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8
9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In re
13 PACIFIC GAS and ELECTRIC
COMPANY, a California corporation,
14 Debtor.

Case No. 01-30923 DM

Chapter 11 Case

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEBTOR'S MOTION FOR
VALUATION OF CLAIM FOR
FEASIBILITY PURPOSES (SAMUEL
ANDERSON, CLAIM NO. 178)

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18 Federal I.D. No. 94-0742640
19
20

Date: October 2, 2002
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

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1 INTRODUCTION AND SUMMARY OF CLAIM

2 Samuel Anderson (Anderson) alleges in his Proof of Claim (the "Claim") that
3 Pacific Gas & Electric Company ("PG&E" or the "Debtor") owes him \$10 million,
4 purportedly for "wrongful termination." Anderson's Claim is meritless, however, for the
5 simple reason that he was never an employee of PG&E, and therefore cannot state a claim
6 for wrongful termination.

7 Attached to the Claim is a copy of Anderson's First Amended Complaint in a
8 lawsuit he filed against PG&E and his actual employer, Corestaff Services, Inc.
9 ("Corestaff"), in which he alleges a myriad of tort and statutory claims. To the extent the
10 Claim is premised on the lawsuit, it is meritless. Anderson's lawsuit is based primarily on
11 allegations of wrongful termination and sexual harassment against Corestaff, and allegations
12 that Corestaff "defrauded" PG&E through abuse of PG&E's minority vendor program. His
13 claims against PG&E are that PG&E, the asserted victim of the alleged fraud, failed to
14 investigate the alleged fraud and his claims for alleged sexual harassment against his
15 Corestaff supervisors.

16 Anderson's allegations are meritless and subject to numerous defenses as a matter
17 of law. Even if PG&E were held liable under any of Anderson's cockeyed theories,
18 Corestaff has agreed to fully indemnify and defend PG&E, without reservation. This claim,
19 therefore, may safely be valued at zero for feasibility purposes.

20
21 STATEMENT OF FACTS

22 Anderson filed the Claim on June 8, 2001. The basis for the Claim is "wrongful
23 termination," and the amount claimed is \$10 million. Declaration of Deborah S. Shefler
24 ("Shefler Decl.") ¶2 & Ex. A.

25 Prior to filing the Claim, and before PG&E filed its petition for bankruptcy
26 protection on April 6, 2001, Anderson filed suit against Corestaff, three Corestaff employees
27 and PG&E. In his First Amended Complaint, filed in San Francisco Superior Court on April
28 26, 1999, Anderson alleged that he was an employee of Corestaff, not PG&E. Shefler Decl.

1 ¶3 & Ex. B ¶1. He then went on to allege that Corestaff wrongfully terminated him for
2 complaining that Corestaff was defrauding PG&E. He also claimed that Corestaff personnel
3 sexually harassed him by showing him an offensive picture, and discriminated against him
4 on the basis of his gender. Id. Ex. B ¶10(e)-(f). Corestaff was a PG&E vendor, hired to
5 coordinate and administer PG&E's minority vendor program. Id. Ex. B ¶1.¹ Anderson was
6 a Corestaff employee, performing work solely for Corestaff. Id. Ex. B ¶¶1, 9.

7 Anderson's complaint includes four causes of action against PG&E: (1)
8 intentional infliction of emotional distress; (2) fraud and concealment; 3) negligent
9 supervision and negligence per se; and (4) violation of California Administrative Code
10 Section 7287. Id. Ex. B. The gist of Anderson's claims against PG&E are that PG&E did
11 not adequately investigate his charges that Corestaff was defrauding PG&E, and that PG&E
12 failed to take action when he allegedly informed it that he was offended by a picture shown
13 to him by his Corestaff supervisor. Id.

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15 ARGUMENT

16 The Claim is meritless for three reasons. First, even if Anderson were to recover
17 against PG&E in his lawsuit (which he will not), PG&E would not be required to pay any
18 such damage award because Corestaff has agreed to fully indemnify and defend PG&E,
19 without reservation. Second, Anderson was not an employee of PG&E, so PG&E could
20 never be liable to him for wrongful termination. Finally, as we explain in more detail below,
21 Anderson's causes of action against PG&E are fatally flawed and subject to dismissal as a
22 matter of law on several grounds. For all of these reasons, the Claim should be valued at
23 zero.

