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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN

CRISTINA TALLEY, Plaintiff, v. CITY OF ANAHEIM, a municipality, and DOES 1 through 50, inclusive, Defendant.	Case No.: SA CV 14-1863 DOC (GJSx) Complaint Filed: November 25, 2014 FAC Filed: January 26, 2015 **DEFENDANT CITY OF ANAHEIM'S TRIAL BRIEF** Trial Date: August 12, 2016 Time: 8:30 a.m. Courtroom: 9D

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TO THE COURT, PLAINTIFF, AND HER ATTORNEYS OF RECORD:

Defendant CITY OF ANAHEIM ("City" or "Defendant") hereby submits the following Trial Brief in this matter:

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I. INTRODUCTION

Plaintiff Cristina Talley ("Talley") is the former City Attorney of Anaheim. She was appointed to the position by the City Council pursuant to Anaheim City Charter Section 701. After receiving two negative performance evaluations, she tendered her resignation to Defendant City of Anaheim on January 31, 2013 in response to the Council's request. Talley filed this lawsuit alleging (i) violation of procedural due process, (ii) age and national origin discrimination under the Fair Employment and Housing Act ("FEHA"), (iii) claims for failure to investigate and prevent discrimination and harassment under FEHA, and (iv) hostile work environment under FEHA.[1]

Talley's claims lack merit, and she will be unable to meet her heavy burden of proof at trial. Talley will be unable to establish her due process claim under 42 U.S.C. §1983 because Talley was employed at-will. The plain language of the City Charter, the governing law of the City, provides that the City Attorney can be removed by a majority vote of the City Council. In addition, the City's Municipal Code states that the City Attorney is exempt from the protections of the City's classified service and the City Council Handbook provides that the City Attorney serves at the pleasure of the City Council. All of these authorities demonstrate that the City Attorney was at-will and provided Talley with notice that she was giving up the protections of the classified service when she accepted the position of City Attorney.

Furthermore, Talley will be unable to establish her claims for national origin or age discrimination under FEHA because the City had legitimate, non-discriminatory reasons for its actions. Talley was not competently performing in

[1] The Court previously dismissed Talley's claims for breach of implied and/or express contract of continued employment and breach of the covenant of good faith and fair dealing. Docket 30 of Case 8:14-cv-01863-DOC-GJS. Additionally, on July 27, 2016, the Court dismissed on summary judgment Talley's claims for gender discrimination under Cal. Gov. Code, §12940, retaliation under Cal. Gov. Code, §12940, and failure to prevent or investigation retaliation. Docket 129 of Case 8:14-cv-01863-DOC-GJS.

her position. In fact, the only two evaluations she had as City Attorney were unfavorable. Furthermore, even prior to these evaluations, Council members expressed concerns to Talley about her performance. Nor does Talley have any evidence suggesting a discriminatory motive of the Council in connection with her evaluations or request for resignation.

Finally, Talley will be unable to establish her claims for failure to prevent and investigate discrimination and harassment. First, the claims are time-barred because Talley alleges she raised her concerns in 2012, but did not file her DFEH complaint until well over one year later. Second, since Talley has no actionable discrimination or harassment claims, these claims also fail. Third, Talley did not notify the City of any discrimination or harassment until more than a year after she resigned, thus there was no duty on the City to investigate during Talley's employment. Finally, the City took reasonable steps to prevent discrimination and harassment and conducted a prompt and thorough investigation upon receipt of Talley's demand letter.

In accordance with Local Rule 16-10, this brief replies to Talley's legal assertions in the Proposed Joint Pretrial Conference Order (which superseded her legal arguments in her Memorandum of Contents of Fact and Law).

