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Reply to Long Beach Office

LYON LEGAL, P.C.

October 23, 2019

Via Electronic Mail Only
Leon.Page@coco.ocgov.com

Leon Page
County Counsel
County of Orange
P.O. Box 1379
Santa Ana, CA 92702

Re: Melanie Eustice's Claims
Demand for Records and Preservation of Evidence

CONFIDENTIAL PURSUANT TO CAL. EVIDENCE CODE

Mr. Page:

Please be advised our office represents Melanie Eustice in connection with her claims against the the County of Orange ("County") for violation of Labor Code section 1102.5 (Whistleblower Retaliation), and Intentional Infliction of Emotional Distress in connection with her October 18, 2019 termination in retaliation for her complaints concerning illegal activity and for refusing to participate in activities that would result in violations of law.

In addition, Ms. Eustice is investigating potential claims for violation of Labor Code sections 1101 (forbidding employee from becoming a candidate for public office) and 1102 (coercion or threat of discharge for following any particular course or line of political action or political activity). (See October 3, 2019 text messages between Ms. Eustice and Mr. Spitzer.)

Please consider this correspondence as notice to the County of Ms. Eustice's claims and a demand to preserve evidence and produce records pursuant to the laws stated herein.

I. FACTUAL BACKGROUND

Ms. Eustice was hired as Todd Spitzer's Communications Director, Executive Aid in June of 2014. In 2017, Ms. Eustice was promoted to Chief of Staff and in 2019 was hired as the Chief of Administration of Public Affairs (Executive Manager), a position she held until her employment was terminated on October 18, 2019. To directly address the potential claims, Ms. Eustice was terminated in retaliation for her complaints concerning illegal behavior and for refusing to participate in activities that would result in a violations of law.

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Specifically, Mr. Spitzer instructed Ms. Eustice to engage in the following illegal activity:

1. Release a Request for Proposal (“RFP”) to Mr. Spitzer prior to publication so he could share it with a prospective County vendor, Walter Stockman (Pacific Educational Services), in violation of several provisions of the 2018 Contract Policy Manual (“Manual”) that was adopted by the Orange County Board of Supervisors on June 26, 2018 and effective July 1, 2018.
2. Mr. Spitzer demanded that Ms. Eustice produce unredacted documents to the Orange County Register in response to its public records request which contained information protected by Government Code section 6254, subd. (k) (State Bar investigations are confidential) and Government Code section 6254, subd. (c) (invasion of privacy related to personnel and/or similar records).

Ms. Eustice voiced her concerns about these instructions verbally and in texts and emails to attorneys in the District Attorney’s office multiple times including expressing her concerns during an October 17, 2019 Executive Board Meeting (in attendance - Scott Zidbeck, Ebrahim Baytieh, Shawn Nelson and Todd Spitzer). In retaliation for her complaints and refusal to comply with Mr. Spitzer’s instructions, on October 18, 2019 Ms. Eustice was told by Mr. Spitzer “[T]hat’s it, you’re fired. Give me your fucking key and your badge and get the fuck out of here right now.”

A. RFP INSTRUCTION

On October 1, 2019, via text message, Mr. Spitzer asked Ms. Eustice for Walter Stockman’s phone number. On October 15, 2019 during an Executive Board meeting, Ms. Eustice instructed Senior Assistant District Attorney, Scott Zidbeck, to respond to the emails sent on October 15, 2019 requesting any changes or edits to the draft RFP as it would need to be released to the public by Friday, October 18, 2019. On October 17, 2019, Mr. Zidbeck told Ms. Eustice and the Executive Team that he had been invited to attend a meeting with Mr. Spitzer and Mr. Stockman to discuss the RFP but that he did not feel comfortable because the RFP had not yet been released to the public. In this regard, he told Mr. Spitzer (who was attending the meeting via phone) that he would not attend that meeting because it was not ethical.

Once Mr. Spitzer was off the phone, Mr. Shawn Nelson told Ms. Eustice to keep the RFP away from Mr. Spitzer because it was in violation of the Manual. Mr. Zidbeck and Mr. Ebrahim Baytieh (Senior Assistant District Attorney) both concurred with Mr. Nelson’s comments. On October 17, 2019 at 4:37 p.m., Mr. Zidbeck emailed Ms. Eustice stating the RFP looked good and there were no other suggested changes. The RFP was posted on the County website for public bid at 11:30 a.m. on October 18, 2019. On October 18, 2019, Mr. Spitzer sent a text to Ms. Eustice stating “You were supposed to send home the RFP last night and you didn’t after you told me you would that RFP is not going out until I sign off on it.” Ms. Eustice reminded Mr. Spitzer, “[T]here are rules that need to be followed.”

