TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, October 9, 2024 at 3:00 p.m.
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1-2. SCV-273886, Evans v. City of Petaluma

This is a joint ruling on the demurrers filed by Defendant City of Petaluma and Defendant Sonoma-Marin Area Rail Transit ("SMART") to Plaintiff's Second Amended Complaint ("SAC"). Both demurrers are SUSTAINED. Leave to amend is DENIED.

City of Petaluma's request for judicial notice is GRANTED. Defendants' counsel shall submit a written order for their respective motions consistent with this tentative ruling and in compliance with Rule 3.1312.

Analysis:

I. Standards on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594,

601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also, *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, "Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (*Lawrence v. Bank of Am.* (1985) 163 Cal.App.3d 431, 436.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Goodman, supra*, at 349.)

II. Second Cause of Action – Premises Liability

The Court previously sustained these two defendants' demurrers to this cause of action on the basis that Plaintiff had failed to allege specific facts describing the conditions of the roadway that created a dangerous condition. Plaintiff had not explained (1) the specific defects in the roadway complained of or (2) exactly how the specific defects in the roadway created the hazards complained of. There were also no facts alleged regarding the nature of the relationship between the condition of the roadway and the injuries suffered by Plaintiff's father. The Court granted Plaintiff leave to amend the cause of action, explaining that it would be Plaintiff's final opportunity to plead this cause of action sufficiently.

Plaintiff amended the cause of action. In addition to re-alleging the general allegations previously found by this Court to be insufficient to state the cause of action, Plaintiff now further alleges the following specific facts:

1. "At the location of the crash there was an approximately 8-inch raised center median;"
2. "This 8-inch raised center median had been struck by numerous vehicles previously as evidenced by numerous wheel strike marks and damage at this location and other similar locations with this type of median;"
3. "This 8-inch raised center median was struck by decedent as he rode his motorcycle causing him to lose control, crash, and die."
4. Additional specifics contributed to making the median dangerous, such as, "absence of lighting in the area...failure to warn/mark…with reflective markings on the date in question…failure to have streetlights illuminating the median, and/or failure to have signage/reflectors warning of the median."
5. The median "was built/designed with warnings for approaching motorists that were broken and/or were removed prior to the accident including, but not limited to, reflective warning dots and a

reflective warning marker at the beginning of the 8-inch raised center median located to alert motorists as they approached same."

The median is alleged to be located at the SMART train crossing on West Payran Street in Petaluma. Plaintiff alleges that the 8-inch raised center median was "dangerous and physically defective in design, placement, and due to its physically deteriorated condition." Plaintiff alleges no facts regarding the alleged "physically deteriorated condition" of the median itself.

The defendants have filed demurrers to the SAC both alleging that, now that Plaintiff has identified the "dangerous condition" as being the median at the railroad crossing, the Court does not have subject matter jurisdiction because the California Public Utilities Commission (CPUC) has exclusive jurisdiction over the median. The defendants also argue that the Plaintiff has still failed to state a cause of action for premises liability because the newly alleged facts regarding the median are not sufficient to allege a dangerous condition. SMART also argues that it does not own, control, or maintain the property, thus it cannot be liable for premises liability.

Plaintiff fails to respond to the defendants' arguments regarding subject matter jurisdiction in her opposition. Plaintiff also failed to respond to SMART's argument that it does not own, control, or maintain the land. The Court will note that SMART's argument that is does not own, control, or maintain the land is not a basis on which this demurrer is sustained. The evidence pointed to in support of this does not sufficiently establish this.

Furthermore, the moving defendants cite several cases (addressed below) supporting their arguments that these additional facts now alleged regarding the median are not sufficient to establish a dangerous condition of property. Plaintiff has not responded to these cases in her opposition.

A. <u>This Court Does Have Subject Matter Jurisdiction Over Complaints Regarding the Center Median</u>

The moving defendants argue that the CPUC has exclusive jurisdiction over all matters concerning railroad crossings. As such, they argue that the Court does not have subject matter jurisdiction in this matter. The defendants' arguments are based on Public Utilities Code §§ 1202 and 1759(a).

