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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KAREN CLOPTON,

Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN, LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN, and Does 1-15,

Defendants.

Case No.: CGC-17-563082

[HON. HAROLD E. KAHN, DEPT. 302]

Complaint Filed: December 13, 2017

NOTICE OF DEMURRER AND DEMURRER BY DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN, LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES AND CLIFFORD RECHTSCHAFFEN TO PLAINTIFF'S VERIFIED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Date: March 26, 2018
Time: 9:30 a.m.
Dept.: 302
Judge: Hon. Harold E. Kahn

Reservation No.: 02080326-09

(*Exempt from filing fees pursuant to Gov. Code, § 6103.)

TO PLAINTIFF KAREN CLOPTON AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 26, 2018 at 9:30 a.m. or as soon thereafter as the matter may be heard in Department 302 of the above-entitled court located at 400 McAllister Street, San Francisco, California 94102, before the Honorable Harold E. Kahn presiding,

Defendants CALIFORNIA PUBLIC UTILITIES COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN, LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES AND CLIFFORD RECHTSCHAFFEN ("Defendants"), will and do hereby demur to Plaintiff KAREN CLOPTON'S Verified Complaint for Damages and Injunctive Relief ("Complaint").

Defendants demur to the Complaint in its entirety and to each cause of action thereof pursuant to Code of Civil Procedure section 430.10, subdivisions (a), (e) and (f) on the grounds set forth in the attached Demurrer and Points and Authorities.

This Demurrer is based on this Notice of Demurrer, the attached Demurrer, the attached Memorandum of Points and Authorities, the Declaration of Steven P. Shaw, and all pleadings, papers, and records on file herein, such matters as the Court may take judicial notice, and any such further matters or evidence that may be presented at or before the hearing on this Demurrer.

PLEASE TAKE FURTHER NOTICE that the Court may issue a tentative ruling on the merits of this matter by 3:00 p.m., the court day before the hearing, pursuant to California Rule of Court 3.1308. The complete text of the tentative rulings for the department may be downloaded off the Court's website. If the party does not have online access, they may call (415) 551-4000 after 3:00 p.m., but no later than 4:00 p.m. on the day preceding the law and motion hearing. If you do not notify the court and the opposing parties by 4:00 p.m. on the court day before the hearing that you are requesting oral argument, no hearing will be held and the tentative ruling will become final.

Dated: February 13, 2018

LIEBERT CASSIDY WHITMORE

By: _____

Suzanne Solomon
Steven Shaw
Attorneys for Defendants CALIFORNIA PUBLIC UTILITIES COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN, LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES and CLIFFORD RECHTSCHAFFEN

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DEMURRER TO VERIFIED COMPLAINT FOR DAMAGES

Defendants California Public Utilities Commission ("CPUC"), Michael Picker, Carla J. Peterman, Liane M. Randolph, Martha Guzman Aceves, and Clifford Rechtschaffen (collectively, "Defendants") hereby demur to the Verified Complaint for Damages and Injunctive Relief ("Complaint") of Plaintiff Karen Clopton ("Plaintiff") under Code of Civil Procedure ("C.C.P.") § 430.10:

DEMURRER TO FIRST CAUSE OF ACTION

1. All Defendants demur to the first cause of action for retaliation in violation of the California Whistleblower Protection Act ("WPA") (Gov. Code § 8547, *et seq.*) on the grounds that it fails to state facts sufficient to constitute a cause of action because it fails to allege that Plaintiff engaged in "protected disclosures" under the statute.

2. The Individual Defendants demur to the first cause of action for retaliation in violation of the WPA on the grounds that the complaint fails to allege that any Individual Defendants engaged in any specific conduct in violation of the WPA.

3. The Individual Defendants demur to the first cause of action for retaliation in violation of the WPA on the grounds that the complaint fails to allege that any causal link exists between Plaintiff's alleged protected disclosures and any allegedly retaliatory conduct by the Individual Defendants.

DEMURRER TO SECOND CAUSE OF ACTION

4. Defendant CPUC demurs to the second cause of action for retaliation in violation of California Labor Code section 1102.5 on the grounds that it fails to state facts sufficient to constitute a cause of action because it fails to allege that Plaintiff engaged in "protected disclosures" under the statute.

