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COMMISSION, MICHAEL PICKER, CARLA J. PETERMAN,  
LIANE M. RANDOLPH, MARTHA GUZMAN ACEVES and  
CLIFFORD RECHTSCHAFFEN

ELECTRONICALLY  
**FILED**

Superior Court of California,  
County of San Francisco

**04/13/2018**

Clerk of the Court  
BY: SANDRA SCHIRO

Deputy Clerk

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

FAC Filed: March 8, 2018

**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 FIRST AMENDED  
COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF**

Date: May 29, 2018

Time: 9:30 a.m.

Dept.: 302

Judge: Hon. Harold E. Kahn

Reservation No.: 04040529-09

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

**TO PLAINTIFF KAREN CLOPTON AND HER ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on May 29, 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,

CA020\022\8501187.v1

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 First Amended Complaint for Damages and Injunctive Relief ("FAC").

Defendants demur to the first and third causes of action in the FAC pursuant to Code of Civil Procedure section 430.10, subdivision (e) on the grounds set forth in the attached Demurrer and Points and Authorities.

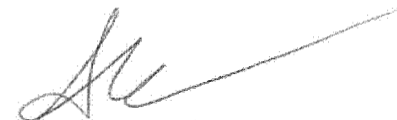
This Demurrer is based on this Notice of Demurrer, the attached Demurrer, the attached Memorandum of Points and Authorities, the Declaration of Suzanne Solomon, and all pleadings, papers, and records on file herein, such matters as the Court may take judicial notice, and any such further matters or evidence 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.

LIEBERT CASSIDY WHITMORE

Dated: April 13, 2018

By:



Suzanne Solomon  
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 FAC under Code of Civil Procedure ("C.C.P.") § 430.10 (e):

**DEMURRER TO FIRST CAUSE OF ACTION**

1. Individual Defendants, Commissioner Martha Guzman Aceves, Commissioner Carla Peterman and Commissioner Clifford Rechtschaffen demur to the first cause of action for retaliation in violation of the California Whistleblower Protection Act (Government Code section 8547 et. seq.)(“WPA”) on the grounds that the FAC fails to allege that those Individual Defendants engaged in any specific conduct in violation of the WPA.

3. All of 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.

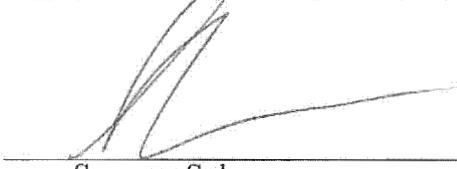
**DEMURRER TO THIRD CAUSE OF ACTION**

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.

Dated: April 13, 2018

LIEBERT CASSIDY WHITMORE

By:



Suzanne Solomon  
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 who was discharged from employment in August 2017. She brings this action against the CPUC, and against the five individual Commissioners of the CPUC. This demurrer to the First Amended Complaint (“FAC”) attacks her first cause of action for whistleblower retaliation, and her third cause of action for FEHA race discrimination.

Plaintiff’s claim for retaliation in violation of the California Whistleblower Protection Act (“WPA”) fails as alleged against the five Commissioners because Plaintiff does not allege that any of them were aware of her alleged protected activity and then engaged in any retaliatory conduct. The FAC does not allege that Individual Defendants Martha Guzman, Carla Peterman or Clifford Rechtschaffen took *any* retaliatory action against Plaintiff; in fact, the FAC does not mention those defendants at all, other than to identify them as parties in the Preliminary Statement. Though the FAC alleges that Individual Defendants Michael Picker and Liane Randolph took retaliatory action, the FAC fails to allege that they were aware of any alleged conduct by Plaintiff that meets the definition of protected activity under the WPA.

Plaintiff’s third cause of action, for race discrimination, fails because she has not pled any facts indicating that the CPUC took any adverse action against her because of her race.

Defendants demurred to the original Complaint on these same grounds, and instead of opposing the demurrer, Plaintiff filed the FAC. (Declaration of Suzanne Solomon, ¶ 2.) The FAC fails to cure the defects and therefore, the demurrer should be sustained without leave to amend.

**II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

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. (FAC, ¶ 1.)