Public Utilities Code § 1202 grants the CPUC exclusive jurisdiction over designing and implementing all railroad crossings in this state. Public Utilities Code § 1759(a) provides that no court of this state, except the Supreme Court and the court of appeal shall have jurisdiction to "review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court."

According to the defendants, reviewing the alleged deficiencies of the center median would constitute an interference with the commission's review and approval of the installation of the median and signage. The Court is not persuaded by this argument. Public Utilities Code § 1202 does not grant the CPUC the authority

to determine premises liability allegations. Section 1759 does not bar the Superior Court from determining whether a dangerous condition of public property existed where a railroad crossing exists. The design immunity of Government Code § 830.6 sufficiently protects from premises liability on the basis of design.

Nonetheless, the defendants' demurrers are being sustained without leave to amend on other grounds, as explained below.

B. Plaintiff Has Failed to Allege Facts Sufficient to Constitute a Dangerous Condition

"The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.) "Accordingly, a claim alleging a dangerous condition may not rely on generalized allegations but must specify in what manner the condition constituted a dangerous condition." (*Ibid*. Internal citation omitted.) "[B]ecause 'all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, 'to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.'" (*City of Los Angeles v. Superior Ct.* (2021) 62 Cal.App.5th 129, 138.) "'[A] claim alleging a dangerous condition may not rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition.'" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.)

"A dangerous condition exists when public property "is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using the property itself," or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users." (*Cerna, supra,* at 1347–48.) "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.'" (*Id*. at 1347, citing *Bonanno v. Cent. Contra Costa Transit Auth.* (2003) 30 Cal.4th 139, 148.)

As noted above, Plaintiff has not alleged any facts supporting the alleged "physically deteriorated condition" of the center median. Plaintiff's allegations regarding its deficient design and placement are general and unsupported by facts. Disregarding the general allegations that are not supported by facts, Plaintiff's factual allegations are that the existence of the center median, coupled with the lack of street lighting and missing reflective markings created a dangerous condition. Based on the case law, which Plaintiff has not responded to, this is not so.

In *Cerna v. City of Oakland, supra,* the plaintiffs were struck by a motorist while they stood at a concrete island divider waiting to cross the remainder of the road. The plaintiffs identified seven features that allegedly made the city intersection dangerous:

> (1) the crosswalk was painted white, not yellow; (2) there was no sign painted in the approaching roadway with the words "SLOW—SCHOOL XING"; (3) there was no traffic signal; (4) there were no crossing guards; (5) signs warning of the presence of student pedestrians were either missing or in

an incorrect position; (6) the crosswalk was not painted with diagonal or longitudinal lines; and (7) there were no blinking lights in the pavement along the parallel painted lines of the crosswalk. (*Cerna v. City of Oakland, supra,* 161 Cal.App.4th at 1348.) The Court of Appeal upheld the trial court's decision that such facts did not constitute a dangerous condition.

In *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, the plaintiff was injured when she was struck by a car as she was walking across the street. She alleged that a dangerous condition existed because the city did not install safety devices, traffic regulatory devices, traffic control devices, signs or traffic signs, or to take steps to manage, control, or reduce traffic flow or speed at that street. (*Id*. at 437-438.)

The Court of Appeal affirmed the lower court's sustaining of the demurrer without leave to amend. The Court noted that the complaint "contains no allegation that Chase Avenue had blind corners, obscured sightlines, elevation variances, or any other unusual condition that made the road unsafe when used by motorists and pedestrians exercising due care…" (*Brenner, supra,* at 440-441.) Furthermore, the Court noted that failure to install traffic regulation or safety devices "has been legislatively excluded as a basis for finding a dangerous condition," referring to Government Code § 830.4 (*Id*. at 442.)

In *Salas v. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, the plaintiffs alleged as the dangerous condition, "Lack of proper signage, controls or signals; failure to provide safe streets or highways; failing to design proper signage, controls or signals; failure to have traffic control devices in place; placing crosswalk in the location without property safety devices; failing to follow recommended standards as to the location of the crosswalk; failing to provide the recommended crosswalk design for the location; [and] failing to properly enforce and/or control speed in the area." (*Id*. at 1062.) This was insufficient.

