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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GRANT NAPEAR,

Plaintiff,

v.

BONNEVILLE INTERNATIONAL CORPORATION, a Utah corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 2:21-cv-01956-DAD-DB

BONNEVILLE INTERNATIONAL CORPORATION'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

District Judge Dale A. Drozd
Magistrate Judge Deborah Barnes

Hearing:

Date: July 18, 2023
Time: 1:30 p.m.
Courtroom: 4, 15th Floor (via Zoom)

Complaint Filed: October 21, 2021

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on July 18, 2023 at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable Dale A. Drozd in Courtroom 4, 15th Floor (via Zoom videoconferencing) of the U.S. District Court for the Eastern District of California, located at 501 I Street, Sacramento, California 94814, defendant Bonneville International Corporation ("Bonneville") will and hereby does move this Court for an order dismissing with prejudice the above-captioned action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for plaintiff Grant Napear's repeated failure to state a claim upon which relief may be granted.

Mr. Napear's second cause of action for discrimination in violation of the California Fair Employment and Housing Act ("FEHA") fails because he does not allege sufficient facts to plausibly infer that Bonneville terminated him because of his religious beliefs.

Mr. Napear's third cause of action for retaliation in violation of California Labor Code sections 1101 and 1102 fails because Mr. Napear does not sufficiently allege a policy or political activity within the meaning of the statutes, nor does he sufficiently allege that Bonneville's decision to terminate him was politically motivated.

Finally, Mr. Napear's first cause of action for wrongful termination in violation of public policy fails because it is derivative of his other causes of action, all of which fail.

On May 23, 2023, counsel for Bonneville and Mr. Napear met and conferred via Microsoft Teams regarding this motion. Counsel for the parties were unable to reach agreement on the issues addressed in this motion or further amendments. Thus, the parties have exhausted their meet and confer efforts regarding Mr. Napear's second amended complaint.

Bonneville's Motion to Dismiss Second Amended Complaint (the "Motion") is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Tanner B. Camp in Support of the Motion, the pleadings and filings in this action, and such other matters as may be presented at or before the hearing on the Motion.

DATED: June 1, 2023.

FOLEY & LARDNER LLP

/s/ *Tanner B. Camp*
David J. Jordan
Tanner B. Camp

Attorneys for Defendant
Bonneville International Corporation

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Grant Napear—former television announcer and radio commentator for the Sacramento Kings—initiated this lawsuit against his former employer, defendant Bonneville International Corporation ("Bonneville"), in October 2021. Eighteen months and three complaints later, one thing remains consistent about Mr. Napear's allegations: their inconsistency.

On May 31, 2020, Mr. Napear received a question on Twitter from a former Kings player: "What's your take on [Black Lives Matter]?" Mr. Napear's response (the "Tweet"), which came less than a week after George Floyd's death, was that "ALL LIVES MATTER . . . EVERY SINGLE ONE!!!" The Tweet, coming as it did less than a week after the death of George Floyd, predictably ignited a firestorm of negative comments and reactions from the public, as well as past and present NBA players. Bonneville, the owner of a radio station known as the radio "home of the Kings" ("KHTK" or the "Station"), terminated Mr. Napear's employment after determining that the statements were likely to discredit the Station's goodwill and reputation with the Kings and the public. The termination was consistent with Mr. Napear's employment agreement, which allowed Bonneville to terminate Mr. Napear for any "conduct that might discredit the goodwill, good name, or reputation of the Company," as determined by Bonneville in its "reasonable discretion."

More than a year later, Mr. Napear initiated this action, claiming that Bonneville fired him because of his religion, race, gender, and political views. After meeting and conferring with Bonneville, Mr. Napear filed an amended complaint asserting the same claims. Bonneville moved to dismiss Mr. Napear's first amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court ultimately agreed with Bonneville and dismissed Mr. Napear's complaint in its entirety.

Regarding his claims for discrimination, the Court found that Mr. Napear had failed to "allege facts that plausibly suggest any inference of discriminatory motive by defendant when it terminated him." He had not even plausibly alleged that Bonneville knew his religion. The Court also dismissed Mr. Napear's political claim because it was rife with inconsistencies. For example,

Mr. Napear alleged that Bonneville had an "*ad hoc* (and unpublished) policy supporting the Black Lives Matter movement" but also that Bonneville "does not now, and never has, supported . . . the Black Lives Matter movement." Similarly, he alleged that Bonneville fired him for expressing an opinion that was against Black Lives Matter, while also alleging that Bonneville agreed with or held the very same opinion. The Court correctly concluded that these allegations were confusing, convoluted, and insufficient to state a claim. And, although the Court gave Mr. Napear leave to amend his claims, it advised him that "he must do so in good faith and consistent with the dictates of Federal Rule of Civil Procedure 11."

