

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 ANITA WASHINGTON,

5 Plaintiff,

6 v.

7 CALIFORNIA CITY CORRECTION CENTER,  
8 JOHN GUZMAN; AND DOES 1 TO 20,

9 Defendants.

1:10-cv-02031 OWW JLT

MEMORANDUM DECISION AND ORDER  
RE DEFENDANT'S MOTION TO  
DISMISS COMPLAINT

(DOC. 7)

10 I. INTRODUCTION

11 Plaintiff Anita Washington ("Plaintiff") proceeds with this  
12 action for damages against CCA of Tennessee, LLC ("CCA")  
13 (incorrectly sued as California City Correction Center) and John  
14 Guzman.  
15

16 On November 5, 2011, CCA filed a Motion to Dismiss the  
17 Complaint. Doc. 7. Plaintiff filed an Opposition on January 11,  
18 2011 (Doc. 10), one day late.

19 II. BACKGROUND

20 This action arises from alleged racial discrimination and  
21 retaliation engaged in by CCA, Plaintiff's former employer, and  
22 Mr. Guzman, CCA's Chief of Security and Plaintiff's former  
23 supervisor at CCA.  
24

25 On August 21, 2000, Plaintiff began her employment with CCA  
26 as a Correction Officer. Doc. 1, Ex.1 ¶ 1. Plaintiff was promoted  
27 to Sergeant in 2001. *Id.* The Complaint alleges that: in 2004, Mr.  
28

1 Guzman communicated his dislike of Plaintiff because of her race  
2 and was "continuously abusive" to Plaintiff (Doc. 1, Ex.1 ¶ 8);  
3 Mr. Guzman told Plaintiff to find another job after Plaintiff  
4 complained to Mr. Guzman about racial harassment (*Id.*); Mr.  
5 Guzman told Plaintiff that her co-workers were complaining about  
6 working with Plaintiff and turned the transport staff against  
7 Plaintiff (*Id.* at ¶¶ 8-9); Mr. Guzman removed Plaintiff from  
8 airlift trips and put Plaintiff in charge of medical runs,  
9 scheduling and paperwork as a set up to terminate Plaintiff's  
10 employment (*Id.* at ¶ 9); Plaintiff was demoted to Corrections  
11 Officer (*Id.* at ¶ 10); Plaintiff was subjected to retaliation in  
12 the form of false accusations of an inappropriate relationship  
13 with an inmate (*Id.*); and Plaintiff was terminated because of the  
14 false allegations motivated by racial discrimination and  
15 retaliation (*Id.*).

18 On or about January 27, 2009, Plaintiff filed a Charge of  
19 Discrimination with the California Department of Fair Employment  
20 and Housing ("DFEH") based on retaliation. *Id.* at ¶ 11. On or  
21 about January 29, 2009, DFEH issued Plaintiff a Notice of Right  
22 to Sue. *Id.* at ¶ 12. On August 31, 2009, Plaintiff filed an  
23 action in state court. Doc. 1, Ex. 1. On October 29, 2010, CCA  
24 removed the action to federal court based on diversity of  
25 citizenship between the parties. Doc. 1.



1 'probability requirement,' but it asks for more than a sheer  
2 possibility that a defendant has acted unlawfully." *Id.* (quoting  
3 *Twombly*, 550 U.S. at 556). "A well-pleaded complaint may proceed  
4 even if it strikes a savvy judge that actual proof of those facts  
5 is improbable, and 'that a recovery is very remote and  
6 unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*,  
7 416 U.S. 232, 236, 94 S.Ct. 1683 (1974)).  
8

9 The Ninth Circuit summarizes the governing standard as  
10 follows: "In sum, for a complaint to survive a motion to dismiss,  
11 the non-conclusory 'factual content' and reasonable inferences  
12 from that content, must be plausibly suggestive of a claim  
13 entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*,  
14 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).  
15