In *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, the Court explained, "A public entity is under no duty to light its streets." (*Id*. at 133, citing *Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477.) "A duty to light, 'and the consequent liability for failure to do so,' may arise only if there is 'some peculiar condition rendering lighting necessary in order to make the streets safe for travel.'" (*Ibid*.)

Government Code § 830.8 provides that a public entity is not liable "for an injury caused by the failure to provide traffic or warning signals, signs, markings, or other devices…" Government Code § 830.4 provides that a condition of property is not dangerous "merely because of the failure to provide regulatory traffic controls, signals, stop signs, yield right-of-way signs, or speed restriction signs…"

Here, Plaintiff's factual allegations are that the dangerous condition consisted of the existence of the center median, being not well lit, missing reflective markings, and having wheel strike marks on it. Plaintiff has not alleged *facts* suggesting that such conditions combined created a trap or any sort of peculiar condition that would require the government to provide lighting or warning/reflective marks. Plaintiff merely made general conclusory statements that vision limitations, elevations variances, and a hidden trap existed.

The government cannot be liable for the lack of lighting and reflective marks, absent some peculiar

circumstances. Plaintiff argues that Government Code §§ 830.4 and 830.8 do not apply "where the 'dangerous condition' is based on factors other than a failure to place signage or when signage is necessary to warn of a hidden trap." This is true. However, that is not the case here. Plaintiff's *factual* allegations rely only on the lack of lighting and lack of warning/reflective signs. Both are factors that are irrelevant absent some *factual* allegation that these factors, combined together, created a peculiar circumstance or trap that would have required the government to provide those things.

Absent Plaintiff's allegations regarding the lighting and missing markings, what remains is the simple existence of the center median with wheel strike marks on it. Plaintiff has not alleged facts suggesting that the median was deteriorated in any way. She has not alleged facts supporting her allegations that its location or design was improper. The existence of wheel strike marks does not suggest a dangerous condition. Plaintiff has not alleged when such strike marks were observed. Thus, even construing the SAC liberally, there are no facts to suggest that the strike marks occurred prior to Plaintiff's father's motorcycle accident. Plaintiff has not alleged facts of any prior accidents at that location.

Plaintiff's allegations are not sufficient to allege a dangerous condition. In the cases above, even where the plaintiff had presented more facts than those present here, similar allegations have been found to be insufficient to allege or prove a dangerous condition.

C. Leave to Amend is Denied

In the Court's previous ruling on these defendants' demurrers to the First Amended Complaint, the Court stated that this was Plaintiff's final opportunity to sufficiently plead this cause of action. Plaintiff has now had three opportunities to do so and has consistently relied on conclusory allegations, despite the Court's instruction not to do so. The specific facts that have finally been provided do not sufficiently allege a dangerous condition.

Despite the Court's previous ruling, Plaintiff has again asked for leave to amend and, again, has failed to explain *how* the complaint can be amended to resolve its deficiencies. Plaintiff has provided no compelling reason why the Court should not uphold its previous ruling that this shall be Plaintiff's last opportunity to properly plead the case against these defendants. Leave to amend is denied.

3-6. 24CV01391, Saabye v. Distributor Operations, Inc.

Defendants' Motion to Compel Arbitration

Defendants' motion to compel arbitration is GRANTED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Defendants' Request for Judicial Notice

Defendants request judicial notice of,

(1) The Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association (the "AAA Rules");

(2) Audio recording of the California Unemployment Insurance Appeal Board hearing on an appeal filed by Plaintiff Tara Saabye related to this matter;

(3) Certified transcript of the hearing recording;

(4) The written decision issued by Administrative Law Judge Stanley Alencastre in the unemployment matter;

(5) The November 4, 2022 Order from the Superior Court of California, County of Los Angeles in the matter of Laura Halcon v. Distributor Operations, Inc. Case No. 22BBCB00267, granting Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration;

(6) The Declaration of Jeremy Shipe, filed in support of Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration from the Superior Court of California, County of Los Angeles in the matter of Laura Halcon v. Distributor Operations, Inc., Case No. 22BBCB00267;

