute was to apply retroactively. (*Ibid*.)

In construing statutes, there is a "strong presumption" against retroactive application unless the amendment contains "'express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.'" (*McClung v. Employment Development Dept*. (2004) 34 Cal.4th 467, 475.) "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" (*Ibid*.) "'Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" (*Id*. at p. 476.) (See *City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 308–311.)

Since the Legislature has not expressly indicated that the 2013 amendment was to apply retroactively, and since we are unaware of any other sources providing a "'clear and unavoidable implication that the Legislature intended retroactive application'"

disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, *nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, . . . , any record of arrest or detention that did not result in conviction*, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program. As used in this section, *a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court*. *Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial*." (§ 432.7, subd. (a), italics added.)

Section 432.7, subdivision (a), in short, prevents an employer from making an employment decision based on any "record" of an arrest that did not result in a conviction. However, the statute does not prevent an employer from asking an employee about a pending charge, and it does not prevent an employer from basing an employment decision on an arrest that does result in a conviction. Critically, the statute does not place any temporal limits on whether the conviction occurs before or after an employment decision is made. The issue of temporal limits was addressed in *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037 (*Pitman*).

In *Pitman, supra,* 197 Cal.App.3d 1037, the employer terminated plaintiff's employment after his arrest. At the time of termination, the arrest had not yet resulted in conviction, but a conviction was obtained prior to plaintiff's filing of his complaint. The trial court sustained defendant's demurrer, and the court of appeal affirmed. The court recognized that section 432.7 "cannot be read as permitting the employer *to utilize* the

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(*McClung, supra,* 34 Cal.4th at p. 475), and Payne has not directed us to any such sources, we base our review on the version of section 432.7, subdivision (a), which is quoted above and which was in effect when Payne was (a) arrested, terminated, and convicted and (b) when he filed both his original complaint and his FAC.

information of a mere arrest for disciplinary purposes" yet held that the demurrer was properly sustained because of the underlying legislative purpose: "The clear purpose of section 432.7 is to prevent the misuse of criminal offender records information, not to shelter an employee from an investigation by his employer for serious misconduct. Accordingly, we find that in order to state a cause of action for a violation of section 432.*7 the complaint must affirmatively allege that the arrest did not result in a conviction*. This is because the statute specifically deals with 'information concerning an arrest or detention which *did not result in conviction*.' (Italics supplied.) The obvious intent of the legislation is to prevent the adverse impact on employment opportunities of information concerning arrests where culpability cannot be proved." (*Pitman,* at p. 1044, some italics added.)

After discussing the legislative purpose underlying section 432.7, the court in *Pitman*, *supra*, 197 Cal.App.3d 1037, went on to explain why the trial court in that case properly sustained the defendant's demurrer: "In the instant action plaintiff merely alleged that the City of Oakland on or about November 15, 1983 utilized information about plaintiff's arrest which *had not* (at that time) resulted in conviction as a factor in determining to terminate plaintiff's employment. At the time he filed his complaint plaintiff was unable to frame his allegation in the language of the statute, since his arrest had resulted in the conviction which was judicially noticed by the court. Plaintiff could not, by artful drafting of his complaint, avoid the clear intent of the statute." (*Id.* at p. 1044.)

Farmers argues that "[t]he instant case is on fours with *Pitman*[, *supra*, 197 Cal.App.3d 1037]." We agree. Payne, like the plaintiff in *Pitman,* was arrested and then terminated from his job. Payne, like the plaintiff in *Pitman,* was convicted after being terminated but before he filed suit. Because Payne, like the plaintiff in *Pitman,* could not "affirmatively allege that the arrest *did not* result in a conviction," (*id*. at p. 1044), he was unable to allege facts sufficient to state a cause of action under section 432.7. Payne's inability to allege that his arrest did not result in a conviction rendered both of his causes of action fatally defective.