24
25
26 ¹Anderson alleges that Corestaff was in charge of coordinating the minority vendor
27 program, but that is not the case. Corestaff was hired to coordinate and administer PG&E's
28 staff augmentation program, and was required to meet certain expectations regarding
subcontracting with minority vendors. PG&E coordinates its minority vendor program
internally.

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I.

PG&E WILL NOT BE LIABLE FOR ANY DAMAGES
RECOVERED BY ANDERSON BECAUSE ITS VENDOR
CORESTAFF HAS AGREED TO FULLY INDEMNIFY AND
DEFEND PG&E IN THE ANDERSON LITIGATION.

As we describe in detail below, Anderson's claims against PG&E are frivolous. Even so, PG&E would not be required to pay any damages, in the unlikely event they were ever awarded to Anderson, because its co-defendant Corestaff has agreed to fully indemnify and defend PG&E, without reservation, in the litigation brought by Anderson. Shefler Decl. ¶4 & Ex. C. For this reason alone, it is appropriate for the Court to value Anderson's claim at zero for feasibility purposes.

II.

ANDERSON CANNOT SUSTAIN A CLAIM FOR WRONGFUL
TERMINATION AGAINST PG&E BECAUSE HE WAS NOT A
PG&E EMPLOYEE.

The Claim alleges only that Anderson seeks \$10 million from PG&E for "wrongful termination." Anderson's civil complaint, however, does not appear to contain any allegation that PG&E is liable for wrongful termination of his employment, and the Claim fails to state any basis to establish such a claim against PG&E in any amount. See 11 U.S.C. §502(b)(1) (providing for disallowance of claims that are unenforceable under any agreement or applicable law). That is because in order to state a claim for wrongful termination a plaintiff must have had an employment relationship with the defendant. See, e.g., Sistare-Meyer v. YMCA, 58 Cal. App. 4th 10, 14 (1997) (independent contractors cannot assert claim for wrongful termination in violation of public policy); Harris v. Atlantic Richfield Co., 14 Cal. App. 4th 70, 73-77 (1993) (tort action for wrongful discharge in violation of public policy does not exist outside the employment relationship); Abrahamson v. NME Hosps., Inc., 195 Cal. App. 3d 1325, 1329-30 (1987) (independent contractor could not maintain cause of action for wrongful termination in violation of public policy); Premier Wine & Spirits v. E. & J. Gallo Winery, 846 F.2d 537, 540 (9th Cir. 1988) (same) (applying

1 California law); Robinson v. Ladd Furniture, Inc., 872 F. Supp. 248, 252-53 (M.D.N.C.
2 1994) (claim for wrongful termination in violation of public policy “is only recognized in the
3 employee/employer context”) (applying California law).

4 In his complaint filed with the San Francisco Superior Court Anderson admits
5 that he was an employee of Corestaff, not PG&E. Shefler Decl. ¶3 & Ex. B ¶1. Since he
6 was not an employee of PG&E, he cannot state a claim for wrongful termination.

7
8 III.

9 PG&E IS NOT LIABLE FOR SEXUAL HARASSMENT BECAUSE
10 THE CONDUCT COMPLAINED OF BY ANDERSON IS NOT
11 ACTIONABLE SEXUAL HARASSMENT, AND EVEN IF IT WAS,
12 ANDERSON FAILED TO EXHAUST HIS ADMINISTRATIVE
13 REMEDIES.

14 Anderson appears to allege in his lawsuit that PG&E sexually harassed him, in
15 violation of California Administrative Code Section 7287.² As a threshold matter, it should
16 be noted that Anderson’s claim under Section 7287 is tantamount to a claim for sexual
17 harassment under the California Fair Employment and Housing Act, set forth in California
18 Government Code Section 12900 et seq. (“FEHA”). Section 7287, which is now known as
19 California Code of Regulation Section 7287, is an implementing regulation of FEHA (Cal.
20 Gov’t Code §12935), and does not, and cannot, provide separate grounds for liability from
21 its implementing statute.

22 Anderson cannot state a claim against PG&E for three reasons: (1) he has failed
23 to exhaust his administrative remedies; (2) PG&E’s employees did not harass Anderson; and
24 (3) the conduct Anderson complains about is not actionable sexual harassment.

