

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

Tentative Ruling

Plaintiff Judith Blackwell's ("Plaintiff") motion for summary adjudication against the affirmative defenses asserted by defendant State Treasurer's Office ("STO") is DENIED.

STO's request for judicial notice of documents filed in this action is granted.

Objections to Evidence

STO's objection to the Declaration of Waukeen McCoy is overruled.

The Court does not rule upon STO's objections to the Declaration of Judith Blackwell because the objections concern evidence deemed immaterial to decision on the motion. (Code Civ. Proc., § 437c, subd. (q).)

Factual and Procedural Background

Plaintiff brings this employment discrimination action against STO and Fiona Ma ("Ma") (collectively, "Defendants"). In the operative third amended complaint ("3AC"), Plaintiff alleges causes of action under the Fair Employment and Housing Act ("FEHA") for (1) sexual harassment, (2) racial discrimination, (3) disability discrimination, and (4) retaliation. Plaintiff also alleges an additional cause of action for intentional infliction of emotional distress ("IIED"). The Court previously sustained, without leave to amend, STO's demurrer to Plaintiff's fifth cause of action for retaliation under Labor Code section 1102.5.

On September 14, 2023, the Court granted STO's motion for summary adjudication as to Plaintiff's second, third, and fourth causes of action. The only remaining causes of action against the STO are Plaintiff's sexual harassment and IIED claims.

On May 17, 2023, STO filed its Answer to the 3AC. Plaintiff seeks adjudication of all of STO's 29 affirmative defenses, except numbers 11 and 20. Plaintiff's moves on the basis that either the defense is not well pled and consists of only legal conclusions, is not a recognized affirmative defense under the law, or is immaterial. As to STO's eighth affirmative defense for failure to follow policies regarding complaints, Plaintiff also contends STO refused to turn over the attorney led investigation into Plaintiff's claims during discovery, so the defense must be dismissed. As to STO's fourteenth affirmative defense for failure to mitigate, Plaintiff also contends there were no substantially equivalent jobs available.

Plaintiff's notice of motion states the motion is based on "this notice of motion; the statement of undisputed material facts filed in support thereof; the memorandum of points and authorities filed in support thereof; the separate statement of undisputed material facts filed in support thereof; the declaration of Waukeen McCoy in support of Plaintiff's motion for summary

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

adjudication; the declaration of Judith Blackwell in support of Plaintiff's motion for summary adjudication; and Plaintiffs request for judicial notice." (Notice of Motion filed July 14, 2023.) While Plaintiff filed a declaration of Judith Blackwell in support of Plaintiff's motion for summary adjudication to Defendant Fiona Ma's affirmative defenses (set to be heard on November 15, 2023), Plaintiff did not file a declaration of Judith Blackwell in support of this motion or a request for judicial notice. This error is noted in the opposition and is not addressed by Plaintiff in her reply.

Legal Standard

The Court must grant a motion for summary judgment or summary adjudication if all the papers submitted show that there is no triable issues as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. § 437c(c); *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35.) Section 437c(c) imposes an affirmative duty on a court to grant a summary judgment motion in an appropriate case. (*Preach v. Moister Rainbow* (1993) 12 Cal.App.4th 1441, 1450.) The Court must decide if a triable issue of fact exists; if none does, and the sole remaining issue is one of law, the court has a duty to determine it. (*Pittelman v. Pearce* (1992) 6 Cal.App.4th 1436, 1441; see also *Seibert Sec. Servs., Inc. v. Superior Court* (1993) 18 Cal.App.4th 394, 404

A plaintiff may move for summary judgment or adjudication if he or she contends that one or more affirmative defenses have no merit. (Code Civ. Proc. § 437c(f)(1).) The plaintiff bears the burden to show there is no triable issue of material fact as to the defense and that she is entitled to summary judgment as a matter of law. (See *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 900.) The burden is met if the plaintiff either negates an essential element of the defense or establishes that the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. (*Id.*, see *Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 119-120.)

Affirmative Defenses 1-7, 9-10, 12-13, 16-18, and 21-29 - DENIED

In support of summary adjudication of STO's affirmative defenses numbers 1-7, 9-10, 12-13, 16-18, and 21-29, Plaintiff presents a single material "fact" stating the "affirmative defense is not well pled and consist of only legal conclusions." The foregoing is not a material fact, but rather a legal argument. Further, Plaintiff's supporting evidence is the Declaration of Waukeen McCoy and the attached Exhibit A, which is STO's Answer.