II. SUMMARY OF RELEVANT FACTS

A. TALLEY IS HIRED AS CITY ATTORNEY

The City hired Talley as a Senior Assistant City Attorney in 1996. Upon the retirement of the former City Attorney, the City Council appointed Talley as interim City Attorney in December 2008. Talley then applied for and the City Council appointed her as the City Attorney on April 17, 2009. Talley did not receive an employment agreement for the City Attorney position. The only document that the City provided to her regarding her employment status was an April 17, 2009 letter from Human Resources Director Kristine Ridge stating Talley was being promoted to the position of City Attorney with a starting salary of

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$195,000 and would serve a one year probationary period. Talley did not negotiate her salary as City Attorney and acknowledges that she was hired in a poor economic climate while the City was undergoing furloughs to save money.

Talley's rights and duties of the City Attorney are governed by several City policies and guidance. Section 701 of the City Charter provides that the "City Attorney, City Clerk and City Treasurer shall be appointed by and may be removed by the affirmative votes of at least a majority of the total membership of the City Council." The City's Municipal Code, which details the personnel system, states that its rules "shall apply only to the classified service unless otherwise specifically provided" and that the "except service shall include . . . the City Attorney." While the Municipal Code limits grounds for removal for classified employees, these protections do not apply to exempt employees. Finally, the Handbook for the City Council in 2012 provided that the "City Attorney is appointed by the City Council and serves at its pleasure."

B. CONCERNS ARISE CONCERNING TALLEY'S PERFORMANCE AS CITY ATTORNEY

As City Attorney, Talley reported directly to the City Council, but by 2012, the Council had legitimate concerns about her performance including her communications and interaction with the Council. As of August 2, 2012, Talley knew the majority of the Council was unhappy with her performance. In addition, prior to August 2012, Council members Murray and Eastman expressed concerns to Talley about her performance.

First, the Council generally felt that Talley was favoring Mayor Tait over other Council members and not advising all Council members about her work. There were occasions where Talley provided advice directly to Mayor Tait. Furthermore, at Talley's August 2, 2012 performance evaluation, Murray expressed concern that she was not keeping the Council informed of matters.

Second, Council members Murray and Sidhu felt that Talley did not always

communicate with them in an effective manner or always provide clear and concise answers to their questions about legal issues.

Third, Council members lost trust and confidence in Talley. In addition to her actions above contributing to this concern, the City lost a lawsuit that caused a majority of the Council to have concerns about her legal advice and how items for Council meetings were placed on the agenda. Moreover, the job requirements of the City Attorney include being a "respected legal advisor" and having "excellent interpersonal skills with the ability to project confidence and credibility." The Council simply did not view Talley as fulfilling these objectives.

C. TALLEY'S AUGUST 2, 2012 PERFORMANCE EVALUATION

On August 2, 2012, the City Council evaluated Talley in closed session. Talley was one of four employees evaluated by the Council that day. The majority of the Council communicated to Talley that they were not happy with her performance at her August 2, 2012 evaluation. The Council, by a 3-2 vote, gave her an "Inconsistent/Needs Improvement" rating. No reference was made to Talley's national origin or age in the evaluation.

A majority of the Council believed that Talley's performance did not improve following the August 2, 2012 evaluation. The only thing that Talley did to improve her performance following the evaluation was to offer assistance to Murray concerning a citizen's advisory committee. In addition, Council members Murray, Sidhu, and Eastman felt that Talley's failure to disclose the FPPC letter concerning Mayor Tait's property demonstrated that she was not responding to the concerns raised at her August 2, 2012 evaluation. Jordan Brandman, while not yet on the Council, attended the Council meeting when Talley disclosed the FPPC letter and was aghast that Talley had not provided the letter to the entire Council prior to the meeting or upon receiving it. The FPPC provided Talley with a response dated May 22, 2012, but Talley did not share it with the Council until a meeting in November 2012.