DEMURRER TO THIRD CAUSE OF ACTION

5. Defendant CPUC demurs to the third cause of action for race discrimination in violation of Government Code section 12940, *et seq.*, because it fails to state facts sufficient to constitute a cause of action because it fails to allege that any adverse action occurred because of Plaintiff's race. (C.C.P. § 430.10 (e); *Guz v. Bechtel* (2000) 24 Cal.4th 317.)

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DEMURRER TO FOURTH CAUSE OF ACTION

6. Defendant CPUC demurs to the fourth cause of action for retaliation in violation of Government Code section 12940, *et seq.*, on the grounds that it fails to state facts sufficient to constitute a cause of action because it fails to allege that Plaintiff engaged in "protected activity" covered by FEHA. (C.C.P. § 430.10 (e).)

Dated: February 13, 2018

LIEBERT CASSIDY WHITMORE

By: _____

Suzanne Solomon
Steven Shaw
Attorneys for Defendants CALIFORNIA PUBLIC UTILITIES COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN, LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES and CLIFFORD RECHTSCHAFFEN

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Karen Clopton is a former Chief Administrative Law Judge for the California Public Utilities Commission ("CPUC"), who was discharged from employment in August 2017. She brings this action against the CPUC, and against the five individual Commissioners of the CPUC. She asserts two causes of action for whistleblower retaliation, a cause of action for FEHA race discrimination and a cause of action for FEHA retaliation. All of Plaintiff's claims fail as a matter of law because she did not engage in any whistleblowing activity, did not engage in any FEHA-protected activity, and has not alleged that any adverse action occurred because of her race.

With regard to the claims asserted under the California Whistleblower Protection Act ("WPA") and Labor Code section 1102.5, Plaintiff has failed to plead any activity that constitutes "protected disclosures" under those statutes. While she asserts that she cooperated with state and federal investigators reviewing CPUC's relationship with the Pacific Gas & Electric Company, she fails to allege the existence of any reports, conduct or other "disclosures" through which she "blew the whistle," as defined in those statutes. In support of these claims, she also alleges that she took various actions to improve racial diversity at CPUC, such as appointing more diverse ALJs and staff, raising issues of "implicit bias" during Director's meetings, and suggesting that the diversity training afforded to CPUC employees was outdated. As a matter of law, none of this conduct constitutes protected activity under the WPA or Labor Code section 1102.5. Additionally, Plaintiff has failed to allege any specific allegations against any of the five Individual Defendants, notwithstanding that she has named them as defendants in her WPA claim.

With regard to Plaintiff's third and fourth causes of action, for race discrimination and retaliation under FEHA, respectively, Plaintiff likewise has failed to assert actionable claims. She has not pled any facts indicating that the CPUC took any adverse action against her because of her race. As to her retaliation claim, Plaintiff has not pled facts showing that she engaged in any FEHA-protected activity.

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II. SUMMARY OF PLAINTIFF'S ALLEGATIONS[1]

Plaintiff was employed as the Chief Administrative Law Judge for Defendant CPUC, beginning in January 2009. She alleges that the CPUC, its President, Michael Picker, and Commissioners Carla J. Peterman, Liane M. Randolph, Martha Guzman Aceves and Clifford Rechtschaffen retaliated against her based on protected activity. (Complaint, ¶ 1.)

According to the Complaint, Plaintiff's responsibilities included managing a staff of 40 ALJs and 35 other personnel who hear administrative cases and prepare draft decisions for consideration by the CPUC. (¶ 11.) She was responsible for the selection, supervision, and evaluation of her staff, assignment of cases, oversight of proceedings, review of proposed decisions, presentation of decisions to the CPUC, creating an internship program and leadership opportunities for judges, and preparation of annual reports and records of accomplishments to the CPUC and the public. (*Id.*)

Plaintiff alleges that, in November 2014, the CPUC fined PGE $1.05 million "for its back-channel communications made in an effort to secure a favorable judge in a rate-setting case." (¶ 14.) Plaintiff asserts that, "[t]he fine was imposed after investigators concluded that CPUC Commissioner Mike Florio and the chief of staff for CPUC President Michael Peevey had encouraged and/or assisted PGE in its efforts to influence the selection of judges whom would be assigned to hear matters involving PGE." (*Id.*) According to Plaintiff, "[f]ederal and state prosecutors investigated these matters to determine whether any laws had been broken." (¶ 15.)