Plaintiff argues affirmative defenses that merely consist of legal conclusions rather than specific facts "are not well pled and cannot survive demurrer." (Memorandum of Points and Authorities at 1:5-8.) This is not a demurrer. On this motion for summary adjudication, Plaintiff bears the initial burden to show there is no triable issue of material fact as to the defense and that she is

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

entitled to judgment on the defense as a matter of law. In so doing, Plaintiff must negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. (*See's Candy Shops, Inc. v. Sup. Ct. (Silva)* (2012) 210 Cal.App.4th 889, 890; Code Civ. Proc., § 437c, subd. (f).) Plaintiff's evidence in support, which consists only of STO's Answer, fails to meet this burden as it does not negate an essential element of the defense or establish STO cannot reasonably obtain evidence needed to support the defense.

On reply, Plaintiff cites to *Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, as support that a moving plaintiff can meet the initial burden by demonstrating an answer is defective in failing to identify a defense thereto. *Sadlier* does not support the foregoing proposition. Instead, *Sadlier* considered whether a motion for summary judgment could be considered before the defendant had filed an answer. The *Sadlier* court found it could be. The Court is not persuaded Plaintiff can merely cite to a defendant's answer to demonstrate a defect warranting summary judgment.

The Court finds Plaintiff failed to meet her initial burden. Thus, the burden never shifted to STO to create a triable issue of material fact.

Plaintiff's motion for summary adjudication as to STO's affirmative defenses numbers 1-7, 9-10, 12-13, 16-18, and 21-29 is DENIED.

Affirmative Defenses 15, 19, and 21 - DENIED

Plaintiff contends STO's affirmative defenses numbers 15, 19, and 21 are not well pled and consist only of legal conclusions. In support, Plaintiff presents two material facts that consist of STO's Answer and STO's November 16, 2021, response to Plaintiff's Form Interrogatory (Employment Law) number 216.1). Form Interrogatory number 216.1 asked STO to identify all facts, witnesses, and documents supporting its affirmative defenses. STO responded "Defendant is continuing its investigation and discovery process of the allegations contained in plaintiff's complaint and at this time has a good faith belief that all of the defenses contained in its answer to plaintiff's Complaint for Damages are potentially viable defenses to this action. This belief is based on information and analysis conducted solely at the direction of attorneys acting on behalf of defendant and/or in anticipation of litigation and, as such, the information is protected by the attorney work product doctrine." (McCoy Decl. ¶ 3, Ex. B.) Plaintiff also cites to Mr. McCoy's declaration that "[d]uring discovery Defendant did not amend its discovery responses to provide facts supporting its Affirmative Defenses." (McCoy Decl. ¶ 4.)

STO's Answer and response to Form Interrogatory number 216.1 does not establish STO cannot reasonably obtain evidence needed to support the affirmative defenses. When Plaintiff served the Employment Law Form Interrogatories, the operative complaint was the First Amended Complaint. As such, the interrogatories related to the basis for the affirmative defenses raised in STO's Answer to the First Amended Complaint. After STO served those responses, Plaintiff

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

filed a Second Amended Complaint and ultimately the operative 3AC, which required STO to file new responsive pleadings. After two demurrers, STO filed its operative Answer on May 17, 2023, which had 29 affirmative defenses, six more than STO's Answer to the First Amended Complaint. Plaintiff never served STO with discovery requests asking STO to disclose the factual basis for the affirmative defenses asserted in its operative Answer. (Mills Decl. ¶ 2.) Accordingly, Plaintiff lacks evidence to support her claim that these affirmative defenses lack factual support. Moreover, there is no duty to update or amend the answers, either to correct errors or to include new information discovered later. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315,1328.) The Court finds Plaintiff failed to meet her initial burden. Thus, the burden never shifted to STO to create a triable issue of material fact.

The Court notes Plaintiff included affirmative defense number 21 in two separate places in her separate statement. Either way, Plaintiff has failed to meet her burden with regard to this affirmative defense.

Plaintiff's motion for summary adjudication as to STO's affirmative defenses numbers 15, 19, and 21 is DENIED.

Affirmative Defense 8 - DENIED

Plaintiff contends STO's affirmative defense for failure to follow policies regarding complaint is not well pled and consists of only legal conclusions, and fails because STO refused to turn over the attorney led investigation into Plaintiff's claims during discovery. Plaintiff presents the same two material facts as addressed above. For the same reasons discussed above, this evidence is insufficient for Plaintiff to meet her initial burden. Plaintiff's motion for summary adjudication as to STO's affirmative defense number 8 is DENIED.