According to the FAC, Plaintiff’s responsibilities included managing a staff of 40 ALJs

1 and 35 other personnel who hear administrative cases and prepare draft decisions for  
2 consideration by the CPUC. (FAC, ¶ 12.) She was responsible for the selection, supervision, and  
3 evaluation of her staff, assignment of cases, oversight of proceedings, review of proposed  
4 decisions, presentation of decisions to the CPUC, creating an internship program and leadership  
5 opportunities for judges, and preparation of annual reports and records of accomplishments to the  
6 CPUC and the public. (*Id.*)

7 Plaintiff alleges that, in November 2014, the CPUC fined PGE \$1.05 million “for its back-  
8 channel communications made in an effort to secure a favorable judge in a rate-setting case.”  
9 (FAC, ¶ 18.) Plaintiff asserts that, “[t]he fine was imposed after investigators concluded that  
10 CPUC Commissioner Mike Florio and the chief of staff for CPUC President Michael Peevey had  
11 encouraged and/or assisted PGE in its efforts to influence the selection of judges whom would be  
12 assigned to hear matters involving PGE.” (*Id.*) According to Plaintiff, “[f]ederal and state  
13 prosecutors investigated these matters to determine whether any laws had been broken.” (FAC, ¶  
14 19.)

15 Plaintiff alleges that she took the following actions, which she contends are protected  
16 activity. Where an individual defendant is mentioned, that person’s name is bolded:

- 17 • She “advised members of the Commission not to interfere in the assignment of judges  
18 to particular cases and urged them to maintain their integrity.” (FAC, ¶ 16.)
- 19 • She “cooperated fully with state and federal prosecutors in their efforts to determine  
20 whether any laws were broken in connection with the communications between PGE  
21 and members of the Commission and their staff and instructed all of the judges on her  
22 staff to cooperate with these investigations.” (FAC, ¶ 20.)
- 23 • She “reported to the Commissioners and the Human Resources Department that a  
24 CPUC attorney was telecommuting for her CPUC job at the same time she was  
25 working full-time at her husband’s law office.” (FAC, ¶ 17.)
- 26 • She “advised” Defendant **Michael Picker** that an individual named Michael Colvin  
27 should not be appointed to an ALJ position “until there was an analysis of the 5,000  
28 emails Colvin sent to PGE.” (FAC, ¶ 21.)

- She “recommended” that CPUC’s Executive Director, Timothy Sullivan, not appoint Mr. Colvin as an ALJ. (FAC, ¶ 22.)
- She “informed” the CPUC’s Human Resources Department that Amy Yip Kikugawa had been illegally appointed as Assistant Chief Administrative Law Judge. (FAC, ¶ 24.)
- She requested the CPUC’s Human Resources Department to withdraw Mr. Colvin’s appointment as an ALJ, in March 2015. (FAC, ¶ 25.)
- She “informed” Individual Defendant **Carla Peterman** “about her [Plaintiff’s] concerns regarding Colvin.” (FAC, ¶ 26.)
- She “promoted actions designed to address racial bias at the CPUC” by appointing a “more diverse staff of administrative law judges,” conducting training on implicit bias, and discussing (in weekly Director meetings) “implicit bias and race discrimination concerns, including the potentially discriminatory implications of having employee photographs [appear] on emails.....” (FAC ¶ 28.)
- 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.” (¶ 29.)

In retaliation for the activities described above, Plaintiff alleges that she was subjected to the following adverse actions. Where an individual defendant is mentioned, that person’s name is bolded:

- The CPUC unjustifiably delayed payment for an attorney retained to represent Plaintiff during federal and state investigations (FAC ¶ 31(a));
- Then-Commissioner Catherine Sandoval [who is not a named defendant] “chastised” Plaintiff for “describing the collusion between PGE and certain CPUC commissioners ... as a ‘scandal’” (FAC ¶ 31(b));
- “Commissioners” criticized her for “upholding the rules” when advising the Commission not to interfere with the assignment of judges (FAC ¶ 31(c));



- The CPUC changed the process by which Plaintiff's performance was evaluated (FAC ¶ 31(d));
- The CPUC hired an investigator to investigate whether Plaintiff had engaged in bullying, intimidating and retaliatory behavior towards staff (FAC ¶ 31(e));
- Defendant **Michael Picker** and Defendant **Liane Randolph** "instructed" Plaintiff that she should not take vacations and told her she was required to attend "all Commissioner meetings (FAC ¶ 31(f));
- The CPUC issued Plaintiff a negative performance evaluation in February 2017 (FAC ¶ 31(g));
- Defendant **Michael Picker** denied Plaintiff's request to attend a work-related conference (FAC ¶ 31(h));
- The CPUC "attempted to remove civil service protections" for Plaintiff's position "through seeking changes in the legislation authorizing" Plaintiff's position (FAC ¶ 31(i)); and
- The CPUC terminated Plaintiff from her position effective August 25, 2017 (FAC ¶ 32).