Now, in his second amended complaint (the "SAC"), Mr. Napear attempts to salvage a subset of his claims by changing his story. For example, although Mr. Napear alleged in the first amended complaint that he always kept his religion to himself, he now claims that he spoke periodically about his religion with his Bonneville co-workers. Also, while he alleged in the first amended complaint that Bonneville never supported and was against the Black Lives Matter movement, he now asserts that Bonneville used Mr. Napear as a "sacrificial lamb" to "curry favor" with the Black Lives Matter movement. Despite the inconsistencies and contradictions with his previous allegations, Mr. Napear's current allegations remain deficient, and his claims should be dismissed.

First, Mr. Napear's second cause of action for religious discrimination in violation of California's Fair Employment and Housing Act ("FEHA") fails because he does not allege facts sufficient to support a plausible inference that Bonneville terminated him because of his religious beliefs. An employer that is unaware of an employee's religious beliefs cannot discriminate on the basis of them, and Mr. Napear still does not allege that Bonneville knew or had reason to know that he was Unitarian or that his Tweet was a religious expression.

Second, Mr. Napear's third cause of action for retaliation in violation of California Labor Code sections 1101 and 1102 fails because Mr. Napear's allegations remain internally inconsistent and do not give rise to a plausible inference that Bonneville terminated him for engaging in protected political activity. He fails to sufficiently allege a "rule, regulation, or

policy" within the meaning of section 1101, he fails to show that the Tweet constitutes "political activity," and he fails to demonstrate that Bonneville's motive in terminating him was political.

Finally, Mr. Napear's cause of action for wrongful termination in violation of public policy fails because it rests on his claims under FEHA and the California Labor Code. Because those causes of action fail, his derivative first cause of action fails as well.

Although Mr. Napear's story and allegations regarding his termination have remained consistently inconsistent, Bonneville's position has not changed. Mr. Napear was terminated because his insensitive and badly timed Tweet and the ensuing fallout were likely to discredit the goodwill and reputation of Bonneville and KHTK with the Kings and the public. He was not terminated because of his religious beliefs or personal political opinions. Thus, Mr. Napear's SAC should be dismissed with prejudice.

II. RELEVANT FACTUAL BACKGROUND

Near the end of 2019, Bonneville and Mr. Napear signed an employment agreement (the "Employment Agreement"), pursuant to which Mr. Napear agreed to "provide services as an On-Air Talent for KHTK 1140-AM," a radio station owned by Bonneville. (SAC, May 11, 2023, ECF No. 49, ¶¶ 17, 18; Decl. of Steve Cottingim ("Cottingim Decl."), Dec. 23, 2021, ECF No. 15, Ex. 1 (Employment Agreement) § 2.a.)[1] These services included Mr. Napear hosting a sports radio talk show on KHTK that aired regionally throughout the Sacramento area. (*See* SAC ¶ 11.)

The Employment Agreement obligated Mr. Napear to, among other things, perform his duties "consistent with the highest standards of the broadcast/media industry." (*Id.* ¶ 19; Cottingim Decl., Ex. 1 § 2.d.) It also required him to refrain from "any offensive or distasteful remarks or conduct, the broadcast of which the Company believes would not be in the public interest" or "any act . . . which might bring either Employee or the Company into public disrepute, contempt, scandal, scorn, or ridicule or otherwise injure the Company." (SAC ¶ 21; Cottingim Decl., Ex. 1 § 2.g.) Bonneville had the right to terminate the Employment Agreement

[1] In its Order Granting Defendant's Motion to Dismiss (the "Order"), this Court determined that it could "consider the employment agreement as incorporated into the FAC." (Order at 8.) For the same reasons, the Court may consider the Employment Agreement as incorporated into the SAC. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

prior to its expiration "for cause," which included any "conduct that might discredit the goodwill, good name, or reputation of the Company," as determined by Bonneville in its "reasonable discretion." (*Id.* § 6.c.vii.; SAC ¶ 36.)

On May 31, 2020, less than a week after the death of George Floyd and the resulting racial justice protests throughout the country, Mr. Napear received a tweet from former Kings player Demarcus Cousins that said, "What's your take on BLM [Black Lives Matter]?" (*See* SAC ¶¶ 30-31.) Mr. Napear responded with the following: "ALL LIVES MATTER . . . EVERY SINGLE ONE!!!" (*Id.* ¶ 32.) Mr. Napear's Tweet provoked a barrage of negative responses and reactions on Twitter from fans and players alike. (*See generally* Decl. of Krystal On ("On Decl."), Dec. 23, 2021, ECF No. 16, Ex. 1.)[2] On June 2, 2020, Bonneville terminated Mr. Napear for cause because his "social media use is inseparably connected with the Company's public image and reputation" and his "statements are likely to discredit the goodwill, good name, and reputation of Bonneville." (Decl. of Matthew Ruggles in Support of Mot. for Leave ("Ruggles Decl."), May 22, 2023, ECF No. 52-2, Ex. B (Termination Letter); *see also* SAC ¶ 36.)[3]

III. PROCEDURAL POSTURE

On October 21, 2021, Mr. Napear sued Bonneville for racial, gender, and religious discrimination under FEHA and retaliation in violation of California Labor Code sections 1101 and 1102. (Compl., Oct. 21, 2021, ECF No. 1.) Counsel for the parties met and conferred regarding deficiencies in the complaint, and Mr. Napear's counsel voluntarily agreed to file an

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[2] In the Order, the Court took judicial notice of the compilation of tweets attached to Ms. On's declaration "solely as an indication of what information was in the public realm at the time." (Order at 9.)