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D. TALLEY RESIGNS FOLLOWING HER JANUARY 29, 2013 EVALUATION

On January 29, 2013, the Council again evaluated Talley in closed session. Council member Brandman, who was new to the Council and wanted to discuss job expectations and performance of the four Council appointees, implemented this review. After providing Talley with an opportunity to present her accomplishments and goals to the Council, and discussing Talley's performance among each other, and speaking with Ridge, the Council majority voted to ask for Talley's resignation. Talley then rejoined the closed session and Council member Brandman told her that the Council had decided to go in a different direction, and gave her 48 hours to decide whether to resign and take paid administrative leave until April 30.

On January 31, 2013, Talley submitted her resignation to the City Council, effective April 30, 2013. She also submitted a two page letter in which she expressed pride about her 16½ years of service to the City and shock at being asked to resign. Her letter did not indicate that she believed that she was not an at-will employee and therefore entitled to an opportunity to be heard, nor did it suggest that she believed she was discriminated against or harassed. On February 4, 2013, Talley met with Human Resources Director Ridge to discuss her resignation. On April 30, 2013, she completed an Exit Questionnaire for the City. Talley did not make any reference to discrimination or harassment based on age or national origin in either of those documents or in person to Ridge. Talley did not request a due process hearing or raise the issue that she was not at-will and was entitled to a hearing before she resigned. Her employment with the City ended on April 30, 2013.

E. TALLEY DOES NOT ALLEGE DISCRIMINATION OR HARASSMENT UNTIL MARCH 2014

Talley was familiar with the City's policies concerning reporting discrimination and the City Attorney's office often handled employee complaints of

discrimination and harassment. Yet, Talley never reported any discrimination to the City during her employment. Talley never filed a formal complaint of discrimination or harassment with the Human Resources Department or specifically told the Director of Human Resources that she was being harassed or discriminated against based on her national origin or age. In addition, Talley did not mention any discrimination or harassment in her resignation letter, exit interview, or meeting with Ridge.

While Talley did speak with other employees about her view on how she was treated by the City Council, Talley only alleged unfair treatment – not any unlawful discrimination or harassment, with a single employee. Specifically, Talley complained that Council member Murray was "unfairly giving [her] a hard time" and "criticizing [her]" "without good cause." Yet one of the requirements for the City Attorney position was to "have thick skin." The only person to whom Talley alleges she disclosed her belief that she was being discriminated against based on her national origin was City Clerk Linda Andal. The City Clerk and City Attorney are peers because they are both appointed by and report to the City Council. Andal was not on the Council and had no involvement in Talley's evaluation or the decision to ask her to resign. Nor was Andal a Human Resources employee and she had no supervisory or management authority over Talley that would trigger a duty to investigate. Finally, Andal never reported any concerns from Talley of any type of discrimination or harassment to anyone in the Human Resources Department.

Talley filed a complaint with the Department of Fair Housing and Employment ("DFEH") on January 13, 2014. On March 18, 2014, Talley's attorney sent a demand letter to the City where for the first time Talley alleged that she was subjected to discrimination on the basis of her national origin and age. Upon receipt of Talley's demand letter, the City hired Ms. Debra Reilly, an attorney, to conduct an independent investigation. Reilly interviewed 15 witnesses and reviewed 35 exhibits, and issued a 166-page investigation report (not including

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exhibits or witness statements) on July 8, 2014, just four months after the City received Talley's demand letter.

III. LEGAL ARGUMENT

A. PLAINTIFF'S CLAIMS

1. Claim 1: Violation of Due Process Under 42 U.S.C. § 1983

a. Elements to Establish Violation of Due Process

In order for Talley to prevail on her claim of violation of due process under 42 U.S.C. § 1983, she must first establish produce evidence that:

1. She possessed a property interest in her employment as City Attorney;
2. If she did not possess a property interest in her employment has City Attorney, that she did not actually or constructively waive her prior property interest when she accepted her position as City Attorney;
3. She was deprived of due process;
4. The City's deprivation of her due process right caused Talley harm; and
5. The City's deprivation was a substantial factor causing Talley's harm.