Plaintiff alleges that she took the following actions, which she contends are protected activity. The complaint does not specify whether Plaintiff contends these are protected activities under the WPA, or Labor Code section 1102.5, or FEHA:

- She "cooperated fully with state and federal prosecutors in their efforts to determine whether any laws were broken in connection with the communications between PGE and members of the Commission and their staff and instructed all of the judges on her staff to cooperate with these investigations." (¶ 17.)

[1] These factual allegations are taken directly from Plaintiff's Complaint and assumed true for purposes of this demurrer only. All "¶" references are to the Complaint.

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- She advised members of the Commission not to interfere in the assignment of judges to particular cases. (¶ 18.)
- She recommended that CPUC's Executive Director, Timothy Sullivan, not appoint an individual named Michael Colvin as an ALJ due to his alleged "close and unethical relationships" with certain PGE employees and she noted that Colvin had allegedly written emails that "disparaged African American administrative law judges in a racially offensive manner." (*Id.*)
- She "promoted actions designed to address racial bias at the CPUC" by (1) appointing a "more diverse staff of administrative law judges," (2) conducting training on implicit bias, (3) suggesting that directors take a test to assess their implicit biases, and (4) in weekly Director meetings, discussing "implicit bias and race discrimination concerns, including the potentially discriminatory implications of having employee photographs [appear] on emails….." (¶ 19.)
- She alerted the CPUC's Human Resources Director and its Executive Director "about archaic and debunked racist theories of white supremacy being taught by the agency's preferred training provider for the statutorily mandated management training for all State supervisors and managers." (¶ 20.)

In retaliation for the activities described above, Plaintiff alleges that she was subjected to adverse actions, including: (1) delayed payment for an attorney retained to represent her during federal and state investigations; (2) chastisement by then-Commissioner Catherine Sandoval for "describing the collusion between PGE and certain PUC commissioners … as a 'scandal'"; (3) criticism from Commissioners for "upholding the rules" when advising the Commission not to interfere with the assignment of judges; (4) the Commission's "alter[ing] the terms of Clopton's employment" by changing the process in which she was evaluated; (5) the Commission's hiring of an outside investigator to "look into Ms. Clopton's 'management style,' including allegations … of 'bullying, intimidating and retaliatory' behavior towards staff"; (6) Plaintiff's receipt of a poor performance evaluation; and (7) the Commission's attempt to "remove civil service protections for the position of Chief Administrative Law Judge" through changes to authorizing

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legislation. (¶ 21(a)-(g).) Plaintiff was ultimately terminated effective August 25, 2017. (¶ 23.)

III. LEGAL STANDARDS

A demurrer tests the legal sufficiency of factual allegations in a complaint. (C.C.P., § 430.10; *Title Ins. Co. v. Comerica-Bank California* (1994) 27 Cal.App.4th 800, 807.) A demurrer may be based on the grounds that the pleading does not state facts sufficient to constitute a cause of action, or that the complaint is uncertain. (C.C.P. § 430.10.) In reviewing a complaint against a demurrer, the court treats the demurrer as "admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Even an allegation of a factual conclusion must be supported by specific facts in order to be sufficient. (*Community Assisting Recovery, Inc. v. Aegis Security Insur. Co.* (2002) 92 Cal.App.4th 886, 894-895.)

To overcome a demurrer, the complaint must be shown to allege sufficient facts to establish every element of each cause of action. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 956.) If the complaint fails to plead any essential element of a cause of action, the court should sustain the demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879-880.) It is the plaintiff's burden to show in what manner the complaint may be amended and how that amendment will cure the defect. (*Blank*, 39 Cal.3d at 318.)

IV. ARGUMENT

A. The First Cause of Action for Retaliation under the WPA Fails to State a Claim

The California Whistleblower Protection Act (Government Code § 8547, *et seq.*) ("WPA") provides that, "state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution." (Gov. Code § 8547.1.) Accordingly, a state employee has a private right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a person from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code § 8547.8(c).)

Plaintiff's first cause of action is deficient for two reasons: (1) the lack of any protected disclosures under the WPA; and (2) the lack of any allegations against the Individual Defendants,

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including the lack of any nexus or causal link between Plaintiff's disclosures and any actions taken by the Individual Defendants.