[3] Although the Court declined to take judicial notice of this termination letter in the Order (*see* Order at 7-8), it may consider the letter now because Mr. Napear's attorney attached the letter to his declaration in support of Mr. Napear's Motion to Modify the Court's Scheduling Order and to Amend the Second Amended Complaint (the "Motion for Leave") and stated that it is "a true and correct copy of [Bonneville's] termination letter to [Mr. Napear] dated June 2, 2020." (Ruggles Decl. ¶ 9 and Ex. B.) Thus, the existence and contents of the termination letter constitute a judicial admission and may be considered in deciding this motion to dismiss. *See Rumbaugh v. Harley*, No. 2:17-CV-01970-KJM-AC, 2018 WL 4002854, at *3 (E.D. Cal. Aug. 22, 2018); *Hornberger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. SACV141645DOCRNBX, 2015 WL 13310465, at *3 (C.D. Cal. Jan. 22, 2015), *aff'd*, 677 F. App'x 336 (9th Cir. 2017).

amended complaint. Mr. Napear filed his first amended complaint (the "FAC") on December 2, 2021. (*See* FAC, Dec. 2, 2021, ECF. No. 12.)

Three weeks later, Bonneville moved to dismiss the FAC under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Mot. to Dismiss, Dec. 23, 2021, ECF No. 13.) The Court granted the motion in its entirety on April 20, 2023, dismissing all of Mr. Napear's claims with leave to amend. (Order, Apr. 20. 2023, ECF No. 48.) Mr. Napear filed the SAC three weeks later, asserting causes of action for wrongful termination in violation of public policy, religious discrimination in violation of FEHA, and retaliation in violation of California Labor Code sections 1101 and 1102.

On May 23, 2023, counsel for the parties met and conferred via Microsoft Teams regarding Bonneville's anticipated motion to dismiss the SAC. (Decl. of Tanner Camp ("Camp Decl."), June 1, 2023, ECF No. 57 ¶ 3.) Bonneville's counsel raised several issues with the SAC and argued that Mr. Napear's claims remained deficient. (*Id.*) Counsel for the parties were unable to reach agreement on further amendments, leading to the filing of the instant motion. (*Id.*)

IV. LEGAL STANDARD

A court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion under this rule, a complaint must allege sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between plausibility of entitlement to relief." *Id.* (internal quotation marks and citation omitted). When considering plausibility, "courts must also consider an 'obvious alternative explanation' for defendant's behavior." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014).

Although allegations of fact in the complaint are taken as true, the court is not required to "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to accept as true "allegations that contradict matters properly subject to

judicial notice or by exhibit" or judicial admissions. *Id.*; *Hornberger*, 2015 WL 13310465, at *3 (holding that judicial admissions "may be considered in a motion to dismiss").

Dismissal is proper under Rule 12(b)(6) where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A district court may dismiss a complaint with prejudice where the plaintiff has had multiple opportunities to amend the complaint and failed to sufficiently state a claim for relief. *See, e.g.*, *Banks v. ACS Educ.*, 638 F. App'x 587, 590 (9th Cir. 2016) (finding no abuse of discretion to dismiss a complaint with prejudice where plaintiff had "several earlier opportunities" to amend the complaint); *Sepehry-Fard v. Dep't Stores Nat'l Bank*, 15 F. Supp. 3d 984, 988 (N.D. Cal. 2014) (dismissing TCPA claim with prejudice where plaintiff had "three opportunities" to allege the claim).

V. ARGUMENT

In the SAC, Mr. Napear asserts claims for wrongful termination in violation of public policy, religious discrimination in violation of FEHA, and retaliation in violation of California Labor Code sections 1101 and 1102. All of these claims are deficient and should be dismissed with prejudice.

A. Mr. Napear's Second Cause of Action Should Be Dismissed Because He Fails to Allege Facts Sufficient to Infer that Bonneville Fired Him Because of His Religion.

Mr. Napear's second cause of action alleges religious discrimination in violation of FEHA. His claim fails because he does not allege facts supporting a plausible inference that Bonneville knew he was Unitarian, let alone discriminated against him on that basis.