Portman v. Cty. of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993); *Beckwith v. Clark County*, 827 F.2d 595, 598 (1987).

In the Final Pretrial Conference Order, Talley asserts that in order to prevail on her Section 1983 claim she need to prove the following:

1. That Defendant City of Anaheim, and its agents, wrongfully deprived Talley of her constitutional right to due process under the color of state law;
2. That Defendant City of Anaheim, and its agents, was acting or purporting to act in the performance of its official duties;
3. That Defendant City of Anaheim's conduct deprived Talley of her property interest in her continued employment with the City of Anaheim and her rights to due process,

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4. That Talley was harmed by this violation; and

5. That Defendant City of Anaheim's wrongful termination of Talley without due process was a substantial factor in causing Talley's harm.

Plaintiff's articulation of the appropriate standard is incorrect because it does not adequately address the elements that Talley must prove in order for the jury to determine that Talley was deprived of due process. Furthermore, Plaintiff does not cite to authority to support her suggested elements.

Plaintiff appears to, in part, draw from the Ninth Circuit Model Jury Instruction 9.5, entitled "Section 1983 Claim Against Local Governing Body Defendants Based on Official Policy, Practice, or Custom—Elements and Burden of Proof" which, in order to prevail, requires a showing of (1) that the Defendant acted under the color of state law; (2) that the Defendant's act deprived plaintiff of a "particular right," as explained in separate instructions; (3) the Defendant acted pursuant to an express adopted official policy or a longstanding practice or custom of the Defendant; and (4) that Defendant's official policy or longstanding practice or custom caused the deprivation of the plaintiff's particular right. Ninth Circuit Model Jury Instruction 9.5. The commentary, however, notes that such an instruction should only be used in conjunction with a "particular rights" instruction, which for this Section 1983 claim would be a "deprivation of procedural due process" instruction. The Ninth Circuit Standard, as set forth in *Portman, supra,* 995 F.2d at 904, provides that a Section 1983 claim based on procedure due process requires the following elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. The Court further explained that "[i]f under state law, employer is at-will, then the claimant has no property interest in the job." In order to recover for such a denial, the Ninth Circuit has further held that such a denial of due process must result in harm to the plaintiff. *Beckwith* 827 F.2d, at 598.

Plaintiff's suggested elements, however, make the assumption that Talley

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had a property right in her employment in the first instance. Before the jury may answer the question of whether Talley was deprived of her property interest, the question must first be answered if she had a property interest in her employment in the first instance.

b. The Determination of Whether Talley Had a Property Interest in Her Employment is a Legal Question for the Court to Decide

Although most of the claims in this case are triable to a jury, Talley's claim for deprivation of a property interest must initially be determined by the Court. Whether Talley had a property interest in her employment is a pure question of law for the Court to determine. *Phillips v. Marion Cty. Sheriff's Office*, 494 F. App'x 797, 799 (9th Cir. 2012) ("Because there were no facts in dispute, whether Phillips had a constitutionally protected property interest was a question of law for the judge."); *Majors v. City of Oakland*, No. C 05-00061 CRB, 2005 WL 2216955, at *4 (N.D. Cal. July 25, 2005) ("It is the Court's role to determine, as a matter of law, whether an agreement rises to the level of a constitutionally protected interest."); *Deen v. Darosa*, 414 F.3d 731, 734 (7th Cir. 2005) ("The question whether a particular job action against a public employee implicates a constitutionally protected property interest is a question of law."); *Circa Ltd. v. City of Miami*, 79 F.3d 1057, 1064 (11th Cir. 1996) ("T]he question of the nature of Circa's interest was purely a question of law and, as such, was not within the province of the jury."); *Ruppert v. Lehigh Cty*.., 496 F. Supp. 954, 956 (E.D. Pa. 1980) (stating "whether plaintiffs have a constitutionally protected property interest in their employment with defendant is a question of law which . . . the Court must decide"). Thus, here the Court, not the jury, should determine whether, under the applicable rules governing the City of Anaheim, Talley had a property interest in her employment.