16 If a district court considers evidence outside the  
17 pleadings, a Rule 12(b)(6) motion to dismiss must be converted to  
18 a Rule 56 motion for summary judgment, and the nonmoving party  
19 must be given an opportunity to respond. *U.S. v. Ritchie*, 342  
20 F.3d 903, 907 (9th Cir. 2003). "A court may, however, consider  
21 certain materials-documents attached to the complaint, documents  
22 incorporated by reference in the complaint, or matters of  
23 judicial notice-without converting the motion to dismiss into a  
24 motion for summary judgment." *Id.* at 908.  
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1 IV. DISCUSSION

2 A. First Cause of Action: Violation of Cal. Gov't Code § 12940

3 CCA moves to dismiss Plaintiff's first cause of action for  
4 violation of the Fair Employment and Housing Act ("FEHA"), Cal.  
5 Gov't Code § 12940. CCA contends that the first cause of action  
6 fails because the Complaint does not allege discriminatory intent  
7 or specific facts that CCA took any personnel action based on  
8 Plaintiff's protected classification.  
9

10 It is recognized that "direct evidence of intentional  
11 discrimination is rare, and that such claims must usually be  
12 proved circumstantially." *Scotch v. Art Inst. Of Cal.-Orange*  
13 *Cnty., Inc.*, 173 Cal.App.4<sup>th</sup> 986, 1004, 93 Cal.Rptr.3d 338 (2009).  
14 As a result, California applies the *McDonnell Douglas* test, a  
15 three-stage burden-shifting test established by the United States  
16 Supreme Court, to claims of discrimination based on a theory of  
17 disparate treatment. *Id.*; *Guz v. Bechtel Nat., Inc.*, 24 Cal.4th  
18 317, 354, 8 P.3d 1089 (2000). "By successive steps of  
19 increasingly narrow focus, the test allows discrimination to be  
20 inferred from facts that create a reasonable likelihood of bias  
21 and are not satisfactorily explained." *Id.*  
22  
23

24 The first step of the *McDonnell Douglas* test places the  
25 initial burden on the plaintiff to establish a prima facie case  
26 of discrimination. *Id.* A prima facie case of employment  
27 discrimination under FEHA requires the plaintiff to show that:  
28

1       “(1) the plaintiff was a member of a protected class, (2) the  
2       plaintiff was qualified for the position he or she sought or was  
3       performing competently in the position held, (3) the plaintiff  
4       suffered an adverse employment action, such as termination,  
5       demotion, or denial of an available job, and (4) some other  
6       circumstance suggests a discriminatory motive.” *Scotch*, 173  
7       Cal.App.4<sup>th</sup> at 1004. If the plaintiff establishes a prima facie  
8       case, there is a presumption of discrimination, and the burden  
9       shifts to the employer to rebut the presumption by producing  
10      admissible evidence sufficient to raise a genuine issue of  
11      material fact the employer took its actions for a legitimate,  
12      nondiscriminatory reason. *Guz*, 24 Cal.4<sup>th</sup> at 355-356. If the  
13      employer meets that burden, the presumption of discrimination  
14      disappears, and the plaintiff must challenge the employer's  
15      proffered reasons as pretexts for discrimination or offer other  
16      evidence of a discriminatory motive. *Id.*

17  
18  
19             Under the first step of the *McDonnell Douglas* test,  
20      Plaintiff need only establish a prima facie case of  
21      discrimination. As to prong 1, CCA asserts that the Complaint  
22      fails to specify Plaintiff's race. The Complaint alleges that  
23      “Defendants discriminated and retaliated against [Plaintiff]  
24      because of her race and for complaining about race discrimination  
25      during the course of her employment.” Doc. 1, Ex. 1 ¶ 7. The  
26      Opposition clarifies that Plaintiff's race is “Black.” Doc. 10,  
27  
28

