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Please note:

This sample document is redacted from an actual research and writing project we did for a customer some time ago. It reflects the law as of the date we completed it. Because the law may have changed since that time, please use it solely to evaluate the scope and quality of our work.

If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN JUAN

SARAH SMITH,
Plaintiff,

Case No.
PLAINTIFF’S OPPOSITION TO
DEMURRER TO COMPLAINT

vs.

COUNTY OF SAN JUAN, et al.,
Defendants.

Date:
Time:
Dept.
Complaint filed:
Trial date:

1. As a matter of law, the facts alleged in the complaint state valid causes of action.

Even if plaintiff’s claims seem unlikely or improbable, the facts must be accepted as true for purposes of ruling on the demurrer. *Del E. Webb Corp. v. Structural Materials* (1981) 123 Cal.App.3d 593, 604. Furthermore, plaintiff’s ability to prove the allegations is also irrelevant. *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-4. Additional facts may be implied or inferred from those facts expressly set forth in a complaint.

To the extent there are factual issues in dispute, however, this court must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the complaint.

1 *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68
2 Cal.App.4th 445, 459.

3
4 **2. The demurrer to the First and Third Causes of Action should be**
5 **overruled.**

6 San Juan has demurred to the First and Third Causes of Action on the grounds
7 that they fail to state sufficient facts to constitute a cause of action. The complaint does
8 state sufficient facts to put San Juan on notice of Smith’s claims. Smith alleged that San
9 Juan employees called her, sent letters, and otherwise harassed her. Complaint ¶ 14.
10 These allegations spell out that Smith was harassed, who did it, that the harassment
11 related to her medical disabilities, that she complained about the harassment, and that San
12 Juan did nothing to prevent it. Smith’s pleading is sufficient for San Juan to know and
13 understand the claims being made against it.

14 It can be inferred from her complaint that Smith was discriminated against on the
15 basis of race, gender, and age and that San Juan’s goal was to force her out of the
16 department where she worked. The department did eventually fire her.

17 Under the primary right theory, the manner in which a plaintiff elects to organize
18 his or her claims within the body of the complaint is irrelevant to determining the number
19 of causes of action alleged.

20 [I]f a plaintiff states several purported causes of action which allege an
21 invasion of the same primary right he has actually stated only one cause of
22 action. On the other hand, if a plaintiff alleges that the defendant’s single
23 wrongful act invaded two different primary rights, he has stated two causes of
24 action, and this is so even though the two invasions are pleaded in a single
25 count of the complaint.

26 *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257.

1 Smith has alleged that San Juan discriminated against her on several separate
2 grounds. But if the Court finds that these allegations are insufficient, Smith seeks leave to
3 amend either or both of these claims.

4
5 **3. Because Smith did exhaust her administrative remedies, the demurrer to**
6 **the Seventh and Ninth Causes of Action should be overruled.**

7 San Juan’s demurrer to the Seventh and Ninth Cause of Action is based on
8 Smith’s purported failure to exhaust her administrative remedies. San Juan’s argument
9 ignores settled case law regarding the specificity of the statements with which a DFEH
10 claim must be filed to meet the requirement for exhaustion of administrative remedies. A
11 plaintiff files a charge with an administrative agency before filing suit so that the agency
12 can investigate the charges, and so that the plaintiff may attempt to obtain voluntary
13 compliance with the law. When submitting the charge, claimants are not held to specify
14 the charges exactly:

15 Incidents not described in a DFEH charge can be included in the
16 subsequently filed lawsuit if they would necessarily have been discovered by
17 investigation of the charged incidents, i.e., if the allegations in the civil
18 complaint were “like or related” to those specified in the DFEH charge.

19 *Soldinger v. Northwest Airlines* (1996) 51 Cal.App.4th 345, 381.

20 San Juan has attached Smith’s complaint as an exhibit to its demurrer. Her
21 complaint incorporates her California Department of Fair Employment and Housing
22 (“DFEH”) complaint as an exhibit. The DFEH complaint sets out the facts supporting
23 her claim. Smith checked the box for “harassment” on the form. There is no box to check
24 for failure to prevent discrimination.

25 Failure to prevent discrimination is in essence a “derivative action” based on other
26 discriminatory conduct. A finding of discrimination would by definition lead to a finding
27 of failure to prevent discrimination, even if that failure is not specifically set forth in the
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1 DFEH complaint. *Nazir v. United Airlines, Inc.* (2009) 148 Cal.App.4th 243, 288.

2 Therefore, this claim is one that would be “like or related” to Smith’s other claims.

3 Smith has found no case law where failure to exhaust administrative remedies was a
4 successful defense to a claim for failure to prevent discrimination under FEHA.

5 In *Sandhu v. Lockheed Missiles & Space Company, Inc.* (1994) 26 Cal.App.4th 846,
6 Sandhu had filed a complaint with DFEH alleging racial discrimination and received a
7 right-to-sue letter. But in his civil action, he also alleged discrimination based on national
8 origin. Lockheed demurred on the ground that Sandhu failed to exhaust his administrative
9 remedies because he had failed to check the proper box on the form. The trial court
10 sustained the demurrer and Sandhu appealed.