If the Court determines that Talley did have a property interest in her

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employment at the time she resigned, then the jury must determine if Talley met her burden to demonstrate she lacked actual or constructive notice that she was waiving her property right by accepting the appointment to City Attorney. *See Beckwith v. Clark County,* 827 F.2d 595, 598 (1987).

c. If the Jury Finds for Plaintiff on Her Section 1983 Claim, the Jury May Only Award Damages Up Until the Time of Trial

If the Jury finds in favor of Plaintiff on her Section 1983 claims, the Jury may only award damages incurred up until the time of trial. *Cary v. Piphus*, 435 U.S. 247, 247; 264 (1978) ("[C]ases dealing with awards of damages for injuries caused by the deprivation of constitutional rights other than the right to procedural due process, are not controlling . . . .").

Although Plaintiff has brought her claim for procedural due process violations under federal law, the property interest that she alleges she possessed as City Attorney is defined by California law. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state-law rules. . . ."). Thus, to the extent that California courts have held that an employer's failure to provide an employee with the opportunity to be heard is cured by the opportunity to be heard at trial or hearing, Plaintiff may not recover front pay or other future damages. *See Coleman v. Regents of University of California*, 93 Cal.App.3d 521, 526 (1979) ("The disability that appellant suffered because of the Skelly violation terminated when she had the opportunity to respond at the administrative hearing. That was her opportunity to give her side of the story 'before a reasonably impartial, noninvolved reviewer . . .'") (citing *Williams v. Cty. of Los Angeles,* 22 Cal.3d 731, 737 (1978)); *Barber v. State Personnel Board*, 18 Cal.3d 395, 402 (1976) (Stating that the remedy for a violation of procedural due process is back

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pay from the time of the violation until hearing.)

2. Claims 4 and 6: National Origin and Age Discrimination Under Government Code section 12940(a)

In order to establish her claims for National Origin and Age Discrimination under the FEHA, Plaintiff must prove by a preponderance of the evidence that (1) Defendant City of Anaheim was an employer; (2) Talley was an employee of the City of Anaheim; (3) Defendant subjected Talley to an adverse employment action; (4) Talley's protected status as a Latina and/or person over the age of forty was a substantial motivating reason for the City's adverse employment action; (5) Talley was harmed; and (6) The City's conduct was a substantial factor in causing Talley's harm. Cal. Civil Jury Instructions ("CACI") 2500 (2013); *Harris v. City of Santa Monica,* 56 Cal.4th 203, 232 (2013); *Guz v. Bechtel Nat. Inc*., 24 Cal.4th 317, 355 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112 (9th Cir. 2011) ("California courts use the familiar *McDonnel Douglas* burden-shifting test when analyzing disparate treatment claims under FEHA.")

In the Final Pretrial Conference Order, Plaintiff asserts that she only has to prove that Talley's status as being of Latina national origin and/or status of being a person over the age of forty was a "motivating reason for her termination." Here, Plaintiff relies on the former version of CACI 2500 for the assertion that she only has to prove that national origin and/or age was a motivating reason for the City's actions. However, CACI was revised in 2013, following the California Supreme Court's decision in *Harris v. City of Santa Monica*, and now requires a plaintiff to show that her protected status was a "substantial motivating reason" for her employer's decision. CACI 2500, Sources and Authority, quoting *Harris, supra,* 56 Cal.4th, 56 Cal.4th at 232 ("Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere

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thoughts or passing statements unrelated to the disputed employment decision. At the same time . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time."). (Italics in original).

