

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 08/30/2018

TIME: 02:43:00 PM

DEPT: C-67

JUDICIAL OFFICER PRESIDING: Eddie C Sturgeon

CLERK: Patricia Ashworth

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00025159-CU-OE-CTL** CASE INIT.DATE: 07/11/2017

CASE TITLE: **Katherine A Jones vs. Salk Institute for Biological Studies [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

APPEARANCES

The Court, having taken the above-entitled matter under submission on 08/17/2018 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

FINAL RULING

The court vacates the tentative ruling of August 17, 2018, and enters the final order:

Defendant Salk Institute for Biological Studies' ("Salk") motion for summary adjudication to plaintiff Beverly M. Emerson, Ph.D.'s first cause of action for disparate treatment (issue one) is denied. Summary adjudication is granted to the third cause of action for retaliation (issue two), the seventh cause of action for wrongful termination in violation of public policy (issue three), and the eighth cause of action for emotional distress (issue four).

Salk is not entitled to summary adjudication to issue one in its favor and against plaintiff as to her first cause of action for disparate treatment. In the first cause of action for gender discrimination (disparate treatment) and wrongful termination in violation of Government Code section 12940(a) in the first amended complaint ("FAC"), plaintiff alleges Dr. Emerson was: (1) promoted at a slower rate than her male counterparts; (2) compensated less than her male counterparts in both wages and benefits; (3) deprived of her fair share of resources, including donor funding and laboratory space; (4) blocked from high-value funding opportunities from private donors and foundations; (5) denied leadership and professional advancement opportunities; (6) forced to work in a hostile environment in which Dr. Emerson was undermined, disrespected, disparaged, and treated unequally; (7) forced to suffer a loss of professional reputation; and (8) denied her request for a contract extension, wrongfully terminating her employment effective December 31, 2017.

Salk contends Dr. Emerson's disparate treatment claim under FEHA fails because all of the claims are time barred, and that all acts before January 3, 2016 are permanent and time barred. Salk is correct the actions of delayed promotion and receipt of the endowed chair were permanent in 1999 and 2013 respectively. These are discrete events and time barred to the ultimate claim for termination. The

situation is tenuous for the reduced size of the lab and staff, since reductions were done in 2014, and plaintiff has not shown there were additional reductions. (See, *Davis v. City Univ. of N.Y.*, 1996 WL 243256, at *8-9 (S.D.N.Y. May 9, 1996) [denying delayed promotion claim when professor was promoted] and *Khoury v. Regents of Univ. of Cal.*, 2008 WL 257465 (Jan. 31, 2008), [inadequate research funding, and excessive workload were not actionable.])[1]

However, the court cannot say as a matter of law Salk has met its burden to show the remaining allegations, including that Dr. Emerson was blocked from high-value funding opportunities from private donors and foundations, denied leadership and professional advancement opportunities, forced to work in a hostile environment in which Dr. Emerson was undermined, disrespected, disparaged, and treated unequally, forced to suffer a loss of professional reputation, and denied her request for a contract extension, are barred. Though the court agrees that some of the complaints over the span of 31 years are unrelated or too remote in time, the court when the evidence is reviewed as a whole, cannot conclude as a matter of law that there is no continuing violation.

Dr. Emerson has raised triable issues of fact she was treated discriminatory based upon her gender and whether Salk engaged in a continuing course of conduct. As recently as February 2016, Dr. Emerson emailed Cancer Center EAB member Robert Eisenman and complained that "no female faculty member has ever been chosen or even approached to serve in a leadership role within the Cancer Center" and about the "lack of transparency in the Cancer Center budget, how funds are allocated, and who makes those decisions." (P's Ex. 107 (Emerson Decl., ¶17); Ex. 144 (02/01/16 Email to Eisenman.)) There are triable issues of fact whether plaintiff suffered adverse employment action. The court cannot find the lack of opportunities to women did not have an impact, when combined about the history as far back as the 2003 report, and the more recent White Papers[2]. Salk's objections based upon irrelevance are overruled.