1 5:13. These allegations sufficiently allege that Plaintiff is a  
2 member of a protected class because of her race. However, the  
3 Plaintiff will be granted leave to amend the Complaint to allege  
4 her protected class with more specificity. As to prong 2, the  
5 Complaint alleges that "[d]uring the course of her employment  
6 with Defendant, Plaintiff performed each and every condition and  
7 covenant required on her part to be performed pursuant to said  
8 employment agreement." Doc. 1, Ex. 1 ¶ 5. As to prong 3, the  
9 Complaint alleges that Plaintiff was removed from airlift trips  
10 and put in charge of medical runs, scheduling and paperwork;  
11 demoted to Corrections Officer; and terminated. As to prong 4,  
12 the Complaint sufficiently alleges other circumstances that  
13 suggest a discriminatory intent and discriminatory action,  
14 including that Mr. Guzman communicated his dislike of Plaintiff  
15 because of her race and was continuously abusive to Plaintiff and  
16 that Plaintiff complained to Mr. Guzman about his racial  
17 discrimination towards her. Accepted as true, the Complaint  
18 sufficiently alleges a claim for relief for discrimination under  
19 the FEHA.  
20  
21

22  
23 CCA's motion to dismiss Plaintiff's first cause of action is  
24 DENIED. Plaintiff is GRANTED LEAVE TO AMEND the first cause of  
25 action.

26  
27 B. Second Cause of Action: Discharge in Violation of Public  
Policy (Cal. Gov't Code § 12920)

28 CCA moves to dismiss Plaintiff's second cause of action for

1 discharge in violation of public policy. CCA contends that the  
2 second cause of action is superfluous to the first cause of  
3 action under FEHA and that Plaintiff cannot concurrently file a  
4 statutory claim and a common law claim predicated on the same  
5 violations. This contention is belied by express legal authority.  
6

7 Section 12993(a) of the California Government Code provides:

8 The provisions of this part shall be construed liberally for  
9 the accomplishment of the purposes of this part. Nothing  
10 contained in this part shall be deemed to repeal any of the  
11 provisions of the Civil Rights Law or of any other law of  
12 this state relating to discrimination because of race,  
13 religious creed, color, national origin, ancestry, physical  
14 disability, mental disability, medical condition, marital  
15 status, sex, age, or sexual orientation, unless those  
16 provisions provide less protection to the enumerated classes  
17 of persons covered under this part.

18 Cal. Gov't Code § 12993(a). In *Rojo v. Kliger*, 52 Cal.3d 65, 82,  
19 276 Cal.Rptr. 130 (1990), the California Supreme Court held that  
20 "FEHA does not displace any causes of action and remedies that  
21 are otherwise available to plaintiffs." "The FEHA was meant to  
22 supplement, not supplant or be supplanted by, existing  
23 antidiscrimination remedies, in order to give employees the  
24 maximum opportunity to vindicate their civil rights against  
25 discrimination." *Id.* at 74-75 (quoting *State Pers. Bd. v. Fair*  
26 *Emp't & Hous. Comm'n.*, 39 Cal.3d 422, 431 (1985)). The *Rojo* court  
27 further held that a plaintiff may pursue relief under FEHA and  
28 common law either sequentially or simultaneously:

We conclude, therefore, that although an employee must  
exhaust the FEHA administrative remedy before bringing suit



1 on a cause of action under the act or seeking the relief  
2 provided therein, exhaustion is not required before filing a  
3 civil action for damages alleging nonstatutory causes of  
4 action. An employee, of course, may elect to waive the  
5 statutory cause of action and remedies, and proceed directly  
6 to court on the common law claims; alternatively, the  
7 employee may pursue both the administrative and the judicial  
8 avenues, either sequentially or simultaneously, in the  
9 latter case amending his or her complaint to join the FEHA  
10 cause of action once the Department has issued the right-to-  
11 sue letter.

12 *Rojo*, 52 Cal.3d at 88 (internal citations omitted).