(7) The October 29, 2014 Order from the United States District Court for the Central District of California in the matter of Luis Esparza v. Interstate Batteries, Inc. et al., Case No. CV14-6480 PA (PJWx), granting Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration;

(8) The Declaration of Karen Sampson filed in support of Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration from the United States District Court for the Central District of California in the matter of Luis Esparza v. Interstate Batteries, Inc., et al., Case No. CV14-6480 PA (PJWx);

(9) The January 12, 2015 Notice of Entry of Order from the Solano County Superior Court in the matter of Harrison v. Interstate Batteries, et al., Solano County Superior Court, Case No. FCS043083, granting Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration; and

(10) The Declaration of Karen Sampson filed in support of Defendant Distributor Operations, Inc.'s Motion to Compel Arbitration from Harrison v. Interstate Batteries, et al. Solano County Superior Court, Case No. FCS043083.

The request is DENIED as to numbers 2-3. The audio recording of the hearing and the transcript of the hearing are evidence that can be subject to dispute. Therefore, they are not appropriate for judicial notice. The request is GRANTED as to numbers 1 and 4. The request is also GRANTED as 5-10 only as to the extent that they are relevant.

Background

Plaintiff filed a complaint against Defendants alleging the following causes of action arising out of her former employment with Defendant Distributor Operations, Inc. (aka Interstate Batteries):

(1) Sex/Gender Harassment: Gov. Code § 12940 et seq.; (2) Sex/Gender Discrimination: Gov. Code § 12940 et seq.; (3) CFRA Interference; (4) CFRA Retaliation; (5) Physical Disability Discrimination: Gov. Code § 12940(a); (6) FEHA Retaliation: Gov. Code § 12940 et seq.; (7) Failure to Prevent Discrimination and/or Retaliation: Gov. Code § 12940(k); (8) Failure to Accommodate: Gov. Code § 12940(m); (9) Failure to Engage in the Interactive Process: Gov. Code § 12940(n); (10) Labor Code § 1102.5 Retaliation; (11) Constructive Discharge in Violation of Public Policy; (12) Failure to Pay Minimum Wages; (13) Failure to Pay Overtime Wages; (14) Failure to Pay Wages Owed; (15) Meal Period Liability; (16) Rest Period Liability; (17) Failure to Provide Accurate, Itemized Wage Statements; (18) Waiting Time Penalties; (19) Violation of Business & Professions Code § 17200 et seq.; (20) Violation of the California Equal Pay Act; and (21) Intentional Infliction of Emotional Distress.

Defendant Bill McCallister was her supervisor. The allegations of the complaint are as follows:

Plaintiff began her employment in July of 2018. In 2020, Plaintiff was promoted to assistant store manager and was paid $19.50 per hour. After being promoted, the previous store manager informed Plaintiff that she should have been getting paid about $30 per hour based on Plaintiff's knowledge and experience. Plaintiff also trained male employees who were subsequently promoted and earned a higher hourly wage than her. When Plaintiff asked the general manager why she was only being paid $19 per hour as opposed to $30 per hour, the general manager laughed. When she complained to the regional manager, he dismissed her and rushed her out of his office. Plaintiff threatened to quit her job due to the unequal pay and in response, the general manager offered her a raise to $22.50 per hour. Plaintiff accepted.

In 2021, Plaintiff had to take a medical leave of absence after suffering severe burns on her arm and hand. While Plaintiff was on medical leave, the general manager reached out to her if she could come back early. She came back to work after 2 months, though she was supposed to be out for 4 months.

In 2021, the general manager promoted Plaintiff to Retail Store Manager. In 2022, Defendant Interstate Batteries sent out an email regarding hiring a new Store Manager for Plaintiff's store. When she inquired why her own position was being posted, the district manager told Plaintiff that she had previously been lied to and she was not in fact the Store Manager. Plaintiff asked if she could continue to work as the Store Manager since she had been successfully doing so for a year and a half. The district manager told her that she could apply for the position, but likely would not be selected. Plaintiff submitted an application for the position and subsequently went on medical leave. When she returned from medical leave, Plaintiff found the position for Retail Store Manager had been filled by Jennifer Vale, Plaintiff's office was taken away and Plaintiff was required to change into her company uniform in the men's locker room. Plaintiff was also informed that she was now to work in the back of the warehouse cleaning batteries, which was a task she had not been required to do previously.