There were changes made at Salk, including in 2013, when Dr. Emerson received an endowed chair, in 2014 when she was elected Chair of the Academic Council, and when Dr. Elizabeth Blackburn became Salk's first female president in January 2016. These changes raise a triable issue of material fact whether the alleged prior discriminatory climate was changing, and thus not permanent. Dr. Emerson was encouraged to work on the Culture & Community White Papers, which made recommendations for change at Salk. Dr. Emerson met with President Blackburn on May 27, 2016, with Drs. Jones and Lundblad. Plaintiff was "extremely hopeful and believed President Blackburn would change things for women at Salk." (Emerson decl., ¶15.) Whether it was reasonable to provide Salk with the time to implement the changes is a question for the trier of fact. There are triable issues whether Dr. Emerson delayed the filing of the lawsuit and whether Salk engaged in a continuing course of unlawful conduct to delay the statute of limitation accruing.

Although Salk argues plaintiff cannot show where in the record her name was removed from her most recent proposal, there are triable issues of fact whether the failure to have her name disclosed on the one-page summary foreclosed her ability to raise interest in her remaining at Salk and ultimately affecting her funding. (Emerson decl., Ex. 107, ¶45, Ex. 130.) Accordingly, summary adjudication to issue one is denied.

Defendant's motion for summary adjudication to the third cause of action for retaliation (issue two) is granted. Plaintiff has failed to raise substantial facts to show pretext and defeat defendant's legitimate claim her contract was not renewed based upon a 2011 guideline.

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or

she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. ... Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. ... If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation "'drops out of the picture,' " and the burden shifts back to the employee to prove intentional retaliation." (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1408–1409, citing *Yanowitz v. L'Oréal USA, Inc.* (2005) 36 Cal.4th 1028, 1042, -citations omitted.) During oral argument, Dr. Emerson stressed there was a question of fact whether her contract was not renewed due to her protected activity of filing the lawsuit. (TR 46:11-22.)

Salk has met its burden to show a legitimate business reason for not renewing plaintiff's employment contract, which was set to terminate December 31, 2017, pursuant to the written full professor's contract entered into in 1999. (Ex. 36.) Since 2011, Salk had a written policy that post-tenure appointments are evaluated under the Post-Tenure Faculty Guidelines. (Ex. 43.) The guideline states, in part:

Each post-tenure faculty member should meet with the President no later than 12 months before the tenure contract concludes to review his/her current and future external fundings and research plans. The academic post-tenure professorial rank will typically be reserved for those with 50% or more of external salary funding. (Ex. 43, p. 1.)

Salk provided evidence it adhered to the guidelines, reviewing her salary and funding data for Dr. Emerson. Emerson had not had a new grant application approved since 2011. "In fact, in Fiscal Year 2017, only 5% of her salary and fringe expenses were covered by external funding." (Ex. 2, Witmer decl., ¶15-16.) Since 2010, Dr. Emerson failed to obtain external funds in an amount that would meet Salk's stated guidelines. (Ex. 55.)

Emerson properly notes Salk has the discretion to make exceptions. Salk admits this in responses to special interrogatory #13: "The President and Board of Trustees also have discretion to award contract extensions considering the interests of the institute and based on individualized circumstances, such as notable awards or achievements or efforts to retain talents." (Ex. 126, p. 20.) Some exceptions are set forth in the guidelines, including endowed chairs as well as separate guidelines when someone has a National Academy of Sciences ("NAS") grant.

Plaintiff has offered the deposition testimony of Elizabeth Keene Alton that some appointments were lifetime, some lasted until a certain age, and then converted. (Alton depo., 85:3-18.) However, Alton retired in 2006, providing only slight evidence supporting plaintiff's position. Since the guidelines were instituted in 2011, Alton's opinions on exceptions are not noteworthy. During oral argument, Salk stated that the declarations of Dr. Blackburn and Kim Witmer, the COO, provide that since the policy went into effect, no one-male or female-was granted post-tenure extension with less than 50 percent funding. (TR 13:5-9.) The court has reviewed these declarations again. Although both Blackburn and Witmer explained the exceptions raised by plaintiff, neither emphatically states no one has been granted post-tenure extension with less than 50% funding. (Witmer decl., ¶19; Blackburn decl., ¶23.) Nonetheless, both have adequately distinguished the exceptions relied upon by plaintiff.