Additionally, in the Final Pretrial Conference Order, Plaintiff takes as proven that employee was "terminated" from her employment by using the language "termination" to describe the "adverse employment action" which she alleges Defendant took against her. After receiving two negative performance evaluations, Plaintiff tendered her resignation to Defendant City of Anaheim on January 31, 2013 in response to the Council's request. Plaintiff alleges that had she not tendered her resignation, she would have been terminated. However, it is for Plaintiff to "plead and prove, by the usual preponderance of the evidence standard," that she was "constructively discharged" so as to carry with it the definition of a termination. CACI 2510, Sources and Authorities (citing *Turner v. Anheuser-Busch, Inc.* 7 Cal.4th 1238, 1244 (1994); *Mullins v. Rockwell International Corp.* 15 Cal.4th 731, 737 (1997)). Without meeting this burden, Plaintiff cannot utilize the phrase "termination" to describe the adverse employment action which she alleges Defendant took against her.

3. Claims 8 and 9: Failure to Properly Investigate or Prevent Claims of Discrimination and Harassment in Violation of Government Code section 12940(k)

In the Final Pretrial Conference Order, the Parties agreed that in order establish a claim for failure to investigate or prevent Talley's claims of discrimination or harassment, Plaintiff must prove that (1) Talley was an employee of the City of Anaheim; (2) Talley was subjected to harassment or discrimination based on national origin or age in the course of employment; (3) that Defendant City of Anaheim failed to take all reasonable steps to investigate *or* prevent the

harassment or discrimination; (4) that Talley was harmed; and (5) that Defendant's failure to take all reasonable steps to prevent *or* properly investigate Talley's claims of harassment or discrimination was a substantial factor in causing Talley's harm.

First, Defendant notes that Plaintiff appears to argue that a failure to prevent discrimination and harassment, and a failure to properly investigate discrimination and harassment are separate and distinct claims, even though both are brought under Government Code section 12940(k). As the Court suggested in its Order re Motions for Summary Judgment, these claims are in fact a single claim. *See* Order re Motions for Summary Judgment, at 33, Docket 129 of Case 8:14-cv-01863-DOC-GJS.

Secondly, while pled as one of Defendant's affirmative defenses, it remains Talley's burden to establish that the City had knowledge that she was subjected to discrimination or harassment. *See Mayfield v. Sara Lee Corp*., No. C 04-1588 CW, 2005 WL 88965, at *8 (N.D. Cal. Jan. 13, 2005); *Villanueva v. City of Colton,* 160 Cal.App.4th 1188, 1199 (2008); *Rao v. AmerisourceBergen Corp*., No. CIV S-08-1527 DAD PS, 2010 WL 3767997, at *7 (E.D. Cal. Sept. 22, 2010); *Doe v. Capital Cities,* 50 Cal.App.4th 1038, 1054 (1996).

Talley never filed a formal complaint of discrimination or harassment with the human resources department or specifically told the Director of Human Resources that she was being harassed based on her national origin or age. In addition, Talley did not mention any discrimination or harassment in her resignation letter, exit questionnaire or exit interview.

Until Talley submitted her demand letter, the City did not have an obligation to investigate because she had not previously reported discrimination or harassment to the City. Upon receipt of Talley's demand letter, the City retained attorney Debra Reilly to conduct a prompt and thorough independent investigation of Talley's claims. *See Kohler v. Inter-Tel Techs.,* 244 F.3d 1167, 1181 (9th Cir. 2001). Reilly interviewed 15 witnesses and reviewed 35 exhibits, and issued a

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166-page investigation report (not including exhibits or witness statements) four months after the City received Talley's demand letter.

Furthermore, while pled as an affirmative defense, it is Talley's burden to establish that she timely filed her Department of Fair Employment and Housing (DFEH) complaint. *Juamaane v. City of Los Angeles*, 241 Cal.App.4th 1390, 1402. Here, the Parties admitted in the Final Pretrial Conference Order that "[a]ll of the conversations with City employees where Talley alleges she raised unfair treatment or discrimination occurred in 2012." Final Pretrial Conference Order, at 7:8-9. Talley, however, did not file her DFEH claim until more than a year later on January 13, 2014. Thus, her causes of action alleging a failure to investigate or prevent discrimination or harassment are time-barred on their face. Cal. Govt. Code §12960(d); *Lelaind v. City & Cty. of San Francisco*, 576 F. Supp. 2d 1079, 1090 (N.D. Cal. 2008).