13 CCA's motion to dismiss Plaintiff's second cause of action  
14 is DENIED.

15 C. Third Cause of Action: Failure to Prevent Discrimination  
16 (Cal. Gov't Code § 12940)

17 CCA moves to dismiss Plaintiff's third cause of action for  
18 failure to prevent discrimination in violation of FEHA. Citing  
19 *Trujillo v. North County Transit District*, 63 Cal.App.4<sup>th</sup> 280, 289  
20 (1998), CCA contends that in the absence of a viable claim of  
21 discrimination, no liability may be imposed on an employer for  
22 failure to prevent discrimination. CCA requests that if the court  
23 grants CCA's motion to dismiss Plaintiff's first cause of action  
24 for discrimination, that it also grants CCA's motion to dismiss  
25 Plaintiff's third cause of action.

26 The Complaint sufficiently alleges employment  
27 discrimination, and CCA's motion to dismiss Plaintiff's first  
28 cause of action is denied. Accordingly, CCA's motion to dismiss  
29 Plaintiff's third cause of action is DENIED.

1           D. Fourth Cause of Action: Retaliation (Cal. Gov't. Code §  
2           12940(f))

3           CCA does not move to dismiss Plaintiff's fourth cause of  
4           action for retaliation under California Government Code §  
5           12940(f). California Government Code § 12940(f) pertains to  
6           medical and psychological examinations and inquiries, not  
7           retaliation. Although the claim is not attacked and therefore  
8           remains intact, it does not reference any applicable Section of  
9           the California Government Code. Plaintiff is GRANTED LEAVE TO  
10          AMEND the fourth cause of action.

11           E. Fifth Cause of Action: Intentional Infliction of Emotional  
12           Distress

13           CCA advances two arguments for dismissal of Plaintiff's  
14           claim for intentional infliction of emotional distress: (1) it is  
15           barred by the exclusive remedy of the Workers' Compensation Act  
16           ("WCA"); and (2) the Complaint does not allege extreme and  
17           outrageous conduct.  
18

19           1. California Worker's Compensation Act

20           The WCA provides that worker's compensation liability "in  
21           lieu of any other liability whatsoever to any person . . . shall,  
22           without regard to negligence, exist against an employer for any  
23           injury sustained by his or her employees arising out of and in  
24           the course of the employment . . . ." Cal. Lab. Code § 3600. The  
25           WCA is generally the "exclusive" remedy for claims against co-  
26           employees (Cal. Lab. Code § 3601) and the "sole and exclusive  
27             
28

1 remedy" for claims against employers (Cal. Lab. Code § 3602).

2 The WCA is not a bar where "the employer's conduct [ ]  
3 contravenes fundamental public policy." *Livitsanos v. Superior*  
4 *Court*, 2 Cal.4th 744, 754, 7 Cal.Rptr.2d 808 (1992) (internal  
5 quotations and citations omitted); see also *Gantt v. Sentry Ins.*,  
6 1 Cal.4th 1083, 1100, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992),  
7 *overruled on other grounds, Green v. Ralee Eng'g Co.*, 19 Cal.4th  
8 66, 78 Cal.Rptr.2d 16 (1998) ("When an employer's decision to  
9 terminate an employee results from an animus that violates the  
10 fundamental policy of this state proscribing any interference in  
11 the official investigation of sexual harassment, such misconduct  
12 cannot under any reasonable viewpoint be considered a normal part  
13 of the employment relationship.") (internal quotations and  
14 citations omitted).

15  
16  
17 Here, Plaintiff alleges racial discrimination and  
18 termination in retaliation for protesting racial discrimination,  
19 which violates fundamental public policy. The WCA does not  
20 preempt Plaintiff's claims for intentional infliction of  
21 emotional distress.

22  
23 CCA's motion to dismiss the fifth cause of action as barred  
24 by the WCA is DENIED.

