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County of San Francisco*
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SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

KAREN CLOPTON,

Plaintiff,

vs.

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

**OPPOSITION TO DEMURRER TO
PLAINTIFF'S VERIFIED FIRST
AMENDED COMPLAINT**

Date: May 29, 2018

Time: 9:30 a.m.

Dept.: 302

Judge: Honorable Harold E. Kahn

Action Filed: December 12, 2017

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I. INTRODUCTION

The California Public Utilities Commission (CPUC), its president, Michael Picker, and its members, Carla J. Peterman, Liane M. Randolph, Martha Guzman Aceves, and Clifford Rechtschaffen, terminated Karen Clopton, the CPUC's Chief Administrative Law Judge, on August 25, 2017. The CPUC terminated Ms. Clopton in retaliation for her whistleblowing about Commissioners' and the CPUC's illegal activities, and for her complaints about racial discrimination at the CPUC.

Ms. Clopton cooperated with state and federal investigations into the misconduct of the CPUC Commissioners and staff involved in collusion between the CPUC and the Pacific Gas & Electric Company (PGE). She also opposed the appointment as a CPUC administrative law judge of a Commission staff member who had unethical ex parte communications with PGE, whose relationship with PGE posed potential conflict of interest issues, and who wrote racist emails regarding African American judges in the Administrative Law Judge (ALJ) Division.

Ms. Clopton advocated for the judicial independence of the CPUC's Administrative Law Judges. The Commissioners, who are political appointees, advocated that Ms. Clopton directly report to them instead of to the Executive Director. Ms. Clopton brought this proposed change in structure to the attention of State Legislators. She feared the proposal would cause the politicization of the ALJ Division.

Ms. Clopton, a widely respected Chief Administrative Law Judge who received many awards and good evaluations, reported racial discrimination at the CPUC. She confronted the CPUC Commissioners and staff over their racially discriminatory statements and conduct directed towards her and other African American CPUC staff. Not only did she complain about racial discrimination, she repeatedly and directly addressed racial issues with the Commissioners and staff as well as discussing their implicit bias.

Her whistleblowing and her confrontation of racial discrimination at the CPUC led to her termination. The Commissioners individually retaliated against her for her whistleblowing. They also terminated her because of her race.

1 **II. SUMMARY OF CHIEF JUDGE CLOPTON'S PROTECTED ACTIVITIES**
2 **AS DISCRIBED IN HER FIRST AMENDED COMPLAINT**

3 Ms. Clopton advised members of the Commission not to interfere in the judge
4 assignments and urged them to maintain their integrity. (First Amended Complaint “FAC” ¶ 9.)

5 In March 2014, Ms. Clopton reported to the Commissioners and the Human Resources
6 Department that a CPUC attorney was telecommuting for her CPUC job at the same time that
7 she was working full-time at her husband’s law office. (FAC ¶ 17.)

8 Ms. Clopton cooperated with federal and state prosecutors’ investigations to determine
9 whether any laws had been broken regarding the CPUC and PGE. The City of San Bruno
10 demanded that the CPUC turn over some 65,000 emails between PGE and company officials,
11 leading to the public release of about 7000 emails. The CPUC fined PGE \$1.05 million for its
12 back-channel communications made in an effort to secure a favorable judge in a rate-setting
13 case. The fine was imposed after investigators concluded that CPUC Commissioner Mike Florio
14 and the chief of staff for CPUC President Michael Peevey had encouraged and/or assisted PGE
15 in its efforts to influence the selection of judges who would be assigned to hear matters involving
16 PGE. (FAC ¶ 20.)

17 Ms. Clopton explained to the investigators how judge assignments were made. She also
18 described the illegal activities of Commissioners Florio and Peevey who were helping PGE try to
19 secure a favorable judge in the case. (FAC ¶ 20.)

20 In January 2015, Ms. Clopton informed President Picker that staff member Michael
21 Colvin should not be appointed to an administrative law judge (ALJ) position until there was an
22 analysis of the 5,000 emails Colvin sent to PGE. (FAC ¶ 21.)

23 In March 2015, Ms. Clopton requested that HR withdraw Michael Colvin’s appointment
24 as an ALJ because of his unethical and illegal behavior and ex parte communication with PGE.
25 She informed Commissioner Carla Peterman about her concerns regarding Colvin. (FAC ¶¶ 25-
26 26.)

27 In April 2017, Ms. Clopton met with Senator Jerry Hill and on June 16, 2017, with
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1 Senator Scott Wiener, regarding the PGE judge shopping incident, the fact that the
2 Commissioners wanted to eliminate the independence of the Chief ALJ, the fact that the
3 Commissioners' travel was paid by a non-profit that received funds from the utilities the
4 Commissioners were overseeing and other issues at the CPUC. (FAC, ¶ 31(j).)