Defendant anticipates that Plaintiff will likely argue the continuing violation exception to time-barred claims. In order to invoke the continuing violation exception for her FEHA claims, Plaintiff must prove that (1) conduct occurring within a year of the date on which Plaintiff file her complaint with the DFEH was similar or related to the conduct that occurred earlier; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent. *Richards v. CH2M Hill, Inc.,* 26 Cal.4th 798, 823 (2001). "Permanent" means that the conduct stopped, Plaintiff resigned or Defendant's statements or actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be future. *Id.* The continuing violation exception does not apply where the alleged unlawful practice is a collection of discrete acts or unrelated employment decisions. *Morgan v. Regents of University of Cal.*, 88 Cal.App.4th 52, 65-66 (2000); *Cucuzza v. City of Santa Clara,* 104 Cal.App.4th 1031, 1042 (2002); CACI 2508.

Finally, to the extent that the jury finds in favor of the Defendant on

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Plaintiff's national origin and age discrimination claims, Plaintiff cannot prevail on these claims because she has no actionable claims for discrimination. *See, e.g. Thompson v. City of Monrovia,* 186 Cal.App.4th 860, 880 (1992). *See* Order re Motions for Summary Judgment, at 32, Docket 129 of Case 8:14-cv-01863-DOC-GJS ("Because Defendant is entitled to summary judgment on Plaintiff's relation claim, 'Plaintiff cannot maintain [a] FEHA failure to prevent claim based upon that allegation.'" [Citations]).

4. Claim 10: Failure to Provide a Workplace Free of Discrimination and Harassment in Violation of Government Code section 12940(j)

In the Final Pretrial Conference Order, the Parties agreed that in order establish a claim for failure to provide a workplace free of discrimination and harassment, Plaintiff must prove that (1) Talley was an employee of the City of Anaheim; (2) Talley was subjected to unwanted harassing conduct because she was Latina and/or over the age of forty; (3) The harassing conduct was severe or pervasive; (4) A reasonable person in Talley's circumstances would have considered the work environment to be hostile or abusive; (5) Talley considered the work environment to be hostile or abusive; (6) The City of Anaheim knew or should have known of the conduct and failed to take immediate and appropriate corrective action; (7) Talley was harmed; and (8) The conduct was a substantial motivating factor in causing Talley's harm.

As stated in regard to Plaintiff's Claims 8 and 9, it is Talley who bears the burden of establishing that Defendant knew or should have known that of allegedly harassing or discrimination conduct. Additionally, Talley admittedly relies on events which occurred in or before 2012. Final Pretrial Conference Order, at 7:8-9. As Talley did not file her DFEH Complaint until January 14, 2013, she may not rely on these alleged incidents in proving her claim for hostile work environment. Cal. Govt. Code §12960(d); *Lelaind*, 576 F. Supp. 2d at 1090.

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B. DEFENDANT'S AFFIRMATIVE DEFENSES

In addition to the arguments and defenses addressed in II.A above, Defendant asserts the following additional affirmative defenses:

1. Failure to Take Advantage of Preventative or Corrective Opportunities Provided by the City

Defendant has the burden of proving by a preponderance of the evidence that:

1. The City had policies to prevent discrimination and harassment, including policies on the procedures for reporting such conduct and ensured that its employees were aware of the policies and procedures;
2. Talley was aware of those policies;
3. Talley never reported any discriminatory conduct despite those policies.

See Achal v. Gate Gourmet, Inc., 114 F. Supp. 3d 781, 804 (N.D. Cal. 2015).