Payne invites us to find *Pitman, supra*, 197 Cal.App.3d 1037, to be wrongly decided. We decline Payne's invitation. First, we find that the holding in *Pitman* is based on the plain (and at the time operative) language of section 432.7, which denies protection to employees whose arrests result in a conviction. Second, although the Legislature amended section 432.7 twice between when *Pitman* was decided and when Payne filed suit (Stats.1990, ch. 769, § 1; Stats.1992, ch. 1026, § 3), the Legislature declined each time to take issue with *Pitman*'s interpretation and application of section 432.7, subdivision (a). "[W]hen the Legislature amends a statute, we presume it was fully aware of the prior judicial construction." (*White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 572.) Accordingly, we presume that the Legislature found *Pitman*'s interpretation and application to be consistent with the language and intent underlying section 432.7. Third, *Pitman* was decided more than a quarter of century ago. In all that time, no California appellate court has disagreed with or disapproved of *Pitman*'s interpretation and application of section 432.7, subdivision (a). Fourth, we are unaware of (and Payne does not identify) any treatise or law review or practice guide that is critical of *Pitman*'s holding.

Finally, Payne does not offer any compelling logical reason why we should not follow *Pitman, supra*, 197 Cal.App.3d 1037, in this case. For example, Payne argues that adherence to *Pitman* will increase the likelihood that an employee will be convicted, but there is no evidence here that Payne would not have entered a guilty plea if he had not been fired. Indeed, the judicially noticeable evidence is to the contrary. The minute order from his criminal case[4] states that Payne "underst[ood] the charge(s)" and the "possible penalties" and, after "freely, voluntarily, knowingly, [and] intelligently" waiving his right to counsel, he pleaded "no contest" to driving under the influence. Payne's action strongly suggests that he withdrew his not guilty plea and pleaded no contest in order to put this unfortunate incident behind him as quickly as possible—his

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[4] The trial court, pursuant to Evidence Code sections 452 and 453, took judicial notice of Payne's the minute order. On appeal, Payne does not challenge the trial court's decision to take judicial notice of court records from his criminal case.

change in plea leading to probation and, at the end of probation, the possible expungement of his conviction. Put differently, the record suggests that Payne's reasonable and sensible course of action would not have been any different if he had not been terminated.

Payne also argues that the *Pitman* rule may result in an employee's action under section 432.7 being time-barred, but there is no evidence here that Payne's case would have been time-barred. The statute of limitations for a section 432.7 claim is three years. (Code Civ. Proc., § 338, subd. (a).) Payne was terminated in February 2012 and his conviction was expunged in August 2014—six months before the statute would have run on his section 432.7 claim. In other words, Payne did not have to file suit in October 2013. He could have waited until after his conviction had been expunged in August 2014 to file suit, thereby allowing him to affirmatively and truthfully allege that his arrest did not result in a conviction.[5] However, Payne elected not to wait. As a result, he was unable to state facts sufficient to allege a cause of action claim under or based on section 432.7.

In short, because Payne did not affirmatively allege that his arrest did not result in a conviction, the demurrer to the FAC was properly sustained.

III. The trial court did not abuse its discretion in denying leave to amend

Although California has liberal policy in favor of amendment, it is not sufficient for a plaintiff to assert "'an abstract right to amend.'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.) To satisfy his or her burden on appeal, "'a plaintiff "must show in what manner he can amend his complaint and how that

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[5] In the FAC, Payne's allegations with respect to his conviction are not entirely in accord with the facts. Specifically, Payne alleges that "Farmers improperly used Plaintiff's prior arrest (which did not and/or may not result in a conviction) as a factor in determining conditions of Plaintiff's employment . . . ." When Payne filed his FAC in October 2013, his prior arrest had most definitely resulted in a conviction. At that time, he had been on probation for almost a year and a half. Payne's rather suspect allegation was probably due to the fact the that when he filed the FAC, his initial motion for early termination of his probation and expungement of his conviction was still pending.

amendment will change the legal effect of his pleading." [Citation.] . . . The plaintiff must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action.'" (*Rossberg*, *supra*, 219 Cal.App.4th at p. 1491.) Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co*. (1992) 7 Cal.App.4th 1088, 1098; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.) Also, leave to amend should not be granted where an amendment would be futile. (*Newell v. State Farm General Ins. Co*. (2004) 118 Cal.App.4th 1094, 1100.) It is axiomatic, "The law neither does nor requires idle acts." (Civ. Code, § 3532.)

