

DOLEZAL V. FORSTER, COUNTY OF AMADOR

Case No. 20-CVC-11921

Demurrer to First Amended Complaint, filed by Defendant County of Amador, set for hearing on 5/18/22. 8:30AM via ZOOM

THE FOLLOWING TENTATIVE RULING IS ISSUED BY JUDGE JUDITH S. CRADDICK, ASSIGNED FOR ALL PURPOSES

Defendant County of Amador's request for judicial notice is not objected to by Plaintiff and is, therefore, granted.

Defendant County of Amador demurs to the First and Third Causes of Action of Plaintiff's First Amended Complaint on the grounds that they fail to state allegations sufficient to constitute a cause of action against it.

The Court rules as follows:

1. **FIRST CAUSE OF ACTION - LIBEL:** Vicarious liability of County of Amador for action of Defendant Forster, Member of its Board of Supervisors. Sustained without leave to amend for failure to state a valid cause of action necessary to establish vicarious liability against County of Amador for the acts of Defendant Forster.
2. **THIRD CAUSE OF ACTION- NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:** Vicarious liability of County of Amador for action of Defendant Forster, Member of its Board of Supervisors. Sustained without leave to amend, for failure to state a valid cause of action for negligent infliction of emotional distress for acts of Defendant Forster.

Plaintiff Matt Dolezal's First Amended Complaint alleges 2 causes of action against Defendant County of Amador. The First Cause of Action for libel and Third Cause of Action for negligent infliction of emotional distress are alleged against Defendant County of Amador based on vicarious liability for acts of its Board of Supervisor member, Co-Defendant Richard Forster "who was employed by or who otherwise represents Defendant County of Amador, whose actions were committed while in the course and scope of his position as an Amador County Supervisor... acting within the course and scope of such agency and with the permission, consent, knowledge and ratification of County of Amador." No facts are stated to expand on or explain how or why the "actions" were committed within the course and scope or that they were committed with the permission, consent knowledge and ratification of County of Amador. The complaint further alleges that the case arises out of Defendant Forster's attempts at retaliation for a recall petition which Plaintiff Matt Dolezal (and his wife, Dana Calhoun - not a party to this case) filed against Defendant Richard Forster, Amador County District 2 Supervisor, in July 2019. Plaintiff's wife then ran against Defendant Forster in the 2020 local election.

Underlying bases for both causes of action alleged by Plaintiff are:

(1) Facebook post: During the time of the recall, a public Facebook page was created entitled "Recall District 2 Supervisor Amador County". In late 2019, Forster posted a comment to that Facebook page relating to Ms. Calhoun and the recall campaign and also stated "Matt (Dolezal) is doing things that are getting him in trouble because of his code of conduct as a Lone Fireman.

(2) Lancaster Email: On or about January 20, 2020, all members of the Amador County Board of Supervisors, including Forster, received an email from "Robert Lancaster". The Lancaster email claimed that the weekend prior, Ms. Calhoun held a campaign event at the American Legion Hall and that Dolezal "was there on duty, wearing his uniform and driving lone Fire Department Equipment trying to gather support for his wife". The email continued "I am a tax payer in Amador County...this is not what I pay taxes for", concluding, "I understand this is out of your control however, this is your employee...I appreciate your time and attention to this matter and I would hope we don't see this in the future."

(3) Mackey Text: On the same date that the Lancaster email was received, Forster sent a text message to Ken Mackey, the Fire Chief of the City of lone (and Dolezal's employer). In that message Forster informed Mackey of the email and stated "I'm just giving you a heads up...I would expect there to be a full investigation...please don't let Jon Hanken ignore and sweep it under the rug." Forster contacted the Amador County Assessor to investigate the identity of "Robert Lancaster" and no such person could be found. Forster texted Ken Mackey again on that same date and informed Mackey that a "Robert Lancaster" could not be found and that it was determined that Ms. Calhoun did not hold a campaign event at the American Legion Hall the weekend prior.

(4) Rotary Club Meeting: Subsequent to the Lancaster Email, Forster attended a Rotary Club meeting with Jackson Fire Chief Debbie Mackey in which he again pursued the issue of having Dolezal terminated from his employment. Debbie Mackey raised the issue of the Lancaster Email and Forster stated "they can't prove who it was Google email is anonymous!"

(5) Statements to Mackey and Finch: Between August 2019 and February 2020, Forster approached Ken Mackey and Rich Finch of Finch's Towing and Auto Body in an effort to have Dolezal terminated from his public and private employment. Also, while on paid leave, Forster approached a group of people, which included Mackey, and said loudly "Good job for firing Matt!"