To plausibly allege a claim for discrimination under FEHA, Mr. Napear must allege facts showing that: (1) he is a "member of a protected class"; (2) he was "performing competently" in his position at Bonneville; (3) he "suffered an adverse employment action,"; and (4) "some other circumstances that suggest a discriminatory motive." *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1242 (9th Cir. 2013); *Wilson v. Cable New Network, Inc.*, 7 Cal. 5th 871, 885 (2019). Because Mr. Napear's claim is based on religious discrimination, he must offer facts supporting

an inference that Bonneville terminated him because of his religion. *See Ali v. Silicon Valley Bank*, No. C 18-03999 JSW, 2019 WL 8752054, at *2 (N.D. Cal. Jan. 28, 2019).

In the Order, this Court dismissed Mr. Napear's religious discrimination claim because he had "not alleged facts sufficient to support the inference that his termination was because of his religion." (Order at 10-12.) Specifically, this Court reasoned that "notably absent from the FAC [were] any allegations of fact indicating that defendant had any reason to know that plaintiff even was a member of the Unitarian Church or that his May 31, 2020 tweet was somehow an expression of a religious belief on his part." (*Id.* at 10-11.) It also noted that the Tweet was not "self-evidently religious in nature, nor are there any other facts . . . from which an inference could be drawn that defendant terminated plaintiff because of his religious beliefs." (*Id.*)

Mr. Napear's amended religious discrimination claim fares no better. Like before, he alleges no facts suggesting that Bonneville knew he was religious or raising a reasonable inference of discriminatory motive. Thus Mr. Napear's second cause of action fails and should be dismissed.

1. There Are No Allegations That Bonneville Knew or Had Reason to Know About Mr. Napear's Religious Beliefs.

It is axiomatic that an employer must be aware of an employee's religious beliefs in order to discriminate on the basis of them. *See Lewis v. United Parcel Service, Inc.*, 252 Fed. App'x 806, 807-08 (9th Cir. 2007) (citing *Friedman v. So. Cal. Permanent Med. Group*, 102 Cal. App. 4th 39 (2002)). Knowledge by an employee's co-workers is not enough. *See Lamb v. Household Credit Servs.*, 956 F. Supp. 1511, 1518 (N.D. Cal. 1997) (declining to impute co-worker's knowledge of harassment to plaintiff's employer). Rather, a plaintiff must allege, and eventually show, that a person with actual influence or authority over employment decisions knew about the employee's religious beliefs (or other protected characteristic) at the time of the adverse employment action. *See, e.g.*, *Perez v. Vitas Corp. of Cal.*, No. CV 16-1681 DSF (AJWx), 2017 WL 5973294, at *3-4 (C.D. Cal. Mar. 29, 2017) (finding that plaintiff failed to show a causal link where evidence "does not support an inference that the individuals who made the termination decision had knowledge of the plaintiff's disability"); *Greer v. Lockheed Martin Corp.*, 855 F.

Supp. 2d 979, 987-88 (N.D. Cal. 2012) (finding that employee could not show a causal link between the protected activity and the employer's adverse action where decision-maker was unaware of the alleged protected activities at the time of termination).

In the Order, the Court found that allegations regarding Bonneville's knowledge of Mr. Napear's religious beliefs were "notably absent." (*Id.* at 10.) Mr. Napear attempted to correct this deficiency by vaguely alleging in the SAC that he "periodically spoke with his co-workers at [Bonneville] about his religion and his faith in God" and that he "often attended religious services on Sundays." (SAC ¶ 28.) He also alleges that he discussed his religion with his former co-hosts, Mike Lamb and Doug Christie. (*Id.*) But these allegations are insufficient to infer that Bonneville knew he was a Unitarian or even religious.

Nowhere in the SAC does Mr. Napear allege that any of his supervisors knew he was Unitarian. Nor does he allege that Bonneville's management or anyone involved in the decision to terminate him knew or had reason to know of his religious beliefs. Instead, the only specific individuals who allegedly knew he was religious are Mike Lamb and Doug Christie, neither of whom are alleged to have played any role in the decision to terminate Mr. Napear. (*See* SAC ¶ 67 (alleging that the individuals involved in the decision to terminate Mr. Napear were Steve Cottingim, Matthew Sadowski, Darrell Brown, Rachel Conrado, Mike Dowdle, Kirby Brown, and Sheri Dew).) Thus, like in the FAC, Mr. Napear fails to sufficiently allege that Bonneville was aware of Mr. Napear's religion. *See, e.g.*, *Perez,* 2017 WL 5973294, at *4 (rejecting argument that knowledge of employees "other than those involved in or capable of influencing the adverse employment decision" could be imputed to employer); *Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th 1237, 1250-51 (2008) (collecting cases). His religious discrimination claim fails for this reason alone. *See Lewis*, 252 Fed. App'x at 807-08.

