

Hubert Acevedo v. California Dept. of Highway Patrol
Superior Court, Sacramento County, California

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Settlement Agreement and Release of All Claims ("Agreement") is made and entered into between HUBERT ACEVEDO ("ACEVEDO"), and the CALIFORNIA DEPARTMENT OF THE HIGHWAY PATROL ("CHP"), collectively referred to as the "Parties."

RECITALS

A. On January 5, 2006, ACEVEDO filed a civil complaint in Los Angeles County Superior Court which was moved to Sacramento Superior Court entitled *Hubert A. Acevedo v. California Highway Patrol, Dwight Helmick, Manuel Padilla, Michael Nivens, Gary Townsend, Paula Guzman, Bob Giannoni, and Does 1 through 50*, Case Number 06AS03307. The allegations, facts and details of this action are more fully set forth in the pleadings, briefs, records and discovery therein, which are incorporated herein by reference. The defendants, other than CHP, have been dismissed from this matter.

B. ACEVEDO also filed administrative appeals before the California State Personnel Board (SPB) entitled *In the Matter of the Appeals by Hubert Acevedo*, SPB Case Numbers 05-0663E and 05-0682E. The allegations, facts and details of this action are more fully set forth in the pleadings, briefs, records and discovery therein, which are incorporated herein by reference. The SPB issued a Decision in the case on January 8, 2008. The CHP Respondents have challenged portions of the Decision issued in those matters in a writ proceeding in Sacramento Superior Court, Case No. 34-2008-00002614-CU-WM-GDS.

C. On February 26, 2008, ACEVEDO filed another civil action in Sacramento County Superior Court entitled *Hubert A. Acevedo v. California Highway Patrol, Dwight Helmick, Manuel Padilla, Michael Nivens, Gary Townsend, Paula Guzman, Bob Giannoni, and Does 1-50*, Case Number 34-2008-00004415-CU-OE-GDS. This lawsuit was never served on any of the defendants named therein. The allegations, facts and details of this action are more fully set forth in the pleadings, briefs, records and discovery therein, which are incorporated herein by reference.

D. ACEVEDO has filed numerous administrative complaints with the California Department of Fair Employment and Housing, The Equal Employment Opportunity Commission, the California Victims Compensation and Government Claims Board, and the California State Personnel Board, against the California Highway Patrol, its employees and its representatives. The allegations, facts and details of these administrative actions are more fully set forth in the complaints, briefs, records and discovery therein, which are incorporated herein by reference.

E. The civil actions, and any administrative complaint or action listed above in paragraphs (A)- (D) above shall be collectively referenced in this agreement as the "Actions." All of the defendants, respondents and potential defendants and respondents identified above paragraphs (A)- (D) above shall be referenced in this agreement as the "Defendants."

F. The Parties have concluded that it would be desirable and in the best interests of the Parties and the public to settle the Actions in the manner and on the terms set forth herein. By this Agreement, the Parties intend to fully and completely resolve any and all remaining disputes between them.

TERMS OF AGREEMENT

Accordingly, in consideration of the mutual promises contained herein, the Parties agree as follows:

1. ACEVEDO agrees to dismiss with prejudice the CHP using the Request for Dismissal with Prejudice forms attached as Exhibit 1. ACEVEDO further agrees that he shall provide to counsel signed dismissals with prejudice for all the Actions as to the CHP before issuance of the settlement proceeds. Counsel for the Defendants agrees not to file the dismissals with the Court until after payment of the settlement proceeds for the amount described in Paragraphs 2 and 15 below. ACEVEDO further agrees that he will neither refile nor pursue the Actions against the Defendants.