During Plaintiff's employment, she suffered from Endometriosis, which required her to take sick days during her menstrual cycle due to the pain caused by it. Though the male employees were allowed to come in late and miss work when they were hungover, Defendants required Plaintiff to get a doctor's note stating that she suffered from a chronic issue.

"During this time", the warehouse manager referred to Plaintiff as a "good little floater" and Defendant McCallister repeatedly patted Plaintiff on the back and stated "good girl" in a condescending manner. She did not witness them saying these things to the male employees.

During the week of December 11, 2023, Plaintiff was required to work overtime hours and was unable to take meal or rest breaks. However, her overtime was not approved and she was required to resubmit her hours with no overtime. Furthermore, Defendant McCallister told her that even when she had to work through her meal breaks, she should clock out to show that the took the meal break and then just add 30 minutes to the end of her timecard. Plaintiff alleges that she was constructively discharged on December 18, 2023 due to the intolerable work environment.

Analysis:

I. An Enforceable Arbitration Agreement Exists Between the Parties

"The party seeking to compel arbitration has the initial burden to plead and prove the existence of a valid arbitration agreement that applies to the dispute. Once that burden is satisfied, the party opposing arbitration must prove any defense to the agreement's enforcement, such as unconscionability." (*Dennison v. Rosland Cap. LLC* (2020) 47 Cal.App.5th 204, 209.)

Defendants have shown that an arbitration agreement exists between the parties. Plaintiff has not disputed that she entered into an arbitration agreement with Defendants, but rather argues that the agreement is unconscionable because it incorporates the AAA's Employment Arbitration rules by reference only and it was a contract of adhesion. As explained below, the arbitration agreement is not unconscionable. Therefore, it is valid and enforceable.

A. The Arbitration Agreement is Not Unconscionable

Unconscionability is a judicially created doctrine and involves a highly context-dependent analysis. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.) Unconscionability has two elements: procedural and substantive. Well-established California law requires that both elements be present for an unconscionability defense to succeed. The two elements, however, need not be present to the same degree and are evaluated on a sliding scale. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Procedural unconscionability concerns how the contract was negotiated and the surrounding circumstances at the time of signing. The analysis first examines whether the contract is adhesive. An adhesive contract is standardized, generally on a preprinted form, and offered on a take-it-or-leave-it basis by the party with superior bargaining power. (*OTO, L.L.C v. Kho* (2019), 8 Cal.5th 111, 126.)

The analysis then examines two relevant factors: oppression and surprise. Oppression means unequal bargaining power between the parties and a lack of negotiation or meaningful choice by the weaker party. "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*OTO, L.L.C, supra,* at 126–127, quoting *Grand Prospect Partners, L.P. v. Ross Dress for Less Inc.* (2015) 232 Cal.App.4th 1332, 1348.)

Substantive unconscionability focuses on the terms of the agreement and occurs when challenged terms are so one-sided as to shock the conscience. A wide variety of attributes may affect the determination of substantive unconscionability, but the paramount consideration is mutuality—agreements to arbitrate must contain at least a modicum of bilaterality. When only the weaker party's claims are subject to arbitration, and there is no reasonable justification for the asymmetry based on business realities, the agreement lacks the requisite degree of mutuality. (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85–86.)

Regarding Plaintiff's argument that the agreement is unconscionable because it only references the AAA Rules, as explained in *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246, the failure to attach the rules would affect the court's unconscionability analysis only if the unconscionability challenge concerned some element of the rules of which the plaintiff had been unaware when she signed the agreement. Plaintiff makes no such claim. Rather, the AAA Rules are referenced in the Dispute Resolution Program document given to Plaintiff, including the website where they could be accessed. There is also the option to request a hard copy of the rules from the employer.

Regarding Plaintiff's claim that the agreement is unconscionable because it was one of adhesion, "adhesion contracts in the employment context typically contain some measure of procedural unconscionability." (*Roman v. Superior Ct.* (2009) 172 Cal.App.4th 1462, 1470.) However, absent additional factors making the circumstances of the negotiation unconscionable, the degree of unconscionability inherent with an adhesion contract is not high. Furthermore, "procedural unconscionability alone does not render an agreement unenforceable." (*Id.* at 1471.)