1. Plaintiff Does Not Allege She Made Protected Disclosures Under the WPA

A "protected disclosure" under the WPA is a good faith communication disclosing information that may evidence: (a) an improper governmental activity, or (b) a condition that may significantly threaten the health or safety of employees or the public if the disclosure was made for the purpose of remedying that condition. (Gov. Code § 8547.2(e).) The statute defines an "improper governmental activity" as an activity performed by a state agency or state employee within the scope of his or her employment that: (i) violates any state or federal law or regulation; (ii) violates an Executive order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual; or (iii) is economically wasteful, involves gross misconduct, incompetency or inefficiency. (Gov. Code § 8547.2(c).)

Plaintiff's allegations do not establish that she made any "protected disclosure." First, she vaguely alleges that she "cooperated fully with state and federal prosecutors in their efforts to determine whether any laws were broken in connection with the communications between PGE and members of the Commission and their staff and instructed all of the judges on her staff to cooperate with these investigations." (¶ 17.) Notably, the Complaint is devoid of any allegations regarding the *content* of her disclosures, or whether she actually disclosed anything at all while "cooperat[ing] fully" with prosecutors. She therefore has not pled that she disclosed the existence of any "improper governmental activity," or of any condition that may significantly threaten the health or safety of employees or the public. Nor did Plaintiff make a "protected disclosure" when she allegedly "instructed all of the judges on her staff to cooperate with" the investigations. (¶ 17.)

The remainder of Plaintiff's allegations supporting the WPA likewise fail to meet the definition of protected disclosures. They consist of internal CPUC communications in which Plaintiff allegedly (1) recommended to CPUC's Executive Director that a particular individual (Michael Colvin) not be appointed as an ALJ, (2) promoted actions designed to address racial

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bias at the CPUC (specifically, appointing a "diverse staff of administrative law judges," conducting training on implicit bias, suggesting that directors take a test to assess their implicit biases, and discussing, in weekly Director meetings, issues regarding implicit bias and race discrimination including the potentially discriminatory implications of having employee photographs appear on emails), and (3) alerting the CPUC's Human Resources Director and its Executive Director "about archaic and debunked racist theories of white supremacy being taught by the agency's preferred training provider for the statutorily mandated management training for all State supervisors and managers." (¶¶ 19-20.) All of these other allegations similarly fail to constitute "protected disclosures" insofar as they do not reflect the reporting of "improper governmental activity" or threats to the health or safety of employees or the public that Plaintiff was attempting to remedy.

Accordingly, because Plaintiff has failed to plead the existence of any "protected disclosures" for purposes of the WPA, Defendants' demurrer should be sustained.

2. The WPA Claim is Defective As Pled Against the Individual Defendants

The WPA claim fails against the CPUC President and the other four Commissioners, for two reasons. First, they are not alleged to have engaged in any retaliatory conduct toward Plaintiff, except for the termination, which was imposed by the CPUC itself, not the Commissioners. Second, Plaintiff has failed to plead any facts showing a nexus between her alleged protected disclosures and any retaliatory conduct by any of the Commissioners.

a. Plaintiff Does Not Allege the Commissioners Took Any Retaliatory Action

Plaintiff has named each of the four CPUC Commissioners and President Picker as individual defendants, and alleges that they "retaliated against and ultimately terminated" her from her position. (¶ 1.) To the extent that Plaintiff seeks to base her WPA claim on her termination, the Individual Commissioners are not properly named, because the employer, not individual employees, is liable for a termination. (*Janken v. GM Hughes Electronics* (1996) 46 Cal. App. 4th 55, 62; *Miklosy v. Regents of the Univ. of California* (2008) 44 Cal.4th 876, 900; *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, 344-47.)

