SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Department of Fair Employment and Housing, an agency of the State of California Plaintiff/Petitioner(s) vs. Tesla, Inc. Defendant/Respondent(s)	No. 22CV006830 Date: 08/26/2022 Time: 9:21 AM Dept: 21 Judge: Evelio Grillo ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 08/24/2022, now rules as follows: The Demurrer of Tesla to First Amended Complaint is OVERRULED. The Motion of Tesla to strike portions of First Amended Complaint is DENIED.

BACKGROUND

On 2/9/22, the Civil Rights Division (CRD) (formerly the DFEH) filed this case. On 3/11/22, the CRD filed an amended complaint alleging racial harassment, race discrimination based on assignments, compensation, discipline, promotion, termination, and constructive discharge, retaliation for making complaints, failure to prevent discrimination and harassment, unequal pay under Labor Codes 11907.5 and Govt Code 12930(f)(5), unlawful waiver of rights and release of claims, and failure to maintain and produce employment records.

The CRD has statutory authority to bring this case. Govt Code 12930(f)(1) states the CRD has authority "To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Chapter 6 (commencing with Section 12940." Govt Code 12961 authorizes the CRD to file a complaint on behalf of the department seeking relief for a group of persons adversely affected, in a similar manner, by an alleged unlawful practice. Govt Code 12965 authorizes the CRD to file a complaint on behalf of the department seeking relief on behalf of a person claimed to be aggrieved.

The CRD brings this case against Tesla as public prosecutor asserting a group claim under Govt Code 12961. The 1AC para 14 states "Plaintiff DFEH, an agency of the State of California, brings this enforcement action against Defendants Tesla and DOES ONE through FIFTY in its prosecutorial role, seeking relief in the public interest for the state and for Defendants' Black and/or African American workers ("the Group")." The 1AC para 29 states "Section 12961 expressly authorizes the DFEH Director to file a complaint on behalf of the department seeking relief for a group of persons adversely affected, in a similar manner, by an alleged unlawful practice." The 1AC para 33 states "DFEH brings this government enforcement action on behalf of the state and a group of Black and/or African American workers."

The CRD brings this enforcement action against Tesla as public prosecutor asserting a group claim. (Govt Code 12961.) The CRD can be both public prosecutor and simultaneously act in the interest of the affected group. (Department of Fair Employment and Housing v. Cisco Systems,

Inc. (August 5, 2022) 2022 WL 3136003.)

The occasional references in the 1AC to Govt Code 12965 do not change the nature of the claim to an aggregation of individual claims. (E.g. 1AC para 28.) There is no indication that the CRD is seeking to represent specific individual aggrieved employees under Govt Code 12965.

The status of this case as a public prosecutor and group claim under Govt 12961 drives the analysis of certain procedural issues on these motions. It also will affect what the CRD will need to prove at trial and what monetary relief the CRD might be able to recover on behalf of the affected "group or class of persons."

DEMURRER OF TESLA TO FIRST AMENDED COMPLAINT

DEMURRER - COMPLIANCE WITH PRE-FILING PROCESS.

The demurrer to the 1AC based on the CRD's alleged failure to plead compliance with the pre-filing process is OVERRULED.

The court DENIES both Tesla's request for judicial notice of the Director's Complaint and the CRD's offer of the Thanosombat Declaration offering testimony that the Director's Complaint was a precursor to "multiple rounds of investigative interrogatories, requests for documents, and subpoenas." "[A] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (Fremont Indem. Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 115.)

The order of 6/8/22 denying Tesla's motion to stay addressed this issue, stating: "The mandatory dispute resolution process appears to apply both when the DFEH is acting on behalf of the people of the State of California in a law enforcement capacity and when the DFEH is representing a person or group of persons. (Govt Code 12930, 12965.) … The mandatory dispute resolution process is not a jurisdictional prerequisite to filing the civil action. (Motors Ins. Corp. v. Division of Fair Employment Practices (1981) 118 Cal.App.3d 209, 224.) … it appears that the DFEH has complied with its mandatory dispute resolution process."

If the court considered the Director's Complaint, it states that the CRD is investigating claims regarding discriminatory practices against African American employees in violation of Govt Code 12940. The text of Govt Code 12940(a) states that it is an unlawful practice "For an employer, because of the race … of any person … to discriminate against the person in compensation or in terms, conditions, or privileges of employment." The claims in the 1AC for discrimination in assignment, compensation, discipline, promotion, termination, and constructive discharge under section 12940(a) are all claims regarding discrimination "in compensation or in terms, conditions, or privileges of employment." Thus, taking all inferences in favor of the CRD on demurrer, the claims in the complaint are within the scope of the Director's Complaint.