After Ms. Eustice's termination on October 18, 2019, she sent an email to Mr. Spitzer, Kasee Moseley (Administrative Aid), and Shawn Nelson referring Mr. Spitzer to certain provisions of the Manual including sections 1.1-103 (Ethical Statement), 1.1-108 (Specific Duties), 2.1-102 ("Arm's Length" Principle), 2.1-103 (General Standards of Ethical Conduct), 2.1-106 (Use of Confidential Information), 2.1-107 (Purchase of Surplus Material and Equipment), 2.2-102 (Vendor/Contractor Code of Conduct), 4.3-110 (Evaluation Committee), and 4.3-111 (Proposer Interviews). Certain provisions provide that "violation may constitute a misdemeanor, and any employee found in violation shall be subject to discipline, including, in appropriate cases, termination of employment."

Ms. Eustice (and other attorneys in the District Attorney's office) believed that sharing a non-publicized RFP with a prospective vendor was a violation of the Manual because it created an unfair advantage for other potential vendors. Indeed, the Manual was created by the Board of Supervisors in 2018 to stave off the deeply corrupt RFP practices that had previously existed. Ms. Eustice also noticed that Mr. Stockman was scheduled to attend a \$2,000 per ticket fundraiser on October 24, 2019 for Mr. Spitzer's campaign which would create an additional conflict should Mr. Spitzer share the RFP with Mr. Stockman prior to its publication.

B. PRODUCTION OF UNREDACTED RECORDS TO THE ORANGE COUNTY REGISTER

On October 3, 2019, Tony Saavedra, Legal Affairs Writer with the Orange the County Register submitted a public records request seeking certain documents related to attorney fees and costs paid by the County in connection with a certain project. Per protocol, the documents were reviewed by attorneys within the District Attorney's office who were tasked with redacting/removing any confidential, private or privileged information. On October 15, 2019, Ms. Denise Hernandez (Attorney) responded to Mr. Saavedra's PRA stating the County was in possession of responsive records and explained that portions of the records have been redacted pursuant to Government Code section 6254, subd. (k) (State Bar investigations are confidential) and Government Code section 6254, subd. (c) (invasion of privacy related to personnel and/or similar records).

On October 18, 2019, Mr. Spitzer forwarded a voicemail to Ms. Eustice from Mr. Saavedra complaining that the County had not produced all the documents that respond to the question concerning the discrepancy between the invoice statements and the Board of Supervisors documents. Mr. Spitzer instructed Ms. Eustice via text to "Call Saavedra and clear up his questions." On October 17, 2019, Ms. Eustice conducted an internal review of the records request including reviewing the 72 pages of responsive documents. Ms. Eustice confirmed and stated in an email to Mr. Spitzer that "[A]ll supporting financial documents related to these expenditures were submitted to Specials in response to a PRA inquiry from Tony Saavedra" and "it appears that no documents were provided in the PRA responsive documents in the amounts of \$2,461.20 and \$3,469.80" because they were omitted by attorney Hernandez pursuant to the Government Code sections cited in her October 15, 2019 letter. On October 18, 2019, Mr.

Spitzer sent a text to Ms. Eustice ordering her to contact Mr. Saavedra and “walk him through the differences and dollar amounts and explain why he cannot reconcile then let’s stop playing games here.” Ms. Eustice responded “[T]here are rules that need to be followed.”

C. MS. EUSTICE’S TERMINATION

Four minutes later, Mr. Spitzer pounded on Ms. Eustice’s office door, entered, slammed the door behind him, and charged at her in an aggressive fashion with his finger pointing at her face. He proceeded to scream at Ms. Eustice “You give me that RFP and you get on that fucking phone right now and you tell Tony Saavedra what he wants to know.” Ms. Eustice responded that she needed to discuss the legality of these actions. Mr. Spitzer then stated “That’s it, you’re fired. Give me your fucking key and your badge and get the fuck out of here right now.” Mr. Eustice stated “[Y]ou’re asking me to do something illegal and you should know that as an attorney.”

Ms. Eustice gathered her personal belongings and exited the building. On Saturday, October 19, 2019, at 4:28 p.m., Ms. Eustice sent a text to Mr. Spitzer seeking to know when she could return to pick up her additional personal belongings and her last paycheck. Mr. Spitzer did not respond. On Monday, October 21, 2019 Ms. Eustice sent an email to Human Resources, Mr. Spitzer, and Mr. Nelson confirming her October 18, 2019 again requesting when she can pick up her belongings and final paycheck. Human Resources employee, Nhi Manarang, responded that same morning instructing Ms. Eustice that her personal belongings will be packed and she will let her know as soon as they are available for pickup. Ms. Manarang also stated “[H]R will be able to process your separation action on 10/30, after Payroll has run for this pay period. You will receive your regular paycheck for this pay period via direct deposit 11/1. Your final payout takes about 1-2 pay periods for Payroll to process, so it should be paid out to you via direct deposit by 11/27.”