2. In exchange for ACEVEDO's agreement to dismiss the Actions with prejudice, the CHP agrees to do the following:

(A) The CHP will pay to ACEVEDO and his attorneys of record, The Law Offices of Gregory Smith, the total lump sum of Nine Hundred Ninety Five Thousand Dollars (\$995,000.00), in a check made payable to ACEVEDO, his attorney of record, The Law Offices of Gregory Smith, and The Law Offices of Patricia Grace, a lien claimant. ACEVEDO represents that Three Hundred Fifty Thousand Dollars (\$350,000.00) of the Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) is reimbursement for legal fees and costs ACEVEDO incurred in a sexual harassment lawsuit filed against him in United States District Court, Central District of California Case No. EDCV04-1160. ACEVEDO represents that the remaining Six Hundred Forty Five Thousand Dollars (\$645,000.00) of the Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) is reimbursement for physical pain and suffering. The Parties agree that the Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) settlement amount constitutes payment in

full for all amounts that may be due and owing from the Defendants to ACEVEDO, and that may be claimed to be due and owing from the Defendants to ACEVEDO, of any nature whatsoever, including, but not limited to, any and all amounts constituting or arising from any lost wages, lost benefits, back pay, future pay, lost retirement, interest, pain and suffering, emotional distress damages, awards, verdicts, judgments, orders, liens, costs, expenses or attorneys' fees.

(B) With regard to the Writ proceeding in Sacramento Superior Court, Case No. 34-2008-00002614-CU-WM-GDS, Defendants will dismiss the action except for the portion of the writ proceeding in which Michael Nivens challenges the State Personnel Board's decision to impose a thirty (30) day suspension against him.

3. ACEVEDO agrees not to oppose Michael Niven's challenge of the SPB's decision to impose a thirty (30) day suspension against him in Sacramento Superior Court, Case No. 34-2008-00002614-CU-WM-GDS.

4. ACEVEDO agrees that he will not seek reinstatement, re-employment or to be employed by the CHP, and that he will not apply for or otherwise seek employment with CHP. ACEVEDO agrees not to exercise any mandatory or permissive reinstatement rights to CHP. This Agreement will act as an immediate letter of resignation and waiver of employment rights if ACEVEDO is ever placed in employment at CHP.

5. The Parties agree not to disclose, discuss or provide the contents or terms of this Agreement to any third party, except as expressly authorized or required by this Agreement, or in response to formal requests authorized by law. The parties agree that the following statement may be provided to third parties:

"The California Highway Patrol and former Chief Hubert "Art" Acevedo, now the Chief of Police for the City of Austin, Texas, have reached a settlement agreement that both parties believe is in their mutual best interests. As part of the

settlement, the parties have agreed not to discuss the details of the settlement. The settlement does not represent any admission of fault on either side. It does allow both parties to move forward and put the potential of a protracted litigation and escalating costs behind them. The CHP has a keen interest in moving forward to further the important business of public safety which the men and women of the CHP do daily on behalf of the citizens of California."

The exceptions to this third party clause are ACEVEDO's attorneys, his wife, his tax preparer, his accountant, and only to the extent disclosure is required by law to governmental regulatory, investigatory and judicial authorities, and the CHP's obligations under the California Public Records Act.

6. The Parties each agree to bear their own costs and attorneys' fees incurred in the Actions. The parties agree that they will not seek reimbursement of attorneys' fees or funds/costs paid to, on behalf of, or regarding ACEVEDO in any matter up to the date of this Agreement. ACEVEDO takes full responsibility for his former attorneys the Law Office of Patricia Grace's fees in all of the above Actions, and agrees to defend and indemnify the Defendants in any claims she might make against the Defendants.

7. The Parties hereby release and forever discharge one another, including their officers, directors, board members, trustees, agents, employees, representatives, attorneys, insurers, departments, divisions, subdivisions, sections, offices, successors and assigns, and each of them, from any and all claims, complaints, demands, causes of action, obligations, damages, costs, expenses, liens, attorneys' fees, warranties, rights and liabilities of any nature whatsoever, whether known or unknown, suspected or not suspected to exist, claimed or not claimed, which have arisen in connection with the Actions, the facts and circumstances alleged in all of the Actions, or which have arisen in connection with any other matter of any nature whatsoever from the beginning of time. This release applies to all of the events and/or incidents alleged to have

occurred in the Actions or otherwise arising out of the allegations contained in the Actions, to any cause of action or claim in any forum based on such allegations, and to any claim or cause of action arising out of ACEVEDO's employment with the CHP.