2. Mr. Napear's Tweet Was Not Self-Evidently Religious.

Mr. Napear also attempts to impute discriminatory motive to Bonneville by alleging, in conclusory fashion, that the Tweet was a "self-evident expression" of his religious beliefs. (SAC ¶ 56.) Expressions or assertions of belief, even if sincere, are not religious simply because a plaintiff contends they are. *See, e.g.*, *Friedman*, 102 Cal. App. 4th at 69-70 (rejecting conclusory

allegations about the place the asserted belief held in the plaintiff's life). Here, while the worth of every human life may be a principle espoused by Mr. Napear's (and almost every other) faith, it is not obvious that the phrase "ALL LIVES MATTER," in response to a question about Black Lives Matter, is an expression of that belief. The phrase does not reference Mr. Napear's faith, nor does it quote from scripture or contain any other moniker connecting it to a particular religion. In other words, even if Mr. Napear personally considered the Tweet to be an expression of his religion, there is no reason to believe that Bonneville did.

Mr. Napear tries to support his claim that the Tweet was self-evidently religious by claiming that "[m]any people that know [Mr. Napear], including but not limited to [his] co-workers at [Bonneville]," would have understood the Tweet to be an expression of his religious beliefs. (*See* SAC ¶ 56.) But, as explained above, he does not allege that *Bonneville* knew he was religious, so there is no reason to believe that Bonneville would have understood the Tweet to be religious. (*Supra* Section V.A.1.) He also alleges that "members of the public also recognized the religious nature and religious principles" reflected by the Tweet. (*Id.*) This speculative allegation contains no meaningful detail, however, and still does not show that Bonneville had reason to believe the Tweet was religious. *See Mayes v. Kaiser Foundation Hosps.*, 917 F. Supp. 2d 1074, 1079-80 (E.D. Cal. 2013) (plaintiff's failure to provide "meaningful detail suggesting the termination was because of race or sex" doomed his failure-to-prevent-discrimination claim).

Moreover, other allegations in the SAC undermine Mr. Napear's claim that the Tweet was self-evidently religious. Specifically, while alleging that the Tweet was a "self-evident expression" of his religious beliefs, Mr. Napear also characterizes the Tweet as a "personal expression of [his] political opinion and ideology." (*Compare* SAC ¶ 56, *with id.* ¶ 63.) Mr. Napear cannot, in good faith, claim that his statement was a political expression and, at the same time, argue that it was self-evidently religious, i.e., one that anyone would recognize as religious. Thus, Mr. Napear's allegations are at odds, and the Court need not accept them as true. *See, e.g.*, *Herrera v. Cnty. of Los Angeles*, 482 Fed. App'x 263, 265-66 (9th Cir. 2012) (unpublished) (affirming dismissal of claims against county where allegations about county policy were "repeatedly contradicted by other allegations" in and attachments to the complaint).

3. No Other Facts Support an Inference of Religious Discrimination.

Finally, Mr. Napear attempts to support an inference of religious discrimination by alleging, on information and belief, that the person hired to replace him was not a member of the Unitarian church. (SAC ¶ 57.) But while "information and belief" pleading is allowed, a plaintiff cannot avoid dismissal under Rule 12 by putting an "information and belief" label on otherwise speculative or conclusory allegations. *See Blantz v. Cal. Dep't of Corrections & Rehab.*, 727 F.3d 917, 926-27 (9th Cir. 2013) (conclusory "information and belief" allegations were insufficient to state a tort claim under California law); *Tarantino v. Gawker Media, LLC*, No. CV 14-603-JFW (FFMx), 2014 WL 2434647, at *5 & n.4 (C.D. Cal. Apr. 22, 2014) (noting that unsupported allegations based on "information and belief" are "insufficient as a matter of law"). Thus, Mr. Napear's allegation on information and belief that he was replaced by someone who was not Unitarian, without more, is insufficient to infer religious discrimination. *See Brodish v. New Electric Fresno, LLC*, No. 2:21-cv-02945-RGK-ADS, 2021 WL 3914259, at *2 (C.D. Cal. July 13, 2021) (alleging, on information and belief and without supporting facts, that plaintiff was replaced by a younger employee was not sufficient to support discrimination claim under FEHA).[4]

The SAC represents Mr. Napear's third opportunity to sufficiently allege a claim for religious discrimination under FEHA. Despite multiple chances and this Court's detailed Order explaining the deficiencies in his claim, Mr. Napear still fails to allege facts sufficient to infer that Bonneville terminated him because of his religious beliefs. Mr. Napear's second cause of action should therefore be dismissed.

[4] Mr. Napear also tries to infer that Bonneville's stated reason for terminating him was pretexual by alleging that Bonneville "now contends that [he] was terminated only after the Sacramento Kings Basketball Team held a 'basketball team meeting' about [Mr. Napear's] continued employment with the Sacramento Kings" and "'voted' to end" the relationship. (SAC ¶¶ 39-40.) Bonneville has never alleged a "team meeting" or "vote" by the Kings in any of its filings or discovery responses, or deposition testimony. In any event, even if these allegations infer "pretext," they are not sufficient to allege a discriminatory motive based on religion. *See Bess v. Adams & Assocs., Inc.*, No. 2:17-cv-00173-TLN-KJN, 2018 WL 4801951, at *6 (E.D. Cal. Oct. 3, 2018).