If the court considered both the Director's Complaint and the Director's Complaint did not identify each of the claims ultimately asserted in this civil action, then the court would consider whether the claims in this case are "like and reasonably related to" those in the Director's

Complaint. (Guzman v. NBA Automotive (2021) 68 Cal.App.5th 1109, 1118.) (See also Department of Fair Employment and Housing v. Law School Admission Council Inc. (N.D. Cal. 2012) 896 F.Supp.2d 849, 861-864.) Any claims in a civil action must "be reasonably expected to grow out of" the charges or "reasonably have been uncovered in an investigation of the charges that were made." (Okoli, supra.) Taking all inferences in favor of the CRD, the claims in the civil complaint were related to or likely to grow out of the charges in the Director's complaint.

At the hearing on 8/24/22, Tesla directed the court to Okoli v. Lockheed Tech. Operations Co. (1995) 36 Cal. App. 4th 1607 [administrative charge of race discrimination did not encompass temporally distinct claim of retaliation], and Yurick v. Superior Court, 209 Cal. App. 3d 1116, 1123 (1989) ["plaintiff's claim of gender discrimination alleged in her administrative charge did not encompass the cause of action for age harassment alleged against Yurick in her lawsuit"].) The court has reviewed both cases. Okoli and Yurick are distinguishable: both cases concern individual cases. In Okoli there was a charge followed by a right to sue letter. In Yurick there was a charge impliedly followed by a right to sue letter. Neither case involved a CRD charge of an unlawful practice under Govt Code 12961 followed by an actual CRD investigation.

Tesla may in its discretion file a motion for summary adjudication on the administrative exhaustion issue regarding the claims it asserts are outside the scope of the Director's Complaint. On a motion for summary adjudication the parties can present evidence and the court can examine the evidence of the CRD's investigation (E.g. Thanosombat Declaration) and determine whether the investigation covered matters such as compensation, assignments, and discipline.

DEMURRER - STATUTE OF LIMITATION

The demurrer to the 1AC based on the statute of limitation is OVERRULED.

Govt Code 12960(d) states: "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, …" This statute of limitations applies.

The court is not persuaded that a CRD claim under Govt Code 12961 has no statute of limitation. Govt Code 12960 et seq is in "Chapter 7, Article 1." Govt Code 12960(a) states "(a) This article governs the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6." Govt Code 12960(d) then states: "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, …" Govt Code 12961 concerns the CRD's ability to bring a group claim, but it does not have a separate statute of limitations.

A fair reading of the statute as a whole is that a CRD group claim under Govt Code 12961 is governed by the statute of limitations in Govt Code 12960. Section 12960 does state both "(a) This article governs the procedure …" and (d) "No complaint may be filed …"

The CRD brings this case on behalf of a group under Govt Code 12961. The claim is based on an alleged pattern or practice of race harassment and discrimination. (1AC para 32,65, 76, etc.) The CRD's Director's Complaint is dated 6/18/19.

The court OVERRULES the demurrer based on statute of limitations because the CRD may clearly prosecute claims for practices that occurred during the limitations period even if those acts arise from a systematic policy of discrimination that came into existence before then. (Carroll v. City and County of San Francisco (2019) 41 Cal.App.5th 805, 819-822.) (See also Alch v. Superior Court (2004) 122 Cal.App.4th 339, 372-377.) The court cannot sustain a demurrer to a cause of action because "a portion of a cause of action" might be barred by the statute of limitation. (Daniels v. Select Portfolio Servicing, Inc. (2016) 246 Cal.App.4th 1150, 1167.) The court must overrule a demurrer if "if the complaint … state[s] a cause of action under any possible legal theory." (Sheehan v. San Francisco 49ers, Ltd. (2009) 45 Cal.4th 992, 998.)

The court does not address whether the CRD is limited to recovering monetary relief for injuries sustained in the one year period before the filing of the Director's Complaint or any other theory of recovery that might allow the CRD to prosecute claims related to actions accruing prior to one year before the CRD filed the Director's Complaint. A motion for summary adjudication is the proper procedural vehicle to raise those defenses.

DEMURRER – UNCERTAIN

The demurrer to the 1AC based on uncertainty is OVERRULED.