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Aside from the termination, the Complaint does not allege that any of the Individual Commissioners took *any action* to retaliate against Plaintiff for a protected disclosure. The Individual Commissioners are not even mentioned in paragraph 20, which describes the alleged adverse actions. All the allegations are against "the Commission," except for one allegation relating to a former Commissioner (Sandoval) who is not a named defendant. (*Id.*, ¶ 21.) Even if any of the allegations were sufficient to qualify as protected disclosures under the WPA, there is no indication that any of the Individual Commissioner took any retaliatory actions against Plaintiff because of such disclosures.

b. Plaintiff Does Not Allege a Causal Link Between A Protected Disclosure and Any Retaliatory Action Allegedly Taken By Any Commissioner

Plaintiff must plead that a causal link exists between a protected disclosure and an adverse employment action. (*Wabakken v. California Dept. of Corrections and Rehabilitation* (C.D. Cal. 2016) (Slip Op.) 2016 WL 8943297, *3.) Even if her alleged protected disclosures meet the legal standard—and they do not—she has failed to sufficiently plead the existence of a causal link between those disclosures and any retaliatory conduct by the individual Commissioners. Not only has she failed to allege that they engaged in any retaliatory conduct, but she has failed to allege that the Commissioners even had knowledge of her disclosures. (*Turner v. City and County of San Francisco* (N.D. Cal. 2012) 892 F.Supp.2d 1188, 1199 [applying same elements to whistleblower retaliation under Labor Code § 1102.5]; *Morgan v. Regents of Univ. of Calif.* (2000) 88 Cal.App.4th 52, 69-70.)

Plaintiff's lack of allegations against the Individual Commissioners is even more problematic in light of Government Code section 951, which requires that claims pled against public officials in their individual capacity must be stated with particularity. (Gov. Code § 951.) This heightened pleading standard is consistent with the general requirement that governmental tort liability must be pled with particularity. (*Richardson-Tunnell v. School Ins. Program for Employees* (2007) 157 Cal.App.4th 1056, 1061; *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 584-85.)

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B. Plaintiff's Second Cause of Action for Retaliation Under Labor Code Section 1102.5 Fails to State a Claim

Plaintiff's second cause of action under Labor Code section 1102.5 is asserted against Defendant CPUC. To establish a claim of retaliation under Labor Code section 1102.5, Plaintiff must allege that: (1) she engaged in a protected activity, (2) the CPUC subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Patten v. Grant Joint Unified School Dist.* (2005) 134 Cal.App.4th 1378, 1384; *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1199.) Under Labor Code section 1102.5, a protected disclosure must involve an alleged "violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." (*Edgerly*, 211 Cal.App.4th at p. 1199.) Accordingly, the disclosure cannot merely relate to general improper conduct.

1. Plaintiff Failed to Make A Protected Disclosure Under the Labor Code

Under Labor Code section 1102.5, the scope of a "protected disclosure" is even more restrictive than under the WPA as it requires the reporting of a suspected violation of law, and specifically excludes general reports of "improper conduct." Indeed, in a series of cases, the scope of such disclosures has been expressly limited to purported legal violations.

For example, in a 2005 case, a teacher claimed that he was terminated from employment because he brought to the attention of his supervisor: (a) "that a male physical education … teacher … was peering into the girl's locker room"; (b) an off-color remark that a male science teacher … had made to a female student"; and (c) a request that additional security staff be added after a student had been assaulted. (*Patten v. Grant Joint Unified School Dist.* (2005) 134 Cal.App.4th 1378, 1382-83.) The court held that these disclosures "do not rise to the level of blowing a whistle" because they were made in "the context of an internal personnel matter based on a student complaint, rather than in the context of a legal violation." (*Id.* at p. 1385.)

Subsequently, in *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 934, a court further examined the scope of section 1102.5 and concluded that a plaintiff/teacher's disclosure that a football coach violated the Education Code when he suggested that a student consume protein shakes was more properly considered a "routine internal personnel

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disclosure" and not protected conduct within the meaning of section 1102.5(b). Likewise, in *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822, a plaintiff who expressed disapproval at the transfer of two firefighters from their unit was determined not to have reported a violation of statute, rule or regulation under section 1102.5. The court reasoned that "[m]atters such as transferring employees, writing up employees, and counseling employees are personnel matters." (*Id.*) The opinion cited the court's language in *Patten* which cautioned that, "[t]o exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site." (*Id.*, citing *Patten*, 134 Cal.App.4th at p. 1385.)

In addition, when an employee discloses information about policies that he or she considers to be unwise, wasteful, that constitute gross misconduct, or the like, and the policy is one for which "debatable differences of opinion may exist," the disclosures are also not protected. (*Mize-Kurzman v. Marin Comm. College Dist.* (2012) 202 Cal.App.4th 832, 853.) And, a disclosure made by an employee to the employee's supervisor about the supervisor's own wrongdoing is not considered a "disclosure" and is not protected whistleblowing activity because the supervisor already knows about his or her wrongdoing. (*Id.*, at pp. 858-59.)