At the time that the trial court denied the request for leave to amend, Payne's conviction had not been expunged. As a result, Payne could not affirmatively allege facts that would allow him to replead successfully his claims under section 432.7. In addition, Plaintiff could not allege a whistle blower claim because he never brought Farmers' allegedly illegal conduct to the attention of a governmental agency. At all relevant times, section 1102.5 provided that internal complaints—that is, complaints made to others within the company—are not sufficient to state a cause of action; rather, the employee must bring his or her complaints to a "government or law enforcement agency."[6]

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[6] As Payne's counsel noted at the hearing on Farmers' demurrer, section 1102.5 had been recently amended to include internal complaints. (See Stats. 2013, ch. 78, § 4.1.) Section 1102.5, subdivision (b) now also protects disclosures of information by an employee to "to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." However, as with section 432.7, the 2013 amendment of section 1102.5 did not go into effect until January 1, 2014 and there is no express indication by the Legislature or by any other sources that the amended statute was to be applied retroactively. *McClung v. Employment Development Dept*., *supra*, 34 Cal.4th at pp. 475–476.) Accordingly, we base our analysis on the version of section 1102.5 that was in effect when Payne was

(§ 1102.5, subd. (b); *Green v. Ralee Engineering Co*. (1988) 19 Cal.4th 66, 77 [§ 1102.5, subd. (b) "does not protect plaintiff, who reported his suspicions directly to his employer"]; *Rope v. Auto-Chlor System of Washington, Inc*. (2013) 220 Cal.App.4th 635, 648–649 [affirming dismissal because no allegation that unlawful activity was reported to any governmental agency].)

Because Payne did not and could not affirmatively allege either that his arrest did not result in a conviction or that he disclosed information about Farmers' allegedly illegal conduct to a government or law enforcement agency, the demurrer to the FAC was properly sustained without leave to amend.

IV. The trial court did not abuse its discretion in denying Payne's request for a stay

It is well established that a trial court is vested with considerable discretion in managing its docket in order to promote both "efficiency" and "the just resolution of cases on their merits." (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.) In order to find an abuse of that discretion, we must find that the trial court's decision was "arbitrary," capricious," or "exceeded the bounds of reason." (*Ibid*.)

Here, Payne complains that the trial court abused its discretion by not staying the proceedings until after his renewed motion for early termination of his probation and expungement of his conviction had been heard. According to Payne, the trial court abused its discretion because such a stay would have lasted only four months—the hearing on the demurrer was held on March 27, 2014 and his renewed motion for early termination/expungement was granted on August 26, 2014. We disagree.

First, as the trial court noted, because there is no "right to expungement," it was "not guaranteed" that Payne's motion for early termination/expungement would be granted soon or at all. Payne's probation was supposed to last three years and at the time of the hearing on Farmers' demurrer, less than two years had passed. Consequently,

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(a) arrested, terminated, and convicted and (b) when he filed both his original complaint and his FAC.

there was a risk that if the trial court granted Payne's motion, the parties might have been forced to wait far longer than four months.

Second, even if early termination of probation and expungement were guaranteed and guaranteed to occur shortly after March 2014, a stay would have been unavailing. Payne's request for a stay is based on the 2013 amendments to section 432.7, which extended the protections of that statute to plaintiffs whose conviction "*has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.45, and 1210.1 of the Penal Code*." (§ 432.7, as amended by Stats. 2013, ch. 721, § 1.) However, as discussed above, because the Legislature chose not to make that amendment retroactive, it has no application to Payne's claim. Instead, both Payne and the trial court were stuck with the version of section 432.7 that excluded protection to employees whose arrest did result in a conviction.

Since the trial court's refusal to stay the proceedings was not arbitrary, or capricious, or beyond the bounds of reason, we affirm.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.