Here, the terms of the arbitration agreement were presented to Plaintiff in a separate and distinct document clearly labeled "Interstate's Dispute Resolution Program," which clearly outlined the terms of the

agreement. Plaintiff signed a "Dispute Resolution Program Acknowledgement," in which she agreed to the following statement,

> By checking the box below I hereby acknowledge that I have received, reviewed, and understand the terms and conditions contained in Interstate's Dispute Resolution Program. I further acknowledge that all understandings and agreement between Interstate and me relating to the subjects covered in Interstate's Dispute Resolution Program are contained in it, and that I knowingly and voluntarily agree to abide by Interstate's Dispute Resolution Program. I further acknowledge that I have been given the opportunity to discuss Interstate's Dispute Resolution Program with my private counsel and have utilized that opportunity to the extent desired.

(Hinkle Decl., Ex. C.) Plaintiff has provided no further evidence regarding the surrounding circumstances at the time of signing. Therefore, there is nothing to suggest that the circumstances were unconscionable.

While Plaintiff briefly states that the agreement is "substantively favoring Defendant," Plaintiff points to no precise terms that she posits are substantively favoring Defendants. Rather, the terms of the agreement are fair. The Court finds no substantive unconscionability.

Accordingly, while there is a low degree of procedural unconscionability due to the fact that the contract was adhesive, there is no substantive unconscionability, and, thus, the arbitration agreement is enforceable.

II. Plaintiff Has Not Alleged Conduct Constituting a Sexual Harassment Dispute

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") amended the Federal Arbitration Act allowing people alleging sexual assault or sexual harassment disputes to forgo arbitration upon their election. The EFAA states in pertinent part,

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute…no predispute arbitration agreement predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

(9 U.S.C. § 402(a).)

The EFAA defines a sexual harassment dispute as "[a] dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." (9 U.S.C. § 401(4).) "When a plaintiff brings several claims, some of which are sexual harassment claims and some of which are not, the EFAA precludes arbitration as to all claims if the 'core' of the case alleges 'conduct constituting a sexual harassment dispute.'" (*Arouh v. GAN Ltd.* (C.D. Cal. Mar. 22, 2024) 2024 WL 3469032, at *6.)

The Court must look at the facts of the complaint to determine whether a "sexual harassment dispute" been plead. "The EFAA does not apply in the absence of a plausible sexual harassment claim." (*Johannessen*

v. Juul Labs, Inc. (N.D. Cal., June 24, 2024) 2024 WL 3173286; see also *Yost v. Everyrealm Inc.* (2023) 657 F.Supp.3d 563, 585.) The Court notes that Plaintiff argues the Court should not rely on these cases since they discuss stating a "plausible" claim under Federal Rule of Civil Procedure 12(b)(6). However, the defense provided by Rule 12(b)(6), is "failure to state a claim upon which relief can be granted." This is the same basis upon which a demurrer may be raised under California law. Therefore, Plaintiff's argument is unpersuasive.

If the plaintiff states a sufficient sexual harassment dispute, then the Court determines which, if any, of the plaintiff's other causes of action are related to that claim and, thus, also protected by the EFAA. The arbitration agreement becomes unenforceable as to the plaintiff's entire care only where the core of her case alleges conduct constituting a sexual harassment dispute. (*Turner v. Tesla, Inc.* (N.D. California 2023) 686 F.Supp.3d 917, 925.)

A claim under the EFAA accrues when there is "a complete and present cause of action, the same standard used for determining the stature of limitations. (See *Rotkiske v. Klemm* (2019) 140 S.Ct. 355, 360; *Walters v. Starbucks Corp.* (S.D.N.Y. 2022) 623 F.Supp.3d 333, 338.) It applies only to claims that accrued on or after March 3, 2022, the day it was signed into law; it does not have a retroactive effect. (*Johnson v. Everyrealm, Inc.* (S.D.N.Y. 2023) 657 F.Supp.3d 535, 550.)