The Demurrer of Defendant County of Amador to the First and Third Causes of Action of the First Amended Complaint is sustained without leave to amend. Plaintiff's Opposition to the Demurrer failed to address the threshold legal question present in each cause of action with facts rather than conclusions, i.e. whether Defendant Forster, an elected official of Defendant County of Amador who is campaigning for re-election, was acting for and on behalf of the County in the course and scope of his employment while campaigning for re-election - or whether his actions

were those of an individual while campaigning, who happened to be a Member of the County Board of Supervisors. Unless a specific statute otherwise imposes liability, a public entity (like any employer) bears no liability for its employee's/official's acts and omissions unless committed in the scope of their employment. See Govt. Code 815, 815.2, 815.3. Moreover, as the Court pointed out in *Farmers v. County of Santa Clara* (1995) 11 Cal.4th 992 "Vicarious liability is deemed inappropriate where the misconduct does not arise from the conduct of the employer's enterprise but instead arises out of a personal dispute."

In reality, whether Plaintiff in this case could state additional facts to successfully plead vicarious liability on the part of Defendant County or not makes essentially little difference in the final analysis, as do the issues of whether the statements were of opinion or fact, true or false, written or spoken, whether campaign-related and outside the scope of the official's duties and other arguments which might be made, because the "official duty privilege" of Civil Code 47(a) and 47(b) is broadly construed as absolute and encompasses and **bars all tort liability**, specifically defamation, whether or not Defendant Forster was acting within or outside his official duties, or even whether there was malice or subterfuge, making the issue of vicarious liability of Defendant County of Amador **moot**. Also, it is unnecessary for the Court to determine whether or not the Government Claims statute was fully complied with relating to libel and/or slander pursuant to Civil Code 45 or 46. For the reasons stated herein and in Defendant County's Memorandum of Points and Authorities in Support of the Demurrer and Reply to Plaintiff's Opposition to the Demurrer, the First Cause of Action as to Defendant County of Amador fails to state a valid cause of action to impose vicarious liability relating to written and/or oral statements or other actions of Co-Defendant Forster and is, therefore, sustained **without leave** to amend.

As to the Third Cause of Action-Negligent Infliction of Emotional Distress, it has long since been California law that emotional distress damages cannot be recovered on a negligence theory except in two specific situations - bystander or direct victim - neither of which exists in this case. See *Marlene P. v. Affiliated Psychiatric Medical Clinic* (1989) 48 Cal.3d 583; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064. Moreover, Defendant County of Amador cannot as a matter of law be found vicariously liable for the acts of Defendant Forster for the reasons stated above relating to the First Cause of Action. The Demurrer to the Third Cause of Action as to Defendant County of Amador fails to state a valid cause of action and is sustained **without leave** to amend.

Plaintiff's request for leave to amend is denied. In what appears almost as an afterthought, Plaintiff states in his opposition to the Demurrer: "Should the Court be inclined to grant the demurrer, then leave to amend must be granted to remedy any pleading deficiencies identified by the Court." In fact, it is the Plaintiffs burden to show in what manner the complaint could be amended to state a cause of action -- the legal basis for the amendment, as well as the allegations (which must be factual and specific, not vague or conclusory) and clearly and unambiguously set forth all facts sufficient to show that the defect can be cured to state a cause of action. *PGA West*

Residential Assn v. Hulven Int'l. (2017) 14 Cal.App.5th 156; *Graham v. Bank of America* (2014) 226 Cal.App.4th 594; *Friends of Shingle Springs v. County of El Dorado* (2011) 200 Cal.App.4th 1470. As here, a Plaintiff does not meet his burden by merely stating in the opposition to the Defendant's Demurrer that "if the Court finds the complaint deficient, Plaintiff respectfully requests leave to amend...." In *Stein v. Axis Ins. Co.* (2017) 10 Cal.App.5th 673, the Court held that the judge properly denied leave to amend when plaintiffs offered no amended complaint to cure the defects pointed out in the Demurrer.

In making the rulings herein, the Court has considered whether or not Plaintiff should be given leave to amend despite his lack of demonstrating the how, what or why amendment should be granted. Since the rulings herein are based on established legal principles, as a matter of law, no amendment could negate those principles to change the legal effect of the complaint.

Unless a hearing is requested, this ruling is effective immediately. Neither further notice of the ruling nor a formal order per CRC 3.1312 is required.