8. ACEVEDO also expressly waives all "unknown claims" against Defendants arising from the facts and circumstances of the Actions, and expressly waives his rights under Civil Code section 1542. Section 1542 reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

ACEVEDO hereby completely and unequivocally waives the provisions of Civil Code section 1542.

9. This Agreement is a compromise settlement of disputed claims, and by executing this Agreement no party admits any wrongdoing, liability or fault in relation to the matters alleged in the Actions or identified in the Recitals herein, and no party admits that ACEVEDO is entitled to any recovery in any of the Actions.

10. In entering into this Agreement, ACEVEDO represents that he has relied upon the advice of his attorney, who is the attorney of his own choice, concerning the legal consequences of this Agreement; that the terms of this Agreement have been completely read and explained to ACEVEDO by his attorney; and that the terms of this Agreement are fully.

11. ACEVEDO acknowledges that Title VII of the Civil Rights Act of 1964, and the California Fair Employment and Housing Act may provide him the right to bring action against the Defendants if he believes he has been discriminated against on the basis of race, age,

ancestry, color, religion, sex, marital status, national origin, physical or mental disability, or medical condition. ACEVEDO understands the rights afforded to him under these Acts and agrees he will not file any action against the Defendants, or any entity or person connected with or employed by the Defendants, based upon any alleged violation of these Acts. ACEVEDO waives any rights to assert a claim for relief available under these Acts against Defendants including, but not limited to, present or future wages, mental or emotional distress, attorney's fees, or injunctive relief.

12. This Agreement sets forth the entire understanding of the Parties in connection with the subject matter herein. None of the Parties have made any statement, representation or warranty in connection herewith which has been an inducement for the other to enter into this Agreement, except as is expressly set forth in this Agreement. It is expressly understood and agreed that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the Parties hereto. The Parties agree that they will make no claim at any time or place that this Agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character.

13. The Parties each represent and warrant that they fully understand that if the facts with respect to which this Agreement is executed should be found hereafter to be different from the facts now believed to be true by any party, each of them expressly accepts and assumes the risk of such possible differences in facts and agrees that this Agreement shall be and remain effective notwithstanding any such differences in facts.

14. ACEVEDO represents and warrants that he has not initiated any legal or administrative proceeding against the Defendants with the exception of the Actions. ACEVEDO

further represents and warrants that he has not assigned, transferred, or purported to assign or transfer to any person or entity any matter, right or claim otherwise released herein. In addition, ACEVEDO represents and warrants that he is not aware of any liens, except as expressly stated herein, asserted in connection with, or in any way affecting, the Actions, and that the Defendants shall not be responsible for any such liens to the extent they may exist. ACEVEDO acknowledges that his former attorney has filed a lien for her work in the Actions, and he has agreed to take full responsibility for her lien. ACEVEDO also agrees to indemnify and hold the Defendants, and the respective heirs, successors and assigns of each, harmless against any claims, demands, causes of action, damages, debts, liabilities, costs or expenses, including, but not necessarily limited to attorneys' fees, arising out of or in connection with any such transfer, assignment, lien, or purported transfer, assignment or lien.

15. The CHP agrees that upon receipt of the original of this Agreement executed by ACEVEDO and when the procedures set forth above in Paragraph 1 are completed and when a fully executed IRS form W-9 is received by the CHP from both ACEVEDO and his counsel, the CHP will tender to ACEVEDO a check in the lump sum amount of Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) in full and complete settlement of all disputed amounts, including but not limited to damages claimed by ACEVEDO in the Actions and any and all associated penalties which could have been or could be assessed on any disputed claim by ACEVEDO to any agency, board, arbitrator, commission or court. ACEVEDO represents that Three Hundred Fifty Thousand Dollars (\$350,000.00) of the Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) is reimbursement for legal fees and costs ACEVEDO incurred in a sexual harassment lawsuit filed against him in United States District Court, Central District of California Case No. EDCV04-1160. ACEVEDO represents that the remaining Six Hundred Forty