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2. Plaintiff Failed to Mitigate her Damages

Defendant has the burden of proving by a preponderance of the evidence:

1. That Talley failed to use reasonable efforts to mitigate damages; and
2. The amount by which damages would have been mitigated.

Ninth Circuit Model Jury Instruction 5.3.

Accepting part-time work after termination from full-time work is not comparable employment to mitigate damages. *See Piutau v. Fed. Express Corp.*, No. C 01-0028 MMC, 2003 WL 1936125, at *1 (N.D. Cal. Apr. 21, 2003) ("With respect to the part-time position, the Court finds that a part-time position is, by its very nature, 'employment of a different or inferior kind' where, as here, the initial employment was full-time.") [citations]. Furthermore, a plaintiff must make more than a few inquiries to conduct a reasonable search. *See Williams v. Imperial Eastman Acquisition Corp.*, 994 F. Supp. 926, 932 (N.D. Ill. 1998) (stating "two

inquiries does not constitute reasonable diligence").

3. Good Faith and Legitimate Nondiscriminatory Reasons for the City's Actions and Decisions

While pled as an affirmative defense, Talley bears the burden of establishing a prima facie case for each of her FEHA claims. If she is able to, the City can rebut claims of discrimination by offering a legitimate, nondiscriminatory reason for the adverse employment action. *Guz v. Bechtel Nat. Inc*., 24 Cal.4th 317, 355 (2000); *Yanowitz v. L'Oreal USA, Inc.,* 36 Cal.4th 1028, 1042 (2005); *Rodriguez v. Int'l Bus. Machines*, 960 F.Supp. 227, 230 (1997); *Rebel Van Lines v. City of Compton*, 663 F.Supp. 786, 790 (C.D. Cal. 1987). If the City produces such a reason, the burden then shifts back to the Talley to produce substantial evidence that the reason is actually pretextual. *Godwin v. Hunt Wesson, Inc*., 150 F.3d 1217, 1222 (9th Cir. 1998); *Guz,* 24 Cal.4th at 357; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Yanowitz v. L'Oreal USA, Inc.,* 36 Cal.4th 1028, 1042 (2005); *Loggins v. Kaiser Permanente Int'l*, 151 Cal.App.4th 1102, 1109 (2007).

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4. Unclean Hands

The City must show that:

1. Talley did not raise her belief that she had a property interest in her employment at any point during her employment *or* that Talley unreasonably delayed raising this belief;
2. Talley's failure to or delay in raising her belief constituted bad faith or inequitableness;
3. Talley's acts of bad faith or inequitableness directly relates to her claims so as to bar recovery.

Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal.App.4th 620, 638 (1995), *superseded by statute on other grounds,* Cal. Senate Bill No. 1818 (2001) (finding that "one tainted with inequitableness or bad faith relative to the matter in

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which he or she seeks relief, however improper may have been the behavior of the defendant" is barred from recovery if the "misconduct which brings the unclean hands doctrine into operation" relates "directly to the transaction concerning which the complaint is made"); See also *Williams v. Int'l Ass'n of Machinists & Aerospace Workers*, 484 F. Supp. 917, 922 (S.D. Fla. 1978), *aff'd,* 617 F.2d 441 (5th Cir. 1980) (Finding that the plaintiff's failure to complain about the legality of an employment "Agreement and Release" until after an adverse ruling on the question of his seniority status was made by an arbitrator, coupled with the fact that the plaintiff's action was not filed for approximately one-and-a-half years following the signing of the Agreement and Release, indicated "bad faith," a "lack of vigilance, and 'unclean hands' on plaintiff's part to warrant denying the equitable relief of rescinding said agreement").

IV. CONCLUSION

For these reasons, the City respectfully requests that the Court enter judgment in its favor and against Plaintiff.

Dated: September 3, 2016

Respectfully submitted,

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