25
26 _____
27 ²This allegation appears in Anderson’s ninth cause of action. He does not allege in his
28 seventh cause of action, however, that PG&E harassed him in violation of California
Government Code Section 12940, nor does he allege any specific conduct by any PG&E
employee that constituted harassment.

1 A. Anderson Failed to Exhaust His Administrative Remedies.

2 Before a plaintiff can bring a complaint for alleged violations of FEHA, he or she
3 must first file a charge with the California Department of Fair Employment and Housing
4 within one year of the alleged discriminatory or harassing conduct. Cal. Gov't Code
5 §12960. Exhaustion of remedies under FEHA is a jurisdictional prerequisite to filing suit.
6 Commodore Home Systems, Inc. v. Superior Court, 32 Cal. 3d 211, 214 (1982); Martin v.
7 Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1724 (1994).

8 Here, the events complained of by Anderson occurred in late 1998, and perhaps
9 in early 1999. Shefler Decl. ¶3 & Ex. B ¶9. Anderson alleges in his complaint that he filed
10 an administrative charge against Corestaff and his Corestaff supervisor, but nowhere does he
11 allege having brought such a charge against PG&E. Id. Ex. B ¶39. As such, he failed to
12 exhaust his administrative remedies and any harassment charge against PG&E is barred.

13
14 B. PG&E Cannot Be Liable Under FEHA Because Its Employees Did Not Sexually
15 Harass Anderson.

16 By its express terms, FEHA only provides for liability for an employer whose
17 employee harasses another employee or applicant or independent contractor. Cal. Gov't
18 Code §12940(j)(1).³ The person Anderson accuses of the allegedly harassing conduct, Julia
19 Dougherty, was his Corestaff supervisor. Shefler Decl. ¶3 & Ex. B ¶¶3, 10(e). She was
20 admittedly not an employee of PG&E. Under the plain terms of the statute, PG&E cannot be
21 liable for sexual harassment under FEHA for the actions of Corestaff personnel.

22
23
24 ³Section 12940(j)(1) provides that it is an unlawful employment practice:

25 For an employer, labor organization, employment agency, apprenticeship training
26 program or any training program leading to employment, or any other person,
27 because of race, religious creed, color, national origin, ancestry, physical
28 disability, mental disability, medical condition, marital status, sex, age, or sexual
orientation, to harass an employee, an applicant, or a person providing services
pursuant to a contract (Cal. Gov't Code §12940(j)(1) (emphasis added))

1 C. The Conduct Complained Of Was Not Actionable Sexual Harassment.

2 Even if there was some theory of liability against PG&E Anderson could
3 articulate (which there is not), the conduct he complains of is not actionable sexual
4 harassment. For sexual harassment to be actionable under FEHA, it must be severe and
5 pervasive. Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989)
6 (“[H]arassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must
7 show a concerted pattern of harassment of a repeated, routine or a generalized nature”)
8 (citations omitted). Here, Anderson complains only that his Corestaff supervisor showed
9 him an objectionable picture. As a matter of law, that conduct is insufficient to support a
10 claim for sexual harassment.

11 The only sexually harassing conduct Anderson complains of is two emails
12 containing pornographic photos, sent by his Corestaff supervisor, back in December 1998.
13 Shefler Decl. ¶3 & Ex. B ¶10(e). Such minimal conduct does not meet the severe and
14 pervasive standard. See, e.g., Brooks v. City of San Mateo, 229 F.3d 917, 926 (9th Cir.
15 2000) (single incident of “highly offensive” touching that lasted a matter of minutes, with no
16 injury to plaintiff or impairment of her ability to perform her job, did not create a hostile
17 work environment).

18 Finally, to the extent Anderson claims PG&E failed to prevent the harassment,
19 his claim fails. There is no liability for failure to prevent harassment when no actionable
20 harassment occurred. Trujillo v. North County Transit Dist., 63 Cal. App. 4th 280, 288-289
21 (1998).

22
23 IV.

24 PG&E IS NOT LIABLE ON ANY OF ANDERSON’S TORT
25 CLAIMS.

26 Anderson has also brought three tort causes of action against PG&E, all
27 stemming from PG&E’s alleged failure to adequately investigate his charges that Corestaff
28 was defrauding PG&E. None of the causes of action can be sustained.

1 A. Anderson Has Not Set Forth Sufficient Facts To Support A Cause Of Action For
2 Intentional Infliction Of Emotional Distress.