California's Fair Employment and Housing Act (FEHA) makes it an "unlawful employment practice" for an employee to harass an employee because of the employee's "sex, gender, gender identity, gender expression…[or] sexual orientation." (Gov. Code, § 12940(j)(1).) "The prohibition against sexual harassment includes protection from a broad range of conduct, [including] the creation of a work environment that is hostile or abusive on the basis of sex." (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 308, citing *Lyle v. Warner Bros. Television Prods.* (2006) 38 Cal.4th 264.) The case of *Lyle v. Warner Bros. Television Prods.* (2006) 38 Cal.4th 264 provides an in depth explanation of what constitutes sexual harassment in California.

> [T]o prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.

(*Lyle v. Warner Bros. Television Prods.*, *supra*, 38 Cal.4th at 278–79.)

> [A] workplace may give rise to liability when it "is permeated with 'discriminatory [sex-based] intimidation, ridicule, and insult,' [citation], that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]' "

(*Id*. at 279.)

> [A] hostile work environment sexual harassment claim requires a plaintiff employee to show she was subjected to sexual advances, conduct, or comments that were (1) unwelcome…(2) because of sex…and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment…In addition, she must establish the offending conduct was imputable to her employer.

(*Ibid*.)

> "[W]orkplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations."…Rather, " '[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' "…This means a plaintiff in a sexual harassment suit must show "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion]...because of...sex.' "

(*Id*. at 279–80.)

> In the context of sex discrimination, prohibited harassment includes "verbal, physical, and visual harassment, as well as unwanted sexual advances."…In this regard, verbal harassment may include epithets, derogatory comments, or slurs on the basis of sex; physical harassment may include assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on the basis of sex; and visual harassment may include derogatory posters, cartoons, or drawings on the basis of sex.

(*Id.* at 280.) "[W]hile the use of vulgar or sexually disparaging language may be relevant to show such discrimination, it is not necessarily sufficient, by itself, to establish actionable conduct." (*Id*. at 281.) "Moreover, 'comments that have the 'sexual charge of an Abbott and Costello movie' and that 'could [easily] be repeated on primetime television' are not the type that trigger Title VII liability.'" (*Id*. at 282.) The *Lyle* Court pointed to the case of *Jackson v. Racine County* (E.D. Wis. Sept. 19, 2005) 2005 WL 2291025, where the district court found a supervisor's comment calling the employee "a 'good girl' who earned her discipline" might be unkind but was not sexual. (*Id*. at *7, aff'd on other grounds sub nom. *Jackson v. Cnty. of Racine* (7th Cir. 2007) 474 F.3d 493.)

Defendants argue that Plaintiff has not stated a plausible claim for sexual harassment because she does not allege that she was subjected to unwelcome sexual advances or experienced epithets or derogatory comments or slurs on the basis of her gender that were severe or pervasive enough to give rise to the cause of action. The Court agrees.

Plaintiff claims that she was subjected to a hostile work environment because she was repeatedly called a "good little floater" and was called a "good girl" while Defendant McCallister patted her on the

back. Plaintiff has not explained in her complaint or her opposition what the word "floater" means in this context. Without more, the word itself is not sexual. Neither of the phrases complained of are sexual. The "good girl" comment identifies Plaintiff as a girl, but doing so is not sexual. Plaintiff's complaint itself alleges that this comment was made in a "condescending manner." Consequently, it was not made in a sexual manner. Even if Plaintiff had alleged that the "good girl" comment had a sexual charge, it would be insufficient to show a hostile or abuse work environment. (*Lyle, supra*, at 280.) Furthermore, Plaintiff does not allege that the comment made her feel uncomfortable, made her feel abused, or made her feel targeted as a female in a sexual manner. It is also not clear whether Defendant McCallister is alleged to have only ever patted her on the back for being a woman, or if anyone else in the workplace, including men, were ever seen being patted on the back. A pat on the back is not severe or pervasive conduct and is not a sexual touch. Plaintiff does not allege that the pat on the back was done in a sexual manner. The conduct complained of by Plaintiff is not "on the basis of sex" or "severe or pervasive" such that it would create an abusive work environment. (See *Lyle, supra*, at 280.)