11 In reversing the trial court and holding that Sandhu had exhausted his
12 administrative remedies, the court turned to *Sanchez v. Standard Brands, Inc.* (5th Cir.
13 1970) 431 F.2d 455, which the court called “the seminal case on this issue.” *Id.* at 858. In
14 *Sanchez*, the court looked at the facts presented to the Equal Employment Opportunity
15 Commission (“EEOC”) in a complaint, and not just to how the plaintiff had filled out the
16 form. The *Sandhu* court followed *Sanchez*:

17 Sanchez also noted that the purpose of a charge of discrimination is to
18 “trigger the investigatory and conciliatory procedures of the EEOC” (*id.* at p.
19 466), and thus its “crucial element . . . is the *factual* statement contained
20 therein. . . . The selection of the type of discrimination alleged, i.e. the
21 selection of which box to check, is in reality nothing more than the
22 attachment of a legal conclusion to the facts alleged.” (*Id.* at p. 462, italics in
23 original.) Checking the wrong box, therefore, was a mere “technical defect.”
24 *Id.* at 859.

25 The court went on to hold:

26 Both California courts and those from other jurisdictions have endorsed the
27 “like or reasonably related” standard articulated in *Oubichon*, recognizing
28

1 that to do otherwise would create a “needless procedural barrier” (*id.* at p.
2 571) to enforcement of FEHA.

3 *Ibid.*, citing *Oubichon v. North American Rockwell Corporation* (9th Cir. 1973)
4 482 F.2d 569, 571.

5 Here, Smith’s claim of failure to prevent discrimination is derivative of her other
6 claims. It follows that an investigation into Smith’s claims of discrimination and
7 harassment would no doubt show that she was discriminated against and harassed, and
8 that San Juan failed to prevent the discrimination and harassment alleged in her DFEH
9 complaint. Although these two claims may not have been set forth in detail, the facts
10 suffice to point an investigator in the right direction. That is all Smith had to do.

11 Some authorities state the more specific the original charge filed with the
12 administrative agency, the less likely a civil lawsuit may be expanded into
13 other areas. However, even if this is an accurate statement of the law, all
14 recognize that a DFEH charge “is not intended as a limiting device.”

15 Incidents not described in a DFEH charge can be included in the
16 subsequently filed lawsuit if they would necessarily have been discovered by
17 investigation of the charged incidents, i.e., if the allegations in the civil
18 complaint were “like or related” to those specified in the DFEH charge.

19 *Soldinger* at 381 (citation omitted).

20 Defendant cited *Martin v. Lockheed Missiles & Space Company, Inc.* (1994) 29
21 Cal.App.4th 1718, in which the plaintiff filed two administrative complaints for age
22 discrimination—one with the EEOC and one with the DFEH. The plaintiff later amended
23 her EEOC complaint to allege sex discrimination, harassment, and retaliation, but she
24 failed to amend her DFEH claim to add these additional charges. After receiving a right-
25 to-sue letter from DFEH, the plaintiff filed her civil action alleging all four of the claims
26 she had made in her amended EEOC complaint.

1 In ruling that the plaintiff had failed to exhaust her administrative remedies for the
2 additional claims, the court held that,

3 [i]f Martin wished to avail herself of state judicial remedies for her additional
4 claims, it was essential that she undertake by reasonable means to make the
5 additional claims known to the DFEH. In our view she did not do so, and
6 therefore she did not exhaust her state administrative remedies.

7 *Id.* at 1729-30.

8 *Martin* does not support San Juan’s demurrer because plaintiff, unlike Martin, *did*
9 notify DFEH in her complaint of the facts that are the basis for her lawsuit, including her
10 claim of harassment:

11 San Juan County has refused to reinstate Plaintiff’s benefits and Defendant
12 Ruiz has harassed Plaintiff while she has been out on disability regarding her
13 injuries. Defendant Ruiz has continued to insist that Plaintiff be assigned to a
14 Case Manager Nurse. Further, Defendant Ruiz has harassed Plaintiff
15 requesting that she inform the County when she planned to return to work.
16 Defendants Ruiz and Falls, have left voice mail messages and sent letters,
17 including letters by registered mail, wrongfully accusing Plaintiff of being
18 absent without leave (AWOL).

19 DFEH Complaint, Insert 4, p.2.

20 The DFEH complaint contains other examples of harassment, including more harassing
21 phone calls, letters, and demands that Smith return to work despite her injuries. DFEH
22 Complaint, Insert 4, p. 3-5.

23 24 **CONCLUSION**

25 Smith has in each cause of action either expressly pleaded facts sufficient to
26 constitute a cause of action or pleaded facts from which facts sufficient to state a cause of
27 action can be inferred. Furthermore, Smith has exhausted her administrative remedies.

1 The demurrer should be overruled. But if the Court finds that the demurrer is well
2 taken as to any cause of action, Smith hereby moves for leave to amend her complaint to
3 allege any facts the Court finds lacking or to clarify any unclear or ambiguous allegations.
4 “Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect
5 has not been given.” *Angie M. v. Superior Court (Hiemstra)* (1995) 37 Cal.App.4th 1217,
6 1227.

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8 Dated:

Respectfully submitted,

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12 LOUIS LAWYER
13 Attorneys for Plaintiff
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