5 CPUC President Picker asked Ms. Clopton before entering into a meeting "Are you ready
6 to meet with three white men with white hair?" (FAC ¶ 23.)

7 From April 2014 through March 2015, Ms. Clopton received racist hate mail. The CPUC
8 never found out who wrote the letters. (FAC ¶ 27.)

9 The Commissioners were well aware that Ms. Clopton promoted actions designed to
10 address racial bias at the CPU. On a regular basis in weekly Directors' meetings, Ms. Clopton
11 discussed implicit bias and race discrimination concerns, including opposing the potentially
12 discriminatory implication of having employee photographs on emails and suggesting that
13 directors privately self-administer Harvard University's Implicit Association Test. (FAC ¶ 28.)

14 Ms. Clopton alerted the Human Resources Director and the Executive Director about
15 archaic and debunked racist theories of white supremacy being taught by the agency's preferred
16 training provider for the statutorily mandated management training for all State supervisors and
17 managers. In addition, she again complained to the CPUC that they hired the same trainer who
18 made these archaic and debunked racist remarks. (FAC ¶¶ 29-30.)

20 III. LEGAL ARGUMENT

21 In ruling on a demurrer, the courts do not test the truth of the plaintiff's allegations or
22 their accuracy. A demurrer tests only the legal sufficiency of the pleading. *Committee on*
23 *Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 213-214 (1983).

24 The courts treat the demurrer as admitting all material facts properly pled, but also "give
25 the complaint a reasonable interpretation, reading it as a whole and its parts in their context ..."
26 *Quelimane Co. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 38 (1998).

27 Also, if a complaint does not state a cause of action, but there is a reasonable possibility
28 that the defect can be cured by amendment, leave to amend must be granted. *Quelimane Co.*

1 *Stewart Title Guaranty Co. Id.*

2 **A. Plaintiff States A Claim for Retaliation Under The California Whistleblower**
3 **Protection Act, Government Code § 8547, Against The Individual**
4 **Defendants.**

5 Defendants are not challenging plaintiff's first claim for relief under Government Code §
6 8547 against defendant the California Public Utilities Commission as an institution.

7 Defendants argue that plaintiff's first cause of action is deficient in relation to the
8 individuals because Ms. Clopton failed to allege that three individual CPUC Commissioners,
9 Aceves, Peterman or Rechtschaffen engaged in any retaliatory conduct and she failed to show
10 any causal nexus between the retaliatory conduct and defendants Picker and Randolph.

11 Under the California Whistleblower Protection Act (CWPA) both of these arguments fail.
12 The plaintiff alleges protected disclosures under CWPA and provides facts in her claim that
13 individual defendants retaliated against her.

14 **1. Plaintiff Alleges Individual Defendants took Retaliatory Action Against**
15 **her.**

16 Ms. Clopton specified the protected disclosure and retaliatory acts by the Commissioners
17 in her complaint. Right before entering the meeting where Ms. Clopton objected to Colvin's
18 appointment, President Picker said to her "Are you ready to meet with three white men with
19 white hair?" (FAC ¶ 23.)

20 Commissioners criticized Ms. Clopton for "upholding the rules" when she advised the
21 Commission to refrain from interfering in the assignment of judges. (FAC ¶ 31(c).)

22 Beginning in September 2014, Ms. Clopton cooperated fully with state and federal
23 prosecutors in their efforts to determine whether any laws were broken in connection with the
24 communications between PGE and members of the Commission and their staff and instructed all
25 of the judges on her staff to cooperate with these investigations. (FAC ¶ 20.)

26 Commissioner Catherine J. K. Sandoval chastised Ms. Clopton for describing the
27 collusion between PGE and certain CPUC Commissioners and staff to influence the assignment
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1 of judges who would hear PGE matters as a "scandal." (FAC ¶ 31(b).)

2 The Commission unjustifiably delayed payment to the counsel retained to represent Ms.
3 Clopton during the federal and state investigations into the Commission's relationship with PGE.
4 (FAC ¶ 31(a).)

5 After Ms. Clopton's participation in the investigation of the CPUC, in June 2016, the
6 Commission began an investigation and hired an outside investigator to look into Ms. Clopton's
7 "management style," including allegations that she engaged in "bullying, intimidating, and
8 retaliatory" behavior towards staff. (FAC ¶ 31(e).)

9 Ms. Clopton alerted the Human Resources Director and the Executive Director about
10 archaic and debunked racist theories of white supremacy being taught by the agency's preferred
11 training provider for the statutorily mandated management training for all State supervisors and
12 managers and then CPUC appointed the same trainer for a retreat that the Commissioners
13 mandated she attend. (FAC ¶ 29.)