Five Thousand Dollars (\$645,000.00) of the Nine Hundred Ninety Five Thousand Dollars (\$995,000.00) is reimbursement for physical pain and suffering. Unless a court order so directs, no deductions or withholdings will be made from the monies paid to ACEVEDO. It is further agreed by the parties that ACEVEDO is liable for any and all tax obligations on the monies paid to him, which may be payable to the appropriate federal, state and/or local taxing authorities. ACEVEDO further agrees to indemnify and hold the CHP harmless from any claims, demands, deficiencies, levies, assessments, executions, judgments, penalties or recoveries by any governmental entity against the CHP arising out of the manner of payment of monies to ACEVEDO by the CHP pursuant to the terms of this Agreement. ACEVEDO further agrees to indemnify the CHP from any and all costs, expenses, or damages (including attorneys' fees) sustained by the CHP by reason of any such claims, demands, penalties, deficiencies, levies, assessments, executions, judgments or recoveries by any governmental entity against the CHP arising out of payment of monies to ACEVEDO by the CHP pursuant to this Agreement. Informational Returns will be filed on this payment in accordance with state and federal tax laws.

16. The Parties hereby instruct their attorneys of record to execute all documents necessary to carry out the terms of this Agreement.

17. This Agreement shall be governed by the laws of the State of California.

18. In the event any portion of this Agreement is deemed to be unenforceable, or is in conflict with applicable law, the remainder of this Agreement shall be enforced and shall remain in full force and effect.

19. This Agreement may be executed in two or more counterparts, each of which will be an original and all of which shall constitute a part of this Agreement.

20. This Agreement may be enforced by any party hereto by filing a motion under Code of Civil Procedure section 664.6 or by any other procedure permitted by law. The Parties agree that Sacramento County, California shall be the venue for any further proceedings to enforce or interpret this Agreement.

21. By their signatures below, the Parties herein acknowledge that they have read the terms of this Agreement, have consulted their respective counsel concerning its contents, understand its contents in its entirety, and enter into this Agreement freely and voluntarily.

22. This Agreement, and the covenants and conditions herein, shall be subject to, and conditioned upon, satisfaction of the requirements set forth in Section 948 of the California Government Code and any other approvals required by rule or law or otherwise required to effectuate the terms and conditions of this Agreement, including, but not limited to, approval by the California Department of Finance. Accordingly, the CHP agrees to make its best efforts to pay ACEVEDO as soon as possible after he complies with the conditions set forth herein. However, the CHP cannot guarantee that the settlement funds will be paid on or by a date certain.

23 If any party to this Agreement files a lawsuit to enforce or interpret this Agreement, the prevailing party in any such suit shall be entitled to costs of suit and reasonable attorneys fees

DATED: May 16, 2008

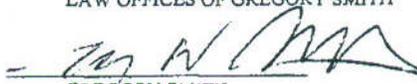

HUBERT A. ACEVEDO
Plaintiff

DATED: May 28, 2008

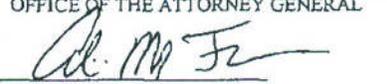

CALIFORNIA HIGHWAY PATROL
Defendant
By: JOSEPH FARROW
Commissioner, California Highway Patrol

Approved as to form:

DATED: May 19, 2008

LAW OFFICES OF GREGORY SMITH

GREGORY SMITH
Attorney for Plaintiff
HUBERT A. ACEVEDO

DATED: May 28, 2008

CALIFORNIA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

ALICIA M.B. FOWLER
Deputy Attorney General
Attorney for Defendant CHP

Superior Court Department 53, Judge Loren E. McMaster, Presiding.

Item 16 **06AS03307** **HUBERT A. ACEVEDO VS. CHP; DWIGHT D HELMICK;MANUEL PADILLA**

Nature of Proceeding: Demurrer

September 25, 2006

Filed By: Fowler, Alicia M.B.

Defendant California Highway Patrol's ("CHP") demurrer to Plaintiff Hubert

Acevedo's Complaint is overruled in part, and sustained with and without leave to amend in part, as set forth below.