In this case, Plaintiff has failed to allege that she engaged in any protected disclosures under Labor Code section 1102.5. As discussed above, paragraphs 17-20 of the Complaint set forth the supposed protected activities in which Plaintiff engaged. Paragraph 17 mentions only that Plaintiff "cooperated fully with state and federal prosecutors in their efforts to determine whether any laws were broken" in communications between Defendant CPUC and PGE. It also asserts that she "instructed all of the judges on her staff to cooperate with these investigations." (Complaint, ¶ 17.) While protected disclosures may include reports made as part of the employee's job duties, the cause of action must still identify an employee's disclosure of a suspected violation of a state or federal statute, or a violation of, or noncompliance with, a local, state or federal rule or regulation. (Labor Code § 1102.5(b).) Paragraph 17 does not identify any such disclosures.

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Paragraph 18 alleges that Plaintiff "advised members of the Commission not to interfere in the assignment of judges to particular cases and urged them to maintain their integrity." (Complaint, ¶ 18.) She also alleges that she recommended that Colvin not be appointed as an ALJ due her perception of "close and unethical relationships with certain PGE employees." (*Id.*) Notably, these allegations still lack a report of any violation of a statute, rule or regulation, and instead are more properly categorized as "internal personnel matter[s]" outside the scope of the statute. (*Patten*, 134 Cal.App.4th at pp. 1384-86; *Carter*, 148 Cal.App.4th at p. 934.)

Paragraph 19 alleges that Plaintiff "promoted actions designed to address racial bias at the CPUC, including appointing a more diverse staff of administrative law judges and conducting training on implicit bias." (Complaint, ¶ 19.) She also contends that, "on a regular basis in weekly Director meetings," she "discussed implicit bias and race discrimination concerns, including the potentially discriminatory implications of having employee photographs on emails...." (*Id.*) Again, these allegations relate to internal policy, operational and/or personnel issues that do not constitute whistleblowing under the statute. Similarly, paragraph 20 relates to Plaintiff alerting the HR Director and the Executive Director "about archaic and debunked theories of white supremacy being taught by the agency's preferred training provider...." (¶ 20.) The same analysis applies insofar as Plaintiff does not allege that the training constituted a violation of, or noncompliance with, any state or federal statutes or regulations.

Because Plaintiff has failed to identify any protected disclosures under Labor Code section 1102.5, Defendant CPUC's demurrer must be sustained.

C. The Third Cause of Action for FEHA Race Discrimination Fails to State a Claim

Plaintiff's third cause of action is for race discrimination under FEHA. The cause of action itself contains no factual allegations and merely incorporates the entire Complaint by reference, concluding that, "[b]y virtue of the foregoing, CPUC discriminated against Ms. Clopton based on her race." (Complaint, ¶ 33.)

To allege FEHA discrimination, Plaintiff must allege that: (1) she is a member of a protected class; (2) she was performing competently in the position held; (3) she was subjected to an adverse employment action; and (4) some other circumstance suggests a discriminatory

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motive. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 355; see also *Hersant v. Dept. of Soc. Servs.* (1997) 57 Cal.App.4th 997, 1002.) Significantly, Government Code section 12940 (a) requires that the employer's adverse action be taken *because of* an employee's protected status in order to state a claim under FEHA. (Gov. Code §12940(a).)

Here, there is no dispute that Plaintiff is a member of a protected class or that she suffered an adverse action (i.e., termination), but she has failed to allege that her termination, or any other adverse action, occurred because of her race. Though she alleges that she engaged in various activities that relate in some manner to race – such as efforts to promote diversity or suggesting a modification of the training provided to CPUC employees – she does not allege that the CPUC took any adverse actions against her ***because of her race***. (See Complaint, ¶¶ 18-20.)

D. The Fourth Cause of Action for FEHA Retaliation Fails to State a Claim

The FEHA retaliation claim merely incorporates the entire Complaint by reference and then alleges that "[b]y virtue of the foregoing, CPUC retaliated against Ms. Clopton after she complained about discrimination at the CPUC." (Complaint, ¶ 35.) Section 12940(h) of the Government Code makes it unlawful "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code § 12940(h).)