B. Mr. Napear's Third Cause of Action Should Be Dismissed Because He Fails to Sufficiently Allege a Violation of California Labor Code Sections 1101 or 1102.

Mr. Napear's third cause of action alleges that Bonneville retaliated against him in violation of sections 1101 and 1102 of the California Labor Code. Sections 1101 and 1102 prohibit an employer from attempting to coerce or influence its employees' political activities through threat of discharge or loss of employment. *Couch v. Morgan Stanley & Co., Inc.*, No. 1:14-CV-10-LJO-JLT, 2015 WL 4716297, at *11 (E.D. Cal. Aug. 7, 2015) ("*Couch I*") (internal quotation marks omitted), *aff'd*, 656 F. App'x 841 (9th Cir. 2016). The California Legislature enacted the statutes to protect "the fundamental right of employees in general to engage in political activity without interference by employers." *Id.*

Here, Mr. Napear does not sufficiently allege that Bonneville had a "rule, regulation, or policy" forbidding or controlling the political activities of its employees or that Bonneville's motive in firing Mr. Napear was political. Thus, Mr. Napear has not alleged a violation of sections 1101 and 1102, and his third cause of action should be dismissed.

1. Mr. Napear Fails to Sufficiently Allege a Rule, Regulation, or Policy Violating Section 1101.

First, Mr. Napear makes contradictory allegations regarding the existence of a "rule, regulation, or policy" forbidding or controlling the political activities of Bonneville's employees. *See* Cal. Lab. Code § 1101; *Prem v. Access Servs., Inc.*, No. 11-cv-01358-ODW-JEM, 2011 WL 3516170, at *5 (C.D. Cal. Aug. 10, 2011) (dismissing claim under section 1101, in part, because plaintiff insufficiently alleged "a rule, regulation, or policy that affected Plaintiff's ability to engage in political activity"). Thus, if based on a violation of section 1101, Mr. Napear's third cause of action fails.

In its Order, this Court declined "to decide whether a plaintiff must always identify a particular policy, rule, or regulation when stating a claim under § 1101." (Order at 17 n.5.) Instead, it concluded that Mr. Napear's allegations in the FAC regarding a policy under section 1101 were too contradictory to state a valid claim. (*Id.*) Although Mr. Napear removed from the SAC certain allegations that troubled this Court, he continues to contradict himself.

In the SAC, Mr. Napear attempts to infer the existence of a requisite policy by alleging that his termination was "an implicit warning that anyone that dared to speak out publicly and criticize the politics of the Black Live Matter movement would be summarily terminated." (SAC ¶ 69.) But in his Motion for Leave—filed less than two weeks after his SAC—Mr. Napear asserts that Bonneville announced a "company-wide policy" that it would "respect individuals' choices about which organizations they chose to support personally, including the Black Lives Matter movement." (Mot. for Leave, May 22, 2023, ECF No. 52, at 6 (internal quotation marks omitted).)[5] Put differently, while claiming his termination was a warning to other employees regarding support of Black Lives Matter, Mr. Napear also asserts that Bonneville announced a policy affirming the right of employees to support whatever organizations they wish. (*Id.*)

Moreover, both these newly devised and conflicting accounts also manage to directly contradict Mr. Napear's unsupported claim in the FAC that Bonneville holds political views that are somehow anti-Black Lives Matter. (*See* FAC ¶¶ 45-47.) The many contradictions across Mr. Napear's pleadings hardly sound in good faith. In any event, because Mr. Napear's latest assertions in the SAC are contradicted by judicial admissions in the Motion for Leave, they are insufficient to allege a "rule, regulation, or policy" in violation of section 1101. (*See* Order at 17); *Herrera*, 482 Fed. App'x at 265-66 (affirming dismissal of claims against county where allegations about county policy were "repeatedly contradicted by other allegations" in and attachments to the complaint).

2. Mr. Napear Fails to Sufficiently Allege that His Statement Constitutes Political Activity.

Second, Mr. Napear fails to allege that he engaged in "political activity" within the meaning of the statutes. Sections 1101 and 1102 protect the "right of employees in general to engage in *political activity.*" *Couch I*, 2015 WL 4716297, at *11 (emphasis added). The term

[5] Mr. Napear's factual assertions in the Motion for Leave may be deemed judicial admissions that the Court may consider when deciding this Motion to Dismiss. *See Rumbaugh*, 2018 WL 4002854, at *3 ("[S]tatements of fact in a brief may be considered admissions of the party in the discretion of the district court."); *Hornberger*, 2015 WL 13310465, at *3 (holding that judicial admissions "may be considered in a motion to dismiss").