Plaintiff has also offered testimony of Marsha Chandler that there are some exceptions to the Post Tenure Guidelines for Professors who have been elected to the National Academy of Science, which has been granted to Drs. Inder Verma and Ron Evans. (P's Ex. 95, Chandler Depo., 57:15-58:3, 58:18-59:7). Again, Salk rebutted this argument, showing Salk has its own separate policy regarding the

NAS post tenure appointments. Chandler testified (hesitantly) that Geoff Wahl was an exception. "That he had received a big grant, and he was just-as his tenure would have been up, a big multi-year grant." (Ex. 95, 60:13-21.) However, it appears Wahl's grant was confirmed at the time of the exception was granted, whereas plaintiff's grant offer was speculative, especially in light of Dr. Emerson's grant history.

In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [... asserted] non-discriminatory reasons." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388–389.) Plaintiff concedes she can show pretext "by showing that the employer's proffered explanation is unworthy of credence." Plaintiff has not met her burden to show by substantial evidence Salk's business reason was pretextual and therefore, Salk retaliated against her by not extending her contract.

Defendant's motion for summary adjudication to the seventh cause of action for wrongful termination (issue two) is granted. During oral argument, plaintiff submitted to the tentative ruling granting the seventh cause of action.

Plaintiff has not met her burden with regard to her wrongful termination in violation of public policy, the seventh cause of action. Plaintiff bases her claim, in part, on the fact that she was demoted. First, plaintiff testified that she was not demoted. (P's depo., Ex. 11, 246:8-10.) Plaintiff's administrative claim fails to reference any demotion, only termination, denial of equal pay and promotion, and a work environment free of discrimination and retaliation. Defendant has not challenged plaintiff's equal pay cause of action. Additionally, the first amended complaint never alleges a demotion. Defendant did not renew her contract. As set forth in *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 678, "A cause of action for wrongful termination in violation of public policy does not lie if an employer decides simply not to exercise an option to renew a contract. In that instance, there is no termination of employment but, instead, an expiration of a fixed-term contract." In that case, the court allowed an amended complaint and a retaliation claim to proceed.

Defendant's motion for summary adjudication to the eighth cause of action for intentional infliction of emotional distress (issue four) is granted. Based upon the above reasoning, the court cannot conclude Salk acted recklessly by callously destroying Dr. Emerson's career. Plaintiff knew at the time she signed her agreement, there was a proposed ending, and was reminded of that not only in 2011 when the guidelines were instituted, but through a series of emails almost a year before her employment agreement ended. Plaintiff never sought medical or psychological assistance, and the third party hearsay about "suicide" is refuted by plaintiff's own deposition testimony that she never considered suicide. Accordingly, summary adjudication is denied to the emotional distress claim.

The court grants Salk's sealing request for plaintiff's separate statement, 71:21-72:24; 134-15:1315:4, plaintiff's material facts 237-238. The balance of the disputed items regarding the sealing request have been resolved by a separate order. Based upon the release of exhibit 129 to the press, the court's action of sealing the record has little effect. Accordingly, the court grants Salk's request to strike exhibit 129.

The court sustains Salk's objection to exhibit 144.

/n

[1] Although the court is not bound by out of state and federal authorities which hold that a slower rate of

promotion is not actionable, California courts may look to analogous federal authority for assistance. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 161, as modified on denial of reh'g (May 12, 2011).) [2] Plaintiff's material fact 212: Based on data collected, the Faculty Issues Subgroup Report ("White Paper") points out a "substantial and longstanding problem in recruiting, promoting and retaining women faculty," a "culture in which a small subset of faculty play a disproportionately large role in academic governance" a "complete lack of gender diversity in leadership positions" "inequitable resource distribution" "widespread perception among Salk faculty that External Relations has a limited number of go-to faculty for interaction with high level donors, members of the Board of Trustees, etc." and "significant gender-specific bias" in the distribution of resources. Ex. 150 (2016 White Paper, page 9-11, para 3).

Eddie C. Sturgeon

Judge Eddie C Sturgeon