14 On February 9, 2017, the Commission gave Ms. Clopton a poor evaluation, rating her as
15 "Improvement Needed" in key areas of her performance, including "Communications Skills" and
16 "Relations with Others." The deficient ratings in these areas reflect resentment directed at Ms.
17 Clopton's efforts to encourage the Commission and staff to maintain high ethical standards in the
18 context of the investigation into the relationship between the CPUC and PGE and her persistent
19 efforts to identify and critique actions and statements reflecting racial bias by Commission
20 members and their staff. (FAC ¶ 31(g).) The poor evaluation also stands in sharp contrast to the
21 Commission's action in naming Ms. Clopton to the position of the CPUC Acting General
22 Counsel for the year beginning March 3, 2014, and the universal acclaim of her performance in
23 that position by the Commission. (FAC ¶ 31(g).)

24 The Commission has attempted to remove civil service protections for the position of
25 Chief Administrative Law Judge through seeking changes in the legislation authorizing it. That
26 action would not only place the Chief Administrative Law Judge in a vulnerable position with
27 respect to efforts by Commissioners to influence his or her decisions, but it would also facilitate
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1 the termination of a Chief Administrative Law Judge for rejecting improper efforts to influence
2 her in the performance of her official duties. (FAC ¶ 31(i).)

3 In the spring of 2017, Ms. Clopton met with several state legislators, including Senator
4 Jerry Hill and Scott Wiener, and informed them of the CPUC judge shopping and that
5 Commissioners travel was being paid by non-profit that received funds from the utilities. (FAC ¶
6 31(j).)

7 In July 2017, the Commissioners terminated Ms. Clopton. (FAC ¶ 32.)

8 The plaintiff's pleadings clearly identify protected activities within the meaning of Gov.
9 Code § 8547.8 and they specify retaliatory actions by the Commissioners.

10 Defendants state that employers not individuals are liable for termination of employees.
11 They also claim that Ms. Clopton did not specify retaliatory actions by the Commissioners
12 against her.

13 The defendants cite *Janken v. GM Hughes Electronics*, (1996) 46 Cal.App.4th 55 alleging
14 that individual defendants are not liable for her termination. *Janken* can be distinguished from
15 this case based on the fact that it is a Fair Employment and Housing Act (FEHA) case, under
16 Gov. Code § 12900, *et seq.*, and not a case under Gov. Code § 8547.8. Under *Janken* the court
17 rejected "the contention that individual supervisory employees are at risk for personal liability
18 for age discrimination on the theory that the "agent" language in the statute defines them as an
19 "employer" for purposes of liability."

20 The two other cases defendants cite can also be distinguished from this case. *Sheppard v.*
21 *Freeman*, 67 Cal.App.4th 339 (1998) is a case against co-workers for providing false information
22 to the employer, that is not the case here and *Miklosy v. Regents of the University of California*
23 (2008) 44 Cal.4th 876 is a workers' compensation case.

24 Gov. Code § 8547.8 (b) states "Any **person** who intentionally engages in acts of reprisal,
25 retaliation, threats, coercion, or similar acts against a state employee or applicant for state
26 employment for having made protected disclosures, is subject to a fine not to exceed ten
27 thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one
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1 year. Gov. Code § 8547.8 (b).

2 “Person” means an individual, corporation, trust, association, a state or local
3 government, or any agency or instrumentality of any of the forgoing.” Gov. Code § 8547.2 (d).

4 “In addition to all other penalties provided by law, any person who intentionally engages
5 in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or
6 applicant for state employment for having made a protected disclosure shall be liable in an action
7 for damages brought against him or her by the injured party.” Gov. Code § 8547.8 (c).

8 The court in *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237 found that supervisory
9 employees can be held liable under the Fair Employment and Housing Act (FEHA) for acts of
10 retaliation, the court stated that the Ninth Circuit “concluded that an individual supervisor may
11 be held personally liable for retaliation under FEHA. *Id.* at 1242. *Jones v. Lodge at Torrey Pines*
12 *Partnership* (2007) 54 Cal.Rept.3rd 379, 401.

13 It is clear that the Legislature intended to permit an employee to be liable for retaliation
14 against a state whistleblower.

15 The Commissioners acted as individuals when they voted to become Ms. Clopton’s
16 supervisors and individually signed her evaluations over her objections. The Commissioners also
17 each voted individually to terminate Ms. Clopton after she had engaged in whistleblowing. The
18 plaintiff has alleged, with particularity, sufficient material facts to establish clearly the individual
19 liability of the Commissioners.
20

21 **2. Plaintiff Alleges A Causal Link Between Her Protected Disclosure and The**
22 **Retaliatory Actions Taken By The Defendants.**

23 Ms. Clopton advised members of the Commission not to interfere in the assignment of
24 judges to particular cases and urged them to maintain the integrity of the judges. (FAC ¶ 16.)

25 The Commissioners criticized Ms. Clopton for “upholding the rules” when she advised
26 the Commission to refrain from interfering in the assignment of judges. (FAC ¶ 31(c).)