CHP's Request for Judicial Notice is granted. Plaintiff vigorously opposed the request. The Court can take judicial notice of records of court files in any court of record in the United States, thus it is proper to take judicial notice of the complaint filed against the CHP and Plaintiff in federal court and a summary judgment order in that case. The Court can also take judicial notice of Exhibit B, the fax from the SPB setting a hearing date, and Exhibit C, Plaintiff's letter to the SPB. The Court is able to take judicial notice of records and files of state administrative agencies, specifically the state personnel board. (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750.) With respect to Exhibits B and C, the Court limits the scope of its judicial notice to the following: Plaintiff filed a complaint with the SPB, and the SPB sent a fax to Plaintiff.

Plaintiff's Complaint spans 85 pages, contains 400 paragraphs and alleges 14 causes of action against the CHP and various individual defendants employed by the CHP, and is not the model of clarity. The Complaint arises out of Plaintiff's efforts to apply for the CHP commissioner position. His name was eventually was dropped from consideration as a result of what he alleges to be unlawful action taken against him.

The 1st cause of action is for violation of public safety officers bill of rights (Gov't Code § 3300 et seq.). The 2nd cause of action is for injunctive relief under Gov't Code § 3300 et seq. The 3rd cause of action is for wrongful disclosure of personnel records in violation of Penal Code §§ 832.5 and 832.7, Gov't Code § 11183, Evidence Code § 1043 and Code of Civil Procedure § 1005. The 4th cause of action is for violation of rights regarding political activities of public employees. The 5th cause of action is for violation of Gov't Code § 19680. The 6th cause of action is for breach of contract. The 7th cause of action is for violation of the whistleblower protection act. The 8th cause of action is for invasion of privacy. The 9th cause of action is for defamation. The 10th cause of action is for inducement to commit a crime. The 11th cause of action is for infliction of emotional distress. The 12th cause of action is for violation of civil rights. The 13th cause of action is for negligence. The 14th cause of action is for breach of duty to defend and indemnify.

CHP's demurrer to the first and second causes for relief based on the Public Safety Officers Procedural Bill of Rights ("PBOR") on the grounds that these causes of action can not be asserted against the individual defendants but only against a public safety department is sustained without leave to amend as to the individual defendants. The Court finds that while the cause of action can be asserted against a public safety department such as CHP, it cannot be asserted against individual public safety officers. Plaintiff does not dispute this point and only argues that CHP does not have standing to assert this ground for demurrer on behalf of the individual defendants. The Court finds that CHP, as the entity required to provide the individual defendants with a defense, has an "immediate, concrete, substantial, and actual" interest and has standing to raise these grounds for demur.

CHP's demurrer to the second cause of action for injunctive relief under the PBOR on the ground that injunctive relief is not available is sustained with leave to amend. CHP argues that Plaintiff has failed to allege a current case or controversy that needs to be enjoined and instead that the acts complained of were completed in April 2004. Plaintiff appears to misapprehend CHP's argument and argues that injunctive relief is expressly authorized by the PBOR. CHP does not dispute that

injunctive relief available, but CHP's point, which is well-taken, is that Plaintiff has failed to allege facts demonstrating that future violations are likely to occur. While there are allegations that are later in time than April 2004, Plaintiff has failed to allege facts demonstrating that future or threatened violations of the POBR are likely to be repeated. Plaintiff made no attempt to direct the Court to any such allegations in its voluminous Complaint.

CHP's demurrer to the third cause of action for wrongful disclosure in violation of Penal Code §§ 832.7 and 832.5, Government Code § 11183, Evidence Code § 1043 and Code of Civil Procedure § 1005 on the grounds that there is no private right of action for monetary damages under these statutes is sustained without leave to amend. Plaintiff did not oppose this portion of CHP's demurrer. As a result, the Court can assume that Plaintiff concedes that CHP's point is well-taken. As the cases make clear, there is no private right of action for damages under these statutes. (*Fagan v. Superior Court of San Francisco County* (2003) 111 Cal.App.4th 607, 613; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426-427.)