"political activity" means "the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons." *Mallard v. Boring*, 182 Cal. App. 2d 390, 395 (1960). The California Supreme Court has recognized "participation in litigation, the wearing of symbolic armbands, and the association with others for the advancement of beliefs and ideas" as political activities. *Gay L. Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 487 (1979). But courts have found other activities—such as reporting racial discrimination to an outside agency or serving as a trial juror—to be nonpolitical. *Prem v. Access Servs., Inc.*, No. CV 11-1358 ODW JEMX, 2011 WL 3516170, at *4 (C.D. Cal. Aug. 10, 2011); *Mallard*, 182 Cal. App. 2d at 395; *see also Henry v. Intercontinental Radio, Inc.*, 155 Cal. App. 3d 707, 715 (Ct. App. 1984) (finding that plaintiff's assertion that his beliefs "regarding working conditions, employment status, and equal opportunities" constituted "political activity" was "questionable").

In its Order, this Court noted that the parties "do not appear to dispute that plaintiff's May 31, 2020 tweet could constitute 'political activity'" and that "the tweet might be considered a 'political activity' under the statutes because it could be construed as espousing a particular view regarding a cause, i.e., the Black Lives Matter movement." (Order at 18 n.6.) In the SAC, however, Mr. Napear expressly disavows that his Tweet was a retort or response to the Black Lives Matter movement. Specifically, although he asserts that Bonneville believed the Tweet to be "anti-BLM," he alleges that the Tweet "is not (and never was intended to be) a specific rejection, repudiation or denial of the importance of the Black Lives Matter political movement or BLM's political message that 'Black Lives Matter.'" (SAC ¶ 63; *see also id.* ¶ 34 (asserting that the Tweet was intended to be "inclusive of Black Lives Matter").) In other words, according to Mr. Napear's own allegations, the Tweet did not espouse a particular view on the Black Lives Matter movement and was therefore not "political activity" within the meaning of sections 1101 and 1102. *See Mallard*, 182 Cal. App. 2d at 395.

Admittedly, some of Mr. Napear's allegations regarding the nature of his Tweet are contradictory and confusing. For example, Mr. Napear alleges (in a conclusory manner) that the Tweet constituted a personal expression of his political belief or opinion. (*See, e.g.*, SAC ¶¶ 63, 68). In the same complaint, however, he alleges that the Tweet was a self-evident expression of

his religious belief. (*Id.* ¶ 55). The Court need not parse through Mr. Napear's convoluted and internally inconsistent allegations. Rather, it can (and should), once again, disregard such allegations as "unwarranted deductions of fact" or "unreasonable inferences." (*See* Order at 17.) Mr. Napear's third cause of action therefore fails because he did not sufficiently allege a "political activity" within the meaning of sections 1101 and 1102.

3. Mr. Napear Fails to Sufficiently Allege that Bonneville's Motive in Terminating Him Was Political.

Third, even if Mr. Napear had alleged a "political activity" within the meaning of sections 1101 and 1102 (he did not), he does not sufficiently allege that Bonneville's motive in terminating him was political. Liability under sections 1101 and 1102 "is triggered only if an employer fires an employee based on a political motive." *Couch v. Morgan Stanley & Co. Inc.*, 656 F. App'x 841, 843 (9th Cir. 2016) (unpublished) ("*Couch II*"). If the employer terminates an employee for a "legitimate, apolitical reason," it does not violate sections 1101 and 1102 even if the termination affects an employee's ability to "express his or her political viewpoint." *Id.*

Here, the employment agreement between Bonneville and Mr. Napear allowed Bonneville to terminate Mr. Napear "for cause," which included (among other things) a determination in Bonneville's "reasonable discretion" that Mr. Napear had engaged in any "conduct that might discredit the goodwill, good name, or reputation of the Company." (Cottinghim Decl., Ex. A § 6.c.vii; *see also* SAC ¶ 36.) Contrary to his allegations in the SAC, Bonneville informed Mr. Napear that it was terminating him for that very reason: because his "social media use is inseparably connected with the Company's public image and reputation" and his "statements are likely to discredit the goodwill, good name, and reputation of Bonneville." (Ruggles Decl., Ex. B (Termination Letter).)