## 25 2. Intentional Infliction of Emotional Distress

26 A cause of action for intentional infliction of emotional  
27 distress exists when there is "(1) extreme and outrageous conduct  
28

1 by the defendant with the intention of causing, or reckless  
2 disregard of the probability of causing, emotional distress; (2)  
3 the plaintiff's suffering severe or extreme emotional distress;  
4 and (3) actual and proximate causation of the emotional distress  
5 by the defendant's outrageous conduct." *Hughes v. Pair*, 46  
6 Cal.4th 1035, 1050, 95 Cal.Rptr.3d 636 (2009) (internal  
7 quotations and citation omitted). A defendant's conduct is  
8 "outrageous" when it is so "extreme as to exceed all bounds of  
9 that usually tolerated in a civilized community." *Id.* at 1051.  
10 The defendant's conduct must also be "intended to inflict injury  
11 or engaged in with the realization that injury will result." *Id.*

12  
13 Defendant contends that Plaintiff fails to allege extreme  
14 and outrageous conduct because the alleged conduct falls within  
15 the ambit of personnel management actions, which are not  
16 "outrageous" as a matter of law. In support, Defendant cites  
17 *Janken v. GM Hughes Electronics*, 46 Cal.App.4<sup>th</sup> 55, 80, 53  
18 Cal.Rptr.2d 741 (1996):

19  
20 Managing personnel is not outrageous conduct beyond the  
21 bounds of human decency, but rather conduct essential to the  
22 welfare and prosperity of society. A simple pleading of  
23 personnel management activity is insufficient to support a  
24 claim of intentional infliction of emotional distress, even  
25 if improper motivation is alleged. If personnel management  
26 decisions are improperly motivated, the remedy is a suit  
27 against the employer for discrimination.

28 Defendant also cites two non-precedential cases that followed  
*Janken*: *Hegelson v. American International Group, Inc.*, 44  
F.Supp.2d 1091 (S.D. Cal. 1999) ("All of the actions submitted by

1 plaintiff are every-day management decisions. Performance  
2 reviews, counseling sessions, lay-off decisions, and work  
3 assignments are all decisions that businesses make every day. . .  
4 . Even if these decisions were improperly motivated, they fall  
5 far short of the necessary standard of outrageous conduct beyond  
6 all bounds of decency.") and *Bartalini v. Blockbuster*  
7 *Entertainment, Inc.*, 1999 WL 1012383, \*1 (N.D. Cal. 1999) (holding  
8 that low bonus and poor performance review, treatment in a rude  
9 and condescending manner, failure to show up for scheduled  
10 appointments, and terminating an employee for failure to correct  
11 a break problem are socially unacceptable, but does not rise to  
12 the level of outrageous conduct).

14  
15 Plaintiff neither addresses Defendant's cited cases nor  
16 distinguishes Defendant's alleged conduct from situations  
17 involving everyday management decisions. Under *Janken*, most of  
18 Plaintiff's allegations are "personnel management decisions" and  
19 cannot be considered "extreme or outrageous" for purposes of  
20 establishing intentional infliction of emotional distress. See  
21 *Janken*, 46 Cal. App.4<sup>th</sup> at 80.

22  
23 The Complaint contains one allegation that potentially gives  
24 rise to "extreme and outrageous conduct": the allegation that Mr.  
25 Guzman communicated his dislike of Plaintiff because of her race  
26 and was "continuously abusive" to Plaintiff. Complaint ¶ 8.  
27 Courts have found racial slurs and epithets sufficient to  
28

1 constitute intentional infliction of emotional distress. See  
2 *Robinson v. Hewlett-Packard Corp.*, 183 Cal.App.3d 1108, 1129-  
3 1130, 228 Cal.Rptr. 591 (1986) (finding summary judgment on  
4 intentional infliction of emotional distress claim inappropriate  
5 because use of racial slurs may constitute outrageous conduct);  
6 *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 498-499, 86 Cal.Rptr.  
7 88 (1970) (holding that complaint states a cause of action for  
8 intentional infliction of emotional distress where supervisor  
9 fired African-American employee while shouting various racial  
10 epithets). The Complaint contains marginally sufficient factual  
11 allegations of extreme and outrageous conduct of racial  
12 discrimination to survive a motion to dismiss.  
13

14  
15 CCA's motion to dismiss Plaintiff's fifth cause of action is  
16 DENIED.