CHP's demurrer to the fifth cause of action for violation of Government Code § 19680 on the grounds that there is no private right of action for money damages is overruled. Plaintiff alleged that the CHP violated his right to seek a promotion in violation of Gov't Code § 19680 and "other statutes." (Complaint, ¶ 259-260.) Section 19860 makes it unlawful for any person to obstruct another person's right to civil service examination, application or employment. CHP states that the statute does not explicitly provide a private cause of action and simply cites *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 295 as support. In opposition, Plaintiff claims that the CHP provided no law supporting its assertion that there was no private right of action. The Court is not convinced by CHP's summary argument that Plaintiff cannot state a cause of action under Gov't Code § 19680.

CHP's demurrer to the sixth cause of action for breach of contract on the grounds that Plaintiff fails to state facts sufficient to state a cause of action is sustained without leave to amend. CHP argues that there is no action for breach of contract against a public employer because public employment is statutory not contractual. Plaintiff argues that "a written or oral employment agreement or collective bargaining agreement" allows this cause of action. However, the law is clear that a breach of contract cause of action is not available against a public employer. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24; *Miller v. State of California* (1977) 18 Cal.3d 808, 813-814.) Plaintiff argues that its sixth cause of action is based on a breach of the duty of good faith and fair dealing. However, the *Shoemaker* case makes clear that for the same reasons a breach of contract cause of action is unavailable, a breach of the duty of good faith and fair dealing is unavailable.

CHP's demurrer to the seventh cause of action based on Government Code § 8547.8 on the grounds that it is premature because Plaintiff failed to exhaust his administrative and judicial remedies is overruled. Under the Whistleblower Protection Act, an employee retaliated against must file a written complaint with the State Personnel Board and cannot file a civil action until doing so and the SPB issued findings or failed to issue findings. Plaintiff alleged that he exhausted his administrative remedies, which for purposes of demurrer the Court must accept as true. CHP argues that this allegation is contradicted by the fact that Plaintiff is still involved in a proceeding with the SPB. While the Court has taken judicial notice of Plaintiff's complaint filed with the SPB and the fax from the SPB, the Court cannot accept as true

any findings contained therein to find that Plaintiff has not exhausted his administrative remedies.

CHP's demurrer to the eighth cause of action for invasion of privacy, the ninth cause of action for defamation, the eleventh cause of action for intentional infliction of emotional distress, the thirteenth cause of action for negligence on the grounds that it is immune from liability under the Government Code § 815 is overruled. Defendant argues that Plaintiff's failure to specifically identify the statutory bases for liability for these causes of action results in immunity under § 815. Plaintiff argues that CHP's argument overlooks Gov't Code § 818.2(a) which would hold CHP liable on a respondeat superior theory and that he alleged that the individual defendants engaged in the tortious activity while acting in the course and scope of their employment with CHP. CHP counters that Plaintiff has not pled facts sufficient to establish a respondeat superior theory and that in any event because the individual defendants would be immune, so too would CHP under Gov't Code §§ 820.2 and 821.6. First, while Plaintiff did not direct the Court to the relevant allegations in the 400 paragraph Complaint, the Court finds that Plaintiff has pled facts showing a respondeat superior theory. In the general allegations, Plaintiff pled that the defendants were employees and acted in the course and scope of that relationship. (Complaint, ¶ 12.) Further, the Court does not find that the individual defendants are immune under Gov't Code § 820.2 at this stage. Under that section, immunity is available where the employee consciously exercised discretion. This showing cannot be made at the pleading stage. It would be error to sustain a demurrer on that basis. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 794.)

CHP's demurrer to the eighth cause of action on the grounds that it is barred by the Workers' Compensation Exclusivity ("WCE") rule is overruled. The WCE does not bar claims for invasion of privacy not arising out of the normal employment relationship, such as an invasion of an employee's constitutional right of privacy. (*Operating Engineers Local 3 v. Johnson* (2003) 110 Cal.App.4th 180, 190.) Plaintiff has alleged that Defendant violated his constitutional right to privacy. (Complaint, ¶ 288.)