Under California law, a complaint must be "a statement of the facts constituting the cause of action, in ordinary and concise language." (CCP 425.10(a).) Further, the attorney or party filing the complaint must certify that the facts stated in the complaint "have evidentiary support." (CCP 128.7(b)(3).) These requirements force parties "to give fair notice of their claims to opposing parties so they can defend" … and to " ' "set forth the essential facts of [the] case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action" ' ". (Lee v. Hanley (2015) 61 Cal.4th 1225, 1238.)

"The California Supreme Court has consistently held that "a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action. … There is no need to require specificity in the pleadings because "modern discovery procedures necessarily affect the amount of detail that should be required in a pleading." (Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 608.)

A complaint does not require an exhaustive statement of facts. The Judicial Council has approved form complaints that provide the essential information to identify the incident but do not include significant detail.

The factual allegations in the 1AC at para 35-58 are adequately specific for purposes of a complaint. The 1AC puts defendant on notice of the claims.

DEMURRER – MANAGEABILITY

The demurrer to the 1AC based on manageability is OVERRULED.

The court finds no merit to the Tesla argument that the CRD cannot pursue the group claim under Govt Code 12961 because the case and trial will not be manageable.

First, the legislature in Govt Code 12961 expressly authorized the CRD to bring group claims. The court is not inclined to nullify the statute by finding that the court cannot implement want the legislature expressly authorized.

Second, in Estrada v. Royalty Carpet Mills, Inc. (2022) 76 Cal.App.5th 685 [review granted], the Court of Appeal held that the manageability concerns that apply to a class action do not apply to a claim on behalf of the LWDA under the PAGA. If manageability concerns do not apply to a claim on behalf of the LWDA under the PAGA, then they similarly do not apply to a claim by the CRD under the FEHA.

Third, the court is not persuaded with the "too big to fail" type argument that the alleged pattern and practice claim will require is too much judicial time and attention to bring to trial and that the court should simply decide that the CRD cannot prosecute the case. The CRD and Tesla can propose appropriate parameters for discovery and trial management. The courts have managed cases of similar complexity before. (Reich v. Southern Maryland (4th Cir. 1995) 43 F.3d 949 (District Court abused its discretion by limiting testimony to 54 of a total of 3368 employees); Donovan v. Burger King Corp. (1st Cir. 1982) 672 F.2d 221, 224-225 (District Court properly limited testimony to 20 of 2,000 employees).

Fourth, Tesla's concerns about the manageability are based on the misunderstanding that the Govt Code 12961 claim of an unlawful practice that "adversely affects, in a similar manner, a group or class of persons" will be the trial of 10,000 individual claims.

The CRD will need to prove the existence of an "unlawful practice." Proof of an "unlawful practice" will likely require the CRD to prove that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." Proof of an "unlawful practice" will likely not require the CRD to prove a uniform practice but it will require the CRD to prove more than a series of isolated incidents. (Alch v. Superior Court (2004) 122 Cal.App.4th 339, 380.) (International Broth. of Teamsters v. U.S. (1977) 431 U.S. 324, 336; U.S. E.E.O.C. v. Scolari Warehouse Markets, Inc. (D. Nev., 2007) 488 F.Supp.2d 1117, 1130.)

When the parties seek to prove or disprove the alleged "unlawful practice," they can rely on a combination of testimony from managers who can speak for the company, statistics about complaints, statistics about the resolution of complaints, and testimony regarding representative incidents and resulting investigations. (Alch v. Superior Court (2004) 122 Cal.App.4th 339, 380.) The court is not obligated to permit each side to present evidence about lawyer selected individual anecdotal incidents. By way of example, in order to promote manageability and relevance, the court could require that evidence about individual incidents and investigations be limited to a statistically significant number of representative incidents and investigations. (Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1.) The court might also impose time limits on the trial. (People v. ConAgra Grocery Products Co. (2017) 17 Cal.App.5th 51, 148-152.)

If Tesla seeks to argue that any discrimination or harassment affected only a portion of the identified group, then Tesla can make that argument at trial and it might affect the amount of any

monetary remedy or the scope of any injunctive relief. Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, suggests that possibility, stating "any procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence, both to challenge the plaintiffs' showing and to reduce overall damages" and also "[i]f trial proceeds with a statistical model of proof, a defendant … must be given a chance to impeach that model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt." (59 Cal.4th at 37-38.)