### III. LEGAL STANDARDS

A demurrer tests the legal sufficiency of factual allegations in a FAC. (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 Against the Individual Defendants

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.) 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 as alleged against the individual defendants on two grounds: (1) She has failed to allege that Defendants Aceves, Peterman or Rechtschaffen engaged in any retaliatory conduct at all; and (2) She has failed to show any causal nexus between the retaliatory conduct she claims that Defendants Picker and Randolph engaged in and any allegedly protected activity.

##### 1. The Complaint Fails to Allege that Individual Defendants Aceves, Peterman or Rechtschaffen 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.)

1 The FAC does not allege that Defendants Martha Guzman Aceves, Carla Peterman or  
2 Clifford Rechtschaffen took *any* action to retaliate against Plaintiff for a protected disclosure.  
3 They are not mentioned at all in paragraph 31. The FAC contains no allegations of specific  
4 actions taken by these three commissioners at all. Accordingly, the WPA claim fails as alleged  
5 against Defendants Aceves, Peterman and Rechtschaffen.

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

8 Plaintiff must plead that a causal link exists between a protected disclosure and an adverse  
9 employment action. (*See Wabakken v. California Dept. of Corrections and Rehabilitation* (C.D.  
10 Cal. 2016) (Slip Op.) 2016 WL 8943297, \*3.) She has failed to do because she has failed to  
11 allege that the Commissioners even had knowledge of her alleged protected activity.

12 First, regarding Defendants Aceves and Rechtschaffen, Plaintiff does not allege that they  
13 engaged in any retaliatory action at all, and therefore she has failed to allege that any such action  
14 was caused by any allegedly protected activity.

15 Though Plaintiff alleges that Defendant Liane Randolph told Plaintiff not to take vacation  
16 time and to attend all Commission meetings (FAC, ¶ 31(f)), the FAC does not allege that  
17 Commissioner Randolph was aware of any of Plaintiff's alleged protected activity. Paragraph 20  
18 of the FAC, which contains a lengthy and detailed list of Plaintiff's allegedly protected activity,  
19 does not mention Commissioner Randolph at all.

20 Regarding Defendant Michael Picker, the President of the Commission, Plaintiff alleges  
21 that she "advised" him that Michael Colvin should not be appointed to an ALJ position "until  
22 there was an analysis of the 5,000 emails Colvin sent to PGE." (FAC, ¶ 21.) That was not  
23 protected activity. A "protected disclosure" under the WPA is a good faith communication  
24 disclosing information that may evidence: (a) an improper governmental activity, or (b) a  
25 condition that may significantly threaten the health or safety of employees or the public if the  
26 disclosure was made for the purpose of remedying that condition. (Gov. Code § 8547.2(e).) The  
27 statute defines an "improper governmental activity" as an activity performed by a state agency or  
28 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).) Merely advising that an action should not be taken until information is analyzed does not meet the definition of whistleblowing. Though Plaintiff alleges, in the next sentence of paragraph 21 of the FAC that she “believed” that Mr. Colvin was engaging in unlawful activities, she does not allege that she communicated that belief to President Picker. FAC at 8:15-18. An unexpressed belief is not a report of “improper governmental activity” or of a threat to the health or safety of employees or the public that Plaintiff was attempting to remedy.

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.)

**B. 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. It merely incorporates the entire FAC by reference, concluding that, “[b]y virtue of the foregoing, CPUC discriminated against Ms. Clopton based on her race by treating her differently than other similarly situated CPUC employees who are not African Americans.” (FAC, ¶ 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 motive. (*Guz v. Bechtel Nat’l, Inc.* (2000) 24 Cal.4th 317, 355.) 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. The complaint fails to identify which adverse action allegedly happened because of her race, and which similarly situated non-African-American employees were treated differently than she was. This failure to allege that the termination was based on her race appears to be intentional, because every paragraph that mentions the termination states that it was retaliatory (FAC, ¶¶ 3,32); there are no allegations in the FAC that allege that the termination was discriminatory.

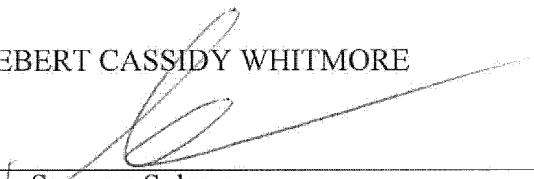
#### V. CONCLUSION

For the foregoing reasons, Defendants' demurrer to the first and third causes of action in the FAC should be sustained without leave to amend. Plaintiff has already amended her complaint once, after Defendants' demurrer to the original complaint, and therefore further leave to amend is not appropriate.

Dated: April 13, 2018

LIEBERT CASSIDY WHITMORE

By:

  
Suzanne Solomon  
Attorneys for Defendants CALIFORNIA  
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MICHAEL PICKER, CARLA J. PETERMAN,  
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