CHP's demurrer to the eighth cause of action on the grounds that it fails to state facts sufficient to constitute a cause of action is sustained with leave to amend. Plaintiff in its opposition simply asserts that its allegations are sufficient but fails to direct the Court to any allegations identifying who disclosed information and to whom it was disclosed. Plaintiff simply alleged that "the intentional leaking of confidential information" violated his right to privacy. (Complaint, ¶ 289.) Plaintiff's cause of action for invasion of privacy, as pled, fails to identify who disclosed information and to whom it was disclosed. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 794.)

CHP's demurrer to the ninth cause of action for defamation on the grounds that it is barred by the WCE is overruled. The WCE does not apply to defamation claims. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 814.)

CHP's demurrer to the ninth cause of action on the grounds that it fails to state facts sufficient to constitute a cause of action is sustained with leave to amend. Plaintiff's cause of action for defamation, as pled, fails to specifically identify each allegedly defamatory statement. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, fn. 3.) Plaintiff simply asserts that its allegations are sufficient but does not point to any allegations to demonstrate that it specifically identified the alleged defamatory

statements. Plaintiff simply alleged that the Defendants “caus[ed] all news stories generated as a result of the ‘anonymous’ letter and the pretext investigations to be disseminated.” (Complaint, ¶ 296.) Plaintiff’s allegations do not specifically identify the statements alleged to be defamatory.

CHP’s demurrer to the tenth cause of action for inducement to commit a crime in violation of Penal Code §§ 135, 135.5, and 832.5 on the grounds that the statutes do not provide a basis for recovery of civil damages is sustained without leave to amend. CHP cites to law standing for the proposition that there is no civil right to damages based upon the violation of a criminal statute. (*Babu v. Peterson* (1935) 4 Cal.2d 276, 288; *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 765.) Plaintiff fails to oppose this argument and the Court can assume that Plaintiff conceded the point to be well-taken.

CHP’s demurrer to the eleventh cause of action for intentional infliction of emotional distress on the grounds that it is barred by the WCE is overruled. The WCE does not bar claims not arising out of the normal employment relationship. Plaintiff has alleged facts showing that the emotional distress was based on, among other things, discrimination. (Complaint, ¶ 328.) These facts are sufficient to show his claim was based on conduct not arising out of the normal employment relationship.

CHP’s demurrer to the eleventh cause of action for intentional infliction of emotional distress on the grounds that it is superfluous and fails to state a claim is overruled. The authorities cited by CHP recognize that it may be proper to sustain a demurrer to a cause of action for intentional infliction of emotional distress when it is based on the identical facts as a defamation claim. (E.g., *Flynn v. Higham* (1983) 149 Cal.App.3d 677, 681.) That same authority recognizes that it would be error to sustain a demurrer where the infliction of emotional distress cause of action is based on more than alleged defamatory statements. Plaintiff’s cause of action is based on more than allegedly defamatory statements. Plaintiff alleged that he was subject to demotion, and numerous wrongful acts and evaluations. (Complaint ¶ 333.) Plaintiff’s cause of action is not identical to his defamation claim.

CHP’s demurrer to the twelfth cause of action for violation of civil rights on the grounds that it is uncertain because it combines numerous separate causes of action into one is sustained with leave to amend. The cause of action as pled combines numerous facts and legal theories. The twelfth cause of action appears to assert violations of FEHA, discrimination, the government code, and also violations of federal law. As pled, the twelfth cause of action is uncertain and vague because it is not clear exactly what theory, or how many theories are being asserted.

CHP’s demurrer to the thirteenth cause of action for negligent hire is sustained with leave to amend. As pled, the claim arises from the normal employment relationship and is barred by the WCE.

CHP’s demurrer to the fourteenth cause of action for breach of duty to defend and indemnify on the grounds that Plaintiff has not pled facts sufficient to establish that he acted in the course and scope of his work for the CHP is sustained with leave to amend. Plaintiff does not oppose this argument in his opposition. CHP argues that the federal lawsuit filed against Plaintiff for which he sought a defense, alleged acts which were clearly outside the course and scope of his employment with the CHP. While that complaint, from another case, may allege acts that were clearly outside the course and scope of employment, there has been no finding to that effect. The Court will not

accept the allegations from a complaint in another case to be true. However, upon review of Plaintiff's Complaint, the fourteenth cause of action does not allege facts that the acts for which he seeks a defense and indemnity were for acts within the course and scope of his employment with the CHP.