MOTION TO STRIKE

The Motion of Tesla to strike portions of First Amended Complaint is DENIED.

The motion to strike allegations as irrelevant, improper, or immaterial is DENIED. The 1AC includes allegations that provide relevant context to the claims but are not directly relevant to the claims. It is permissible to put such allegations in a complaint.

The motion to strike citations to articles is DENIED. The 1AC includes citations to news articles. A complaint is not required to include citations to the sources of the factual allegations. That noted, citations to articles, witnesses, and documents provides some assurance that the complaint is filed following reasonable investigation and that the allegations in the complaint "have evidentiary support." (CCP 128.7(b)(3).)

The motion to strike allegations of outdated EEO-1 Reports is DENIED. The 1AC includes allegations from EEO-1 Reports that provide relevant context to the claims but are not directly relevant to the claims. It is permissible to put such allegations in a complaint.

MOTION TO STRIKE – SUPPLEMENT

On 4/22/22, Tesla filed its motion to strike. On 7/18/22,Tesla filed a supplemental brief making the new argument that the 1AC improperly relied on allegation in still active administrative complaints.

Tesla's supplemental brief is procedurally improper because it expands the number of pages in Tesla's briefing over the permitted limit. A party cannot file sequential briefs as a way to avoid page limits. That noted, it appears that Tesla's supplemental brief was filed after Tesla became aware of certain facts and that it was a reasonable and good faith effort to put all the relevant issues before the court at the same time. The CRD opposed the supplemental arguments on the merits. The court will consider the supplemental brief.

The motion to strike the allegations in the 1AC that are based on still active administrative complaints is DENIED.

The CRD's Director's Complaint regarding the group claim is dated 6/18/19 and the Thanosombat Declaration states that the CRD investigated the group claim. Tesla's supplemental brief indicates that while the CRD was investigating the group claim that Tesla employees continued to file individual claims.

The CRD could reasonably rely on all information in its possession when drafting the allegations in the 1AC. That would include public information, information the CRD obtained in its investigation of the group claim, and information the CRD obtained from individuals who filed individual complaints.

The CRD does not need to investigate and conclude every Govt Code 12965 investigation by every person in a group before the CRD determines that a group claim is appropriate and files a civil action under Govt Code 12961. To read the statute otherwise would be absurd because then the steady filing of individual complaints would prevent rather than support the filing of a group claim.

Related to this issue, the recent case of Department of Fair Employment & Housing v. M&N Financing Corp. (2021) 69 Cal.App.5th 434, ___, states "Thus, section 12961, by its plain terms, does not require the filing of a complaint by an aggrieved person prior to the Department's initiation of a lawsuit." If the CRD could file a Govt Code 12961 civil action without the filing of any complaint by any aggrieved person, then it would be absurd to require the CRD to delay filing a Govt Code 12961 civil action until complete investigation of all pending complaints by all aggrieved persons.

Tesla's argument that the CRD must investigate every individual complaint before filing any group civil action is based on the misunderstanding that a Govt Code 12961 claim alleging an "unlawful practice" is an aggregation of Govt Code 12965 claims alleging individual claims. That is not the law. The "unlawful practice" claim on behalf of a group requires the CRD to prove that "discrimination was the company's standard operating procedure," but it does not require the CRD to prove that Tesla discriminated against or permitted the harassment of each and every member in the group. (Alch v. Superior Court (2004) 122 Cal.App.4th 339, 380.)

COMMENTS ON EFFECT OF DENYING MOTION TO STRIKE

The substantive scope of discovery will be limited by the scope of the claims in the case. The allegedly immaterial allegations in the complaint about Tesla's factory safety,

unionized status, vehicle sales, or its plans to move its headquarters to Texas do not automatically determine the substantive scope of discovery.

The temporal scope of discovery will be determined by the statute of limitations and might be extended by a reasonable number of years to provide some historical context for the alleged pattern or practice. (Bell v. Lockheed Martin Corp. (D. New Jersey, 2010) 270 F.R.D. 186, 193-194 ["Cases examining the scope of discovery in a Title VII action permit discovery for a time period that predates the plaintiff's claims"].) The 1AC's reference to facts outside the statute of limitations does not automatically expand the scope of relevance for purposes of discovery.

The admission of evidence at trial will be limited by relevance to the claims asserted as limited by physical location and temporal scope. (Evid Code 350, 352.) The information in the 1AC that is provided as context might not be admissible at trial.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 08/26/2022

Evelio Grillo / Judge