Affirmative Defense 14 - DENIED

Plaintiff contends STO's affirmative defense for failure to mitigate is not well pled and consists of only legal conclusions, and fails because there were no substantially equivalent jobs available at the time which Plaintiff could have obtained. Plaintiff presents the same two material facts as addressed above, plus one additional fact that there were no substantially equivalent jobs. For the same reasons discussed above, STO's Answer and its discovery responses from November of 2021 are insufficient for Plaintiff to meet her initial burden.

As to the third material fact, Plaintiff relies on the missing Declaration of Judith Blackwell. Despite this filing omission, even if the Court considered Ms. Blackwell's declaration submitted in support of her motion for summary adjudication of defendant Fiona Ma's affirmative defenses, the evidence is inadequate. In the declaration Ms. Blackwell simply states, without any other supporting evidence, that "[a]fter being terminated there were no substantially equivalent jobs available at the time which I could have obtained." Plaintiff's conclusion does not establish

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

that STO cannot obtain evidence to the contrary or that Plaintiff failed to sufficiently mitigate her damages, including by failing to conduct an adequate job search.

Plaintiff has failed to meet her initial burden. Thus, the burden never shifted to STO to create a triable issue of material fact. Plaintiff's motion for summary adjudication as to STO's affirmative defenses number 14 is DENIED.

Conclusion

Plaintiff's motion for summary adjudication as to STO's affirmative defenses is DENIED in its entirety.

The minute order is effective immediately. No formal order pursuant to California Rules of Court, Rule 3.1312, or further notice is required.

**NOTICE:**

Consistent with Local Rule 1.06(B), any party requesting oral argument on any matter on this calendar must comply with the following procedure:

To request limited oral argument, on any matter on this calendar, you must call the Law and Motion Oral Argument Request Line at (916) 874-2615 by 4:00 p.m. the Court day before the hearing and advise opposing counsel. At the time of requesting oral argument, the requesting party shall leave a voice mail message: a) identifying themselves as the party requesting oral argument; b) indicating the specific matter/motion for which they are requesting oral argument; and c) confirming that it has notified the opposing party of its intention to appear and that opposing party may appear via Zoom using the Zoom link and Meeting ID indicated below. If no request for oral argument is made, the tentative ruling becomes the final order of the Court.

Unless ordered to appear in person by the Court, parties may appear remotely either telephonically or by video conference via the Zoom video/audio conference platform with notice to the Court and all other parties in accordance with Code of Civil Procedure 367.75. Although remote participation is not required, the Court will presume all parties are appearing remotely for non-evidentiary civil hearings. The Department 53/54 Zoom Link is <https://saccourt-ca-gov.zoomgov.com/my/sscdept53.54> and the Zoom Meeting ID is 161 4650 6749. To appear on Zoom telephonically, call (833) 568-8864 and enter the Zoom Meeting ID referenced above. NO COURTCALL APPEARANCES WILL BE ACCEPTED.

Parties requesting services of a court reporter will need to arrange for private court reporter services at their own expense, pursuant to Government code §68086 and California Rules of Court, Rule 2.956. Requirements for requesting a court reporter are listed in the Policy for Official Reporter Pro Tempore available on the Sacramento Superior Court website at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-6a.pdf>. Parties may contact Court-Approved Official Reporters Pro Tempore by utilizing the list of Court Approved Official Reporters Pro Tempore available at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-13.Pdf>

A Stipulation and Appointment of Official Reporter Pro Tempore (CV/E-206) is required to be signed by each party, the private court reporter, and the Judge prior to the hearing, if not using a reporter from the Court's Approved Official Reporter Pro Tempore list.

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

**34-2021-00304120-CU-CR-GDS: Judith Blackwell vs. Fiona Ma  
10/05/2023 Hearing on Motion for Summary Adjudication in Department 54**

Once the form is signed it must be filed with the clerk. If a litigant has been granted a fee waiver and requests a court reporter, the party must submit a Request for Court Reporter by a Party with a Fee Waiver (CV/E-211) and it must be filed with the clerk at least 10 days prior to the hearing or at the time the proceeding is scheduled if less than 10 days away. Once approved, the clerk will be forward the form to the Court Reporter's Office and an official reporter will be provided.