The slew of negative responses and reactions to the Tweet on Twitter support Bonneville's stated reason for the termination. (*See generally* On Decl., Ex. 1.) Many of the responses and retweets said that Mr. Napear had embarrassed the Sacramento Kings and called on the team and KHTK to terminate him. (*E.g.*, *id.* at 19 ("@SacramentoKings and @Sports1140KHTK need to and have needed to get rid of this one along [*sic*] time ago."), 32

("@SacramentoKings This guy needs to GO. Not gonna listen to him again."), 55 (@SacramentoKings SACRAMENTO FANS DO NOT SUPPORT THIS. GRANT NEEDS TO BE FIRED AND TAKEN OFF THE RADIO."), 64 ("@SacramentoKings this is embarrassing the organization."), and 68 ("Fire Grant Napear. @SacramentoKings").) These allegations, admissions, and judicially noticed facts demonstrate that Bonneville terminated Mr. Napear for an apolitical reason: it determined in its "reasonable discretion" that the Tweet "might discredit" KHTK's reputation with the Kings and the public. *Cf. Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1391 (1999) (no wrongful termination in violation of public policy where newspaper terminated reporter for failing to meet the paper's editorial standards, despite the reporter's right to express his own opinion).

In the Order, the Court held that Mr. Napear's "convoluted" allegations in the FAC did not "tend to exclude" Bonneville's stated reason for the termination. (Order at 18-19.) And even though Mr. Napear changes his story in the SAC, his allegations remain convoluted, contradictory, and inconsistent with his contention that Bonneville terminated him because of a personal political opinion. For example, Mr. Napear alleges that Bonneville fired him because it believed his Tweet was "anti-BLM" and wanted to "curry favor with the powerful Black Lives Matter political movement." (*E.g.*, Compl. ¶¶ 64, 66, 68.) But he also alleges that his Tweet was not "offensive to any particular group," nor was it "a specific rejection, repudiation or denial of the importance of the Black Lives Matter political movement." (*Id.* ¶¶ 41, 63.) In other words, he alleges that Bonneville terminated him for a political opinion he does not have.[6]

Moreover, in support of his second cause of action, Mr. Napear alleges that his Tweet was a "self-evident" religious expression and that Bonneville's decision to fire him was "substantially motivated" by animus toward his religion. (*See* SAC ¶¶ 55-56.) Although these allegations are insufficient to assert a claim for religious discrimination under FEHA (*see supra* Section V.A.), they are also inconsistent with Mr. Napear's conclusory allegations in support of his third cause of action that Bonneville fired him for expressing his personal political opinion. (*See* SAC ¶¶ 63-

[6] It bears repeating that Mr. Napear previously alleged that Bonneville shared the same political opinion for which he now claims Bonneville terminated him. (*See* FAC ¶¶ 45-47.)

68); *see Herrera*, 482 Fed. App'x at 265-66 (affirming dismissal of claims against county where allegations about county policy were "repeatedly contradicted by other allegations" in and attachments to the complaint).

Ultimately, Mr. Napear's convoluted allegations regarding his political claim are detached from reality and insufficient to exclude Bonneville's alternative, apolitical explanation for Mr. Napear's termination. *See Eclectic Props.*, 751 F. 3d at 1000 (finding that "the complaint's factual allegations do not support a plausible inference that Defendants had the required specific intent to default, nor do they tend to exclude the alternative explanation that the transactions were merely a group of business deals gone bad"). For this additional reason, Mr. Napear's third cause of action fails and should be dismissed. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation.").

C. Mr. Napear's First Cause of Action Should Be Dismissed Because It Is Derivative of His Other Causes of Action, All of Which Fail.

Mr. Napear's first cause of action is for wrongful termination in violation of public policy. To state this claim, a plaintiff must allege: "(1) the existence of an employer-employee relationship; (2) termination of the employee's employment; (3) a 'nexus' between the termination and the employee's protected activity; (4) legal causation; and (5) damage to the employee." *Wright v. Thrifty Payless, Inc.*, No. 2:13-cv-01681-KJM-EFB, 2013 WL 5718937, at *5 (E.D. Cal. Oct. 15, 2013). There must also be a valid public policy supporting the wrongful discharge action. *Id.*

In the SAC, Mr. Napear alleges that he was terminated in violation of "the public policy set forth in [FEHA] section 12940, *et seq.*, as well as California Labor Code sections 1101 and 1102." (SAC ¶ 47.) In other words, Mr. Napear's first cause of action is dependent on and derivative of his second and third causes of action. Because he fails to sufficiently allege violations under those causes of action (*see supra* Sections V.A. & B.), his derivative first cause

of action fails as well. *See Bess v. Adams & Assocs., Inc.*, No. 2:17-cv-00173-TLN-KJN, 2018 WL 4801951, at *6 (E.D. Cal. Oct. 3, 2018) ("Plaintiff has not alleged facts sufficient to state a claim under FEHA for discrimination based on his age and race, so Plaintiffs' derivative claim for wrongful termination in violation of public policy fails.").

VI. CONCLUSION

Mr. Napear's SAC fails to allege sufficient facts supporting his claims that he was terminated for expressing his religious beliefs or personal political opinions. Mr. Napear has had three opportunities to revise his allegations and assert viable causes of action but has failed to do so. Bonneville respectfully requests that this Court grant its motion and dismiss the SAC with prejudice.

DATED: June 1, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2023, a copy of the foregoing was served via the Court's electronic filing system upon the following:

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