The Court will also note that it is not clear from the allegations of the complaint that these comments, even if they could be construed as severe and pervasive, occurred after the effective date of the EFAA (March 3, 2022). The complaint alleges that these comments were made "during this time," presumably referring to Plaintiff's time being employed with Defendants. Plaintiff's employment began in 2018. It is possible, based on the allegations of the complaint, that the conduct occurred prior to the EFAA going into effect.

Furthermore, even when combined with Plaintiff's other complaints regarding not being considered for the manager position, being asked for a doctor's note for her sick leave related to her Endometriosis, being paid less than the male employees, losing her office and having to change in the men's locker room, and not being paid overtime or for missed meal periods, the conduct complained of does not rise to the level of severity or pervasiveness required to state a claim for sexual harassment.

Regarding not being considered for the manager position, based on Plaintiff's own allegations, she went out on medical leave during the time the position was being filled. Furthermore, the position was filled by a female. Therefore, the facts to not suggest that she was unable to interview for the position because she is female.

Regarding being asked for a doctor's note for her chronic condition, Plaintiff alleges that the males were allowed to take days off for being hungover, but does not allege that the males were not required to provide a doctor's note if they had a chronic condition that required them to take sick leave often.

Regarding being paid less than the male employees, there are no facts alleged regarding the male employee's experience, positions, tenure at the company, etc. Thus, it is not apparent based on the facts alleged that this was because of any sort of animus or disparate treatment toward females.

Regarding her office being given away while she was on medical leave and having to change in the men's locker room, there are insufficient facts alleged that would suggest that this happened as a way to target Plaintiff because she is female. There are no facts supporting an inference that the office was taken away because she is female, rather than taken because it was needed for the new manager. It is also unclear from the complaint whether Plaintiff was required to change into her uniform at work, rather than being able to do so before arriving to work, or whether there was anywhere else for her to change. The language of the complaint is vague as to whether she was "forced" into changing in the men's locker room by her employer or if she was "forced" simply because there was nowhere else to change. There is nothing to suggest that this was intended as a way to humiliate Plaintiff or to require her to undress in front of male employees.

Finally, regarding the overtime and meal periods, there is nothing to suggest that this was because Plaintiff is a female. In fact, the allegations suggest that Plaintiff may not have been the only employee required to do this.

Accordingly, Plaintiff has not alleged conduct constituting a sexual harassment dispute under the standards of the EFAA and California law. Plaintiff's claims do not fall under the protections of the EFAA. Since there is a valid and enforceable arbitration agreement between the parties, Plaintiff's claims must be arbitrated.

The Court's analysis above shall not be construed as an analysis of the sufficiency of Plaintiff's claim of discrimination. It is a narrow analysis of whether a sufficient claim of sexual harassment has been made.

Plaintiff's Motions to Compel Discovery

Plaintiff's motions to compel initial disclosures and discovery responses from Defendants are DENIED. The Court has concurrently ruled on Defendant's motion to compel arbitration and has ordered that this matter shall be arbitrated. Defendants objected to each of Plaintiff's discovery requests on the basis that Defendants are entitled to arbitration, thus the discovery requests were premature and had been propounded in the improper forum. These objections had merit. (See *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [participating in discovery is inconsistent with desire to arbitrate].) Furthermore, responses with only objections need not be verified. (*Blue Ridge Ins. Co. v. Superior Ct.* (1988) 202 Cal.App.3d 339, 345.) Therefore, the Court finds no misuse of the discovery process.

Defendants' request for sanctions against Plaintiff is DENIED. The Court is not compelled that the imposition of sanctions upon Plaintiff for filing these motions would be proper given that the motion to compel arbitration was not filed until after these discovery motions were filed.

7. 24CV03721, Zerah v. Guerneville School District

Defendants' demurrer to Plaintiff's complaint is DROPPED as MOOT. This motion was filed on August 1, 2024. Plaintiff timely filed an amended complaint on August 16, 2024. Defendants have subsequently filed a demurrer to the First Amended Complaint that is scheduled to be heard November 6, 2024. As such, the demurrer to the original complaint is moot.