On Monday, October 21, 2019 at 5:53 p.m. Mr. Leon Page attempted to contact Ms. Eustice via telephone. He followed up with a text at 5:59 stating “I hope you’re doing well. Shawn gave me some of the details that happened but I can’t tell what was actually said or intended between you and Todd. Even if Todd did not intend to actually terminate your employment, would you prefer to resign and get the same 3-month severance in exchange for a waiver and general release.” On October 22, 2019 at 6:16 a.m. Mr. Page emailed Ms. Eustice regarding the proposed severance. Ms. Eustice responded immediately thereafter requesting 6 months of severance including medical, a positive employment verification, and no lifetime ban on working for the County¹. Mr. Page did not respond. At 7:19 a.m. Mr. Spitzer sent a nonsensical email to Ms. Eustice referencing her alleged comment to him “[O]h yeah, Mr. Attorney Smarty Pants, you are breaking the law” in response his request to send over the RFP. On October 23, 2019 at 12:02 Mr. Page emailed Ms. Eustice falsely stating he had been unable to connect with Ms. Eustice and also declaring for the first time that that District Attorney had

¹ This offer is hereby withdrawn.

not terminated her employment (despite the fact that she was told on October 18, 2019 that she's fucking fired).

D. LEGAL SUMMARY

California Labor Code section 1102.5, subdivision (b) provides whistleblower protection to employees who disclose information to those with authority over the employee if the employee has a reasonable cause to believe that the information discloses are violation of or noncompliance with a local, state or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. (Ca. Lab. Code § 1102.5, subd. (b).) In addition, subdivision (c) provides that "[A]n employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." (Ca. Lab. Code § 1102.5, subd. (c).)

Ms. Eustice has endured an abusive work environment in Mr. Spitzer's office including angry outbursts, emotional abuse, bullying, shamming, and control tactics. When Mr. Spitzer could not compel Ms. Eustice to do his bidding in connection with the RFP and PRA, he erupted in a fit of rage charging at her and screaming "get the fuck out of here."

II. DEMAND FOR PRESERVATION OF EVIDENCE: LITIGATION HOLD

Having received this notice, the County is now obligated to preserve any information and evidence that may be related to this case. We hereby demand the County and anyone working on its behalf not to destroy, conceal, or alter any such hard copy or electronic information in any way. The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2001).

Failure to preserve evidence will leave the County open to the presumption that there was actually "destruction in anticipation of a discovery request. The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party." *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal.4th 1, 12 (1998).

Destruction of evidence carries serious consequences for the County's attorneys as well. "As a practical matter, modern civil discovery statutes encourage a lawyer to marshal and take charge of the client's evidence, most often at an early stage of the litigation. In doing so, a lawyer customarily instructs the client to preserve and maintain any potentially relevant evidence, not only because it is right for the client to do so but also because the lawyer recognizes that, even if

the evidence is unfavorable, the negative inferences that would flow from its intentional destruction are likely to harm the client as much as or more than the evidence itself. In addition, the risk that a client's act of spoliation may suggest that the lawyer was also somehow involved encourages lawyers to take steps to protect against the spoliation of evidence. Lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence." *Id.* at 13.

As indicated above, spoliation of evidence may result in evidentiary sanctions, monetary sanctions, or tort claims, judgment as a matter of law, and an award of our attorney's fees. We have an expectation of reviewing certain documents that Ms. Eustice knows exist and that would normally be created and retained by an employer like the County; should those documents be unavailable, we will seek an audit of the document retention and production process for deletion or other impropriety.

Please confirm in writing that you have taken the steps outlined in this letter to preserve the evidence in this case.

III. DEMAND FOR PRODUCTION OF DOCUMENTS PURSUANT TO CODE

We hereby demand that the County produce documents according to the following laws.

A. LABOR CODE § 226

Labor Code § 226 provides that an employer must provide all wage and hour information to former employees within 21 days of the request. The records required are:

an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or his social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer ... and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee Labor Code§ 226(a).

We hereby request all documents regarding Ms. Eustice's gross wages, total hours worked, time records, records of all types of deductions, hourly rates, and other information as described above.

Access to applicable documents must be granted no later than twenty-one (21) calendar days from the date of this request. Failure to provide such records within the twenty-one-day period will result in monetary penalties, costs, and attorneys' fees, including injunctive relief pursuant to Labor Code § 226(h).

B. LABOR CODE § 1198.5

Labor Code § 1198.5 requires employers to provide "a copy of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee" within 30 days of the written request.

We hereby request a copy of all of Ms. Eustice's personnel records (including Ms. Eustice's employment contract). This includes, but is not limited to, any and all applications for employment, payroll authorization forms, notices of commendation, warning, or discipline, notices of layoff, leaves of absence, and vacation, notices of wage attachment or garnishment, education and training notices and records, performance appraisals, reviews, or discipline, and attendance records, as well as investigation documents of any kind.

IV. CLOSING DEMAND

Through me, Ms. Eustice is interested in the negotiation of a severance in exchange for the execution of a release and severance agreement prior to the filing of her 910 claim and ultimately a lawsuit. If this is of interest to the County, please contact my office by Friday, October 25, 2019 or we will proceed with the exhaustion of her claim by filing a 910-claim form with the County. Feel free to call my cell phone at 310-704-7901 or email (d.lyon@lyon-legal.com) me if you need to speak after hours.

Thank you.

REGARDS,

LYON LEGAL, P.C.



DEVON M. LYON, ESQ.