To allege a claim for FEHA retaliation, Plaintiff must allege "(1) … she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Moore v. Regents of the Univ. of California* (2016) 248 Cal.App.4th 216, 244.) To engage in protected activity, the employee must have communicated to her employer a belief that she reasonably and in good faith understood the employer's practices to be ***unlawful***. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 473-74; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046.) "[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193,

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citing *Yanowitz*, at p. 1047; *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046.)

Plaintiff's retaliation claim does not demonstrate that she engaged in any FEHA-protected activity. Though her Complaint alleges that she raised issues concerning diversity, bias and preventing discrimination, she does not allege that she ever *actually complained* that any race-based *FEHA-prohibited activity was occurring* at CPUC. Her alleged recommendation that Michael Colvin not be hired as an ALJ, in part, because he had written emails that "disparaged African American administrative law judges in a racially offensive manner" was not protected activity. (Complaint, ¶ 18.) Nor was hiring a more diverse staff of administrative law judges, conducting training on implicit bias, recommending that managers examine their own implicit bias, or alerting the Human Resources Director that training needed to be improved. None of those actions constitute reports of FEHA-prohibited conduct.

Courts have routinely held that merely expressing concerns or questions about diversity is not protected activity unless a complaint is made that FEHA-prohibited activity is occurring. For example, in a recent case against Toyota, the plaintiff alleged that he was fired for making criticisms of Toyota's commitment to diversity, which he alleged was FEHA-protected activity. Specifically, he had reported an executive's refusal to include AIDS Walk LA on a list of events eligible for sponsorship by Toyota, and he had commented to Toyota's Diversity Advisory Board that, while Toyota's LGBT employees had made some progress, they still "had a long way to go." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1176, 1193.) The court found that neither of these incidents constituted protected activity. First, it noted that the denial of Husman's request for sponsorship of the AIDS walk did not violate any FEHA prohibition, emphasizing that the plaintiff cannot make out a prima facie case of retaliation unless the "employee conveys a reasonable concern that "the employer has acted or is acting in an ***unlawful*** discriminatory manner." (*Id.* at p. 1194, citing *Moore v. Regents*, *supra*, 248 Cal.App.4th at p. 245 [emphasis added].) Second, Husman's comments to the Diversity Advisory Board fell short of "communicating a particularized complaint about discriminatory treatment of LGBT employees and, instead, was likely understood as an exhortation common among diversity

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advocates that, while progress has been made, much work remains to be done." (*Id.* at p. 1194.)

Similarly, in *Hood v. Pfizer, Inc.* (3rd Cir. 2009) 322 Fed.Appx. 124, 126, 131 (cited in *Husman*), an employee's question at company-wide meeting as to "why Pfizer wasn't doing more to promote diversity" was found to express "a generalized concern" regarding diversity that was "worlds apart from the kind of particularized statement targeting discrete past events" necessary to demonstrate retaliation. (*Husman*, 12 Cal.App.5th at p. 1194, citing *Hood*, at pp. 126, 131.)

The same analysis applies here. While Plaintiff may have promoted diversity and/or better training at the CPUC, there are no allegations that she reported FEHA-prohibited conduct. While Plaintiff is not required to demonstrate that her employer's actions were, in fact, illegal, her conduct is subject to protection under FEHA only where she reasonably and in good faith believes that the practice was unlawful. (Wiseman and Reese, California Practice Guide: *Civil Procedure Before Trial Claims & Defenses* (The Rutter Group 2017), ¶ 13:726, citing *Miller*, *supra*, 36 Cal.4th at pp. 473-74; *Yanowitz*, 36 Cal.4th at p. 1046.) Here, there is no indication that Plaintiff reported any conduct she reasonably believed to be unlawful regarding race discrimination.

Because Plaintiff's allegations do not demonstrate that she engaged in protected conduct protected by FEHA, Defendant CPUC's demurrer should be sustained.

V. CONCLUSION

For the foregoing reasons, Defendant CPUC's demurrer to the entire Complaint should be sustained, and the Individual Commissioners' demurrer to the first cause of action for whistleblower retaliation under the WPA should be sustained.

Dated: February 13, 2018

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