27 Additionally, Ms. Clopton recommended that Commissioners and Executive Director
28 Timothy Sullivan not appoint Michael Colvin as an administrative law judge. Her
recommendation was based on Mr. Colvin's close and unethical relationships with certain PGE

1 employees. Specifically, Mr. Colvin had conducted back channel communications with PGE
2 staff regarding issues pending before the Commission, including writing emails that disparaged
3 African American administrative law judges in a racially offensive manner. (FAC ¶ 22.)

4 The Commission and the individual members of the commission gave Ms. Clopton a
5 poor evaluation, rating her as “Improvement Needed” in subjective areas of her performance,
6 including “Communication Skills” and Relations with Others.” The deficient ratings in these
7 areas reflect resentment directed at Ms. Clopton’s efforts to encourage the Commission and staff
8 to maintain high ethical standards in the context of the investigation into the relationship between
CPUC and PGE. (FAC ¶ 31(g).)

9 The Commission altered the terms of Ms. Clopton's employment by changing the process
10 by which her employment performance was evaluated. Previously, her evaluations had been
11 conducted by the Commission's President and Executive Director. Under the new, ad hoc
12 practice, all Commissioners evaluated Ms. Clopton's performance, and the Executive Director's
13 role in the evaluation was eliminated. (FAC 31(d).)

14 Ms. Clopton clearly cited in her complaint significant evidence that she informed the
15 Commissioners of her protected acts.

16 The Commissioners acted as individuals when they voted to change her employment
17 procedure, give a poor evaluation, and terminate her in retaliation for her whistleblowing. There
18 is a causal link between Ms. Clopton’s protected disclosure and the adverse employment actions
19 against her.

20 **B. Plaintiffs States A Claim For Race Discrimination.**

21 Defendants claim that Ms. Clopton's claim for discrimination fails because she has not
22 adequately pled that Commissioners took any adverse action against her because of her race.

23 In Ms. Clopton’s, case the CPUC Commissioners discriminated against her and they had
24 knowledge of her complaints.

25 For example, the President of the Commission asked Ms. Clopton before entering into a
26 meeting “Are you ready to meet with three white men with white hair?” (FAC ¶ 18.)

27 Ms. Clopton complained to the HR director and the Executive director that a trainer made
28 archaic and debunked racist remarks. The CPUC’s response was to hire the same trainer to lead a

1 retreat she was required to attend. (FAC ¶ 30.)

2 The Commissioners were well aware that Ms. Clopton promoted actions designed to
3 address racial bias at the CPUC. On a regular basis in weekly Directors' meetings, Ms. Clopton
4 discussed implicit bias and race discrimination concerns, including identifying the potentially
5 discriminatory implication of having employees' photographs on emails and suggesting that
6 directors privately self-administer Harvard University's Implicit Association Tests. (FAC ¶ 28.)

7 The Commissioners terminated her, which is clearly an adverse action. The plaintiff
8 asserts that their action to terminate her was based on racial discrimination and whistleblowing.
9 For the defendants to prevail in this case, they must assert a legitimate business reason for their
10 action. That is a factual matter for a jury to decide and cannot be decided through a demurrer
11 filing.

12 IV. CONCLUSION

13 The defendants all were Ms. Clopton's supervisors and acted individually in all incidents
14 mentioned, including her evaluation and the decision to terminate her.

15 Ms. Clopton alleges sufficient material facts to establish individual liability of each
16 Commissioner for retaliation for her whistleblowing and significant facts regarding that fact she
17 was discriminated against based on race.

18 For the foregoing reasons, defendants' demurer should be overruled in its entirety. If
19 there is a reasonable possibility that a defect in the complaint can be cured by amendment or that
20 the pleading liberally construed can state a cause of action, a demurrer should not be sustained
21 with out leave to amend. *Minsky v. City of Los Angeles* 11 Cal.3d 113, 118 (1974).

22 Dated: May 15, 2018

23
24 SIEGEL, YEE & BRUNNER

25 By: /s/ Jane Brunner
26 Jane Brunner

27 Attorneys for Plaintiff
28 KAREN CLOPTON

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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 475 14th Street, Suite 500, Oakland, California 94612.


On May 15, 2018, I served the following document(s):

1. Opposition to Demurrer to Plaintiff's Verified First Amended Complaint

on the parties to this action, pursuant to Local Rule 2.11(P), by transmitting the documents listed above to be electronically served through File & Serve Xpress to the parties on the Service List maintained by File & Serve Express for this case, and sent to:

Suzanne Solomon
Liebert Cassidy Whitmore
135 Main Street, 7th Floor
San Francisco, CA 94105
ssolomon@lcwlegal.com

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 15, 2018, at Oakland, California.


Elizabeth A. Johnson