3 In order to state a claim for intentional infliction of emotional distress, a plaintiff
4 must show that the defendant engaged in conduct “so extreme as to exceed all bounds of that
5 usually tolerated in a civilized community.” McGough v. University of San Francisco, 214
6 Cal. App. 3d 1577, 1587 (1989) (citations omitted). Insults, indignities, threats or
7 annoyances are not extreme and outrageous behavior. Alcorn v. Anbro Eng’g, Inc., 2 Cal.
8 3d 493, 499 n.5 (1970). Discipline and criticism in the workplace are not outrageous if they
9 are a normal part of the employment relationship. Shoemaker v. Myers, 52 Cal. 3d 1, 25
10 (1990).

11 Here, Anderson alleges only that two PG&E employees “treated plaintiff harshly,
12 with hostility, ignored him and would not exchange pleasantries in the workplace.” Shefler
13 Decl. ¶3 & Ex. B ¶13(n) (emphasis added). Such trivial allegations simply are insufficient
14 to support a claim for intentional infliction of emotional distress.

15
16 B. Anderson Cannot Support His Claim For Negligence.

17 The elements of a negligence cause of action are “(a) a legal duty to use due care;
18 (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the
19 resulting injury.” Evan F. v. Hughson United Methodist Church, 8 Cal. App. 4th 828, 834
20 (1992). In order to make out a claim for negligent supervision, a plaintiff must show that the
21 employer knew or should have known that the employee or contractor would cause the
22 specific harm that occurred. Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1054-55 (1996)
23 (employer could not have known that studio employee would drug and sexually assault
24 plaintiff, even if employer knew about employee’s use of his position to gain sexual favors).

25 Here, Anderson claims that PG&E negligently failed to supervise Corestaff, and
26 failed to investigate Anderson’s claims that Corestaff was stealing from PG&E and abusing
27 the minority vendor system. How Anderson could have been harmed by such conduct is a
28 mystery, since PG&E, not Anderson, was the alleged victim of Corestaff’s purported

1 wrongdoing. As for his claims that PG&E failed to investigate his allegations of sexual
2 harassment, Anderson has not alleged any facts to show that PG&E knew or should have
3 known that his Corestaff supervisor would show him the offensive picture. PG&E could not
4 have predicted that behavior, and therefore could not have stopped it before it occurred.
5 Furthermore, Anderson does not allege that his supervisor, or anyone else, continued to
6 engage in any sexually harassing conduct following his alleged complaint to PG&E, and
7 therefore he cannot show that he was harmed by any alleged failure by PG&E to take action
8 to stop the alleged harassment.

9
10 C. Anderson Cannot Sustain His Claim For Fraud And Concealment Against PG&E.

11 Fraud requires proof of (a) a misrepresentation; (b) knowledge of the falsity of
12 the misrepresentation; (c) intent to defraud (i.e., intent to induce reliance); (d) justifiable
13 reliance; and (e) resulting damage. Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996).
14 Anderson cannot show justifiable reliance, causation or damage resulting from any of the
15 alleged fraudulent actions of PG&E.

16 In his complaint, Anderson alleges that a PG&E employee "defrauded" him by
17 promising to investigate his complaints against Corestaff. He claims that had PG&E (and
18 presumably the other named defendants) not defrauded him, he would not have left his prior
19 employment months before to take his job with Corestaff. Shefler Decl. ¶3 & Ex. B ¶24.
20 The alleged fraudulent actions by PG&E, however, occurred, if at all, long after Anderson
21 had quit his previous job and joined Corestaff. Obviously, any after the fact promise of
22 action by PG&E could not have induced him to work for Corestaff, and Anderson could not
23 have justifiably relied on any action by PG&E to his detriment. Anderson's damages, if any,
24 arise from Corestaff's termination of his employment, an action in which PG&E had no
25 involvement.

26
27 CONCLUSION

28 As described above, Anderson's claims are vulnerable to several defenses as a

1 matter of law. Even in the unlikely event PG&E were to be found liable, it will not have to
2 pay on any judgment because Corestaff has agreed to indemnify PG&E without reservation.
3 Therefore, it is appropriate for the Court to value the Anderson claim at zero for feasibility
4 purposes.

5
6 DATED: August 30, 2002.

7 Respectfully,

8 JEFFREY L. SCHAFFER
9 ETHAN P. SCHULMAN
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