Plaintiff may have leave to file a First Amended Complaint not later than Thursday, October 5, 2006. The responsive pleading shall be due filed and served 10 calendar days thereafter (15 days if service is by mail). Although not required by California Rules of Court, or Local Rule, should the responsive pleading be a demurrer, moving party is requested to attach a courtesy copy of the amended complaint.

This minute order is effective immediately. No formal order nor further notice is required, the tentative ruling providing sufficient notice.

Item 17 **06AS03307** **HUBERT A. ACEVEDO VS. CHP; DWIGHT D HELMICK;MANUEL PADILLA**

Nature of Proceeding: Motion To Strike

Filed By: Fowler, Alicia M.B.

Defendant California Highway Patrol's ("CHP") motion to strike is granted in part as set forth below. Portions of the motion have been mooted by the Court's ruling on the demurrer in Item #16.

CHP moves to strike allegations throughout the Complaint where Plaintiff refers to individual defendant Dwight D. Helmick as "SCUD" Helmick. CHP argues that this reference has no relevance to the Complaint and is simply added to show that Helmick had a reputation for "dropping bombs, or scud missiles on any CHP employee he perceived as threats to his administration." (Complaint, ¶ 46.) Plaintiff argues that the CHP simply wants to strike the allegations because it does not like them and that in any event, it lacks standing to raise this issue. Plaintiff does not address how the "SCUD" reference is relevant or proper. The Court finds that CHP has an interest in allegations relating to its former Commissioner, someone it owes a defense in this action. The Court finds it appropriate to strike all references to "SCUD" in Plaintiff's Complaint.

CHP also moved to strike Plaintiff's allegation indicating that a "website titled, "The adventures of Spikey the Pig" had been created in order for disgruntled employees to voice their opinions related to Helmick on the grounds that it is improper and irrelevant. Plaintiff did not oppose this portion of the motion and the Court grants the motion to strike in this regard.

CHP also moves to strike the references in Plaintiff's fourth cause of action to Gov't Code §§ 19572, 19680 and 19990 on the grounds that they are irrelevant because they do not create a private right of action. Plaintiff argues that it refers to them to provide examples of "statutes intended to protect the Constitutional right of

public employees to engage in political activities. The Court does not find the CHP's argument convincing and therefore denies CHP's motion to strike these allegations.

CHP's motion to strike with regards to the seventh cause of action is moot as the Court sustained the demurrer without leave to amend and is moot as to the twelfth cause of action as the Court granted leave to amend.

CHP moves to strike the phrase "and other officers" from Plaintiff's eighth cause of action on the grounds that allegations regarding violations of other officers rights is irrelevant. Plaintiff does not oppose this portion of the motion. The Court grants CHP's motion to strike "and other officers" from the eighth cause of action.

CHP also moves to strike portions of the Complaint seeking punitive damages on the grounds that punitive damages cannot be recovered against a public entity. Plaintiff counters that it only seeks punitive damages against the individual defendants. Because the Complaint does not distinguish between CHP and the individual defendants, CHP's motion to strike is granted with leave to amend to properly allege punitive damages.

CHP also moves to strike Plaintiff's prayer for prejudgment interest on the grounds that such interest cannot be recovered against a public entity or public employees. Plaintiff argues that he only seeks prejudgment interest against the individual defendants. However, Civil Code § 3291 prohibits an award of prejudgment interest in actions against public entities and public employees in action involving personal injuries. While Plaintiff does not argue that his causes of action do not involve personal injuries or otherwise assert a proper basis for prejudgment interest, the Court does not believe CHP has demonstrated that Plaintiff would not be entitled to prejudgment interest as a matter of law. The motion to strike the prayer for prejudgment interest is overruled.

This minute order is effective immediately. No formal order nor further notice is required, the tentative ruling providing sufficient notice.