17 **F. Sixth Cause of Action: Defamation**

18 CCA advances three arguments to support dismissal of  
19 Plaintiff's claim for defamation: (1) the exclusive remedy of the  
20 WCA; (2) the Complaint does not sufficiently allege defamation;  
21 and (3) it is barred by privilege under California Civil Code §  
22 47(c).  
23

24 **1. California Workers' Compensation Act**

25 The WCA provides that worker's compensation liability "in  
26 lieu of any other liability whatsoever to any person . . . shall,  
27 without regard to negligence, exist against an employer for any  
28

1 injury sustained by his or her employees arising out of and in  
2 the course of the employment . . . ." Cal. Lab. Code § 3600. The  
3 WCA is generally the "exclusive" remedy for claims against co-  
4 employees (Cal. Lab. Code § 3601) and the "sole and exclusive  
5 remedy" for claims against employers (Cal. Lab. Code § 3602).

6  
7 Citing *Robomatic, Inc. v. Vetco Offshore*, 225 Cal.App.3d  
8 270, 275 Cal.Rptr. 70 (1990), CCA contends that courts examining  
9 the effect of the WCA's exclusivity on intentional torts have  
10 concluded that the WCA bars claims for defamation. The *Robomatic*  
11 court, however, held that the WCA was the exclusive remedy for  
12 negligent infliction of emotional distress ensuing from dismissal  
13 of employment; it does not discuss whether the WCA precludes  
14 defamation claims. *Id.* at 274.

15  
16 "[W]hile the Supreme Court has not explicitly passed on this  
17 question, its opinions to date and decisions of the Courts of  
18 Appeal all indicate that the Workers' Compensation Act does not  
19 preclude a civil action for defamation against one's employer . .  
20 . ." *Operating Eng'rs Local 3 v. Johnson*, 110 Cal.App.4<sup>th</sup> 180,  
21 186-187, 1 Cal.Rptr.3d 552 (2003). In *Vacanti v. State*  
22 *Compensation Insurance Fund*, 24 Cal.4<sup>th</sup> 800, 814, 102 Cal.Rptr.2d  
23 562 (2001), the California Supreme Court observed that "courts  
24 have exempted defamation claims from exclusivity because an  
25 injury to reputation does not depend on a personal injury." *See*  
26 *also Howland v. Balma*, 143 Cal.App.3d 899, 904-905, 192 Cal.Rptr.

1 286 (1983) (holding that slander action against former employer  
2 was not barred by exclusive provisions of WCA; gist of slander  
3 action is damage to reputation, which it not a "personal injury"  
4 (i.e., medical or personal injury to the body) or a risk of  
5 employment within the purview of the WCA); *Livitsanos v. Superior*  
6 *Court*, 2 Cal.4<sup>th</sup> 744, 757 n.9, 7 Cal.Rptr.2d 808 (1992) (observing  
7 that "[a] number of courts have apparently determined that the  
8 gravamen of an action for libel or slander is damage to  
9 "reputation," a "proprietary" as distinct from a physical or  
10 mental injury, and therefore have concluded that defamation does  
11 not lie within the purview of the workers' compensation law). The  
12 WCA does not bar Plaintiff's claim for defamation.

13  
14  
15 CCA's motion to dismiss Plaintiff's sixth cause of action on  
16 grounds of WCA exclusivity is DENIED.

17 2. Defamation

18 Defamation can take the form of slander or libel. Cal. Civ.  
19 Code § 44. Slander is an oral, unprivileged communication by  
20 radio or any mechanical or other means which:  
21

- 22 1. Charges any person with crime, or with having been  
indicted, convicted, or punished for crime;
- 23 2. Imputes in him the present existence of an infectious,  
24 contagious, or loathsome disease;
- 25 3. Tends directly to injure him in respect to his office,  
26 profession, trade or business, either by imputing to him  
27 general disqualification in those respects which the office  
or other occupation peculiarly requires, or by imputing  
28 something with reference to his office, profession, trade,  
or business that has a natural tendency to lessen its  
profits;



- 1           4. Imputes to him impotence or a want of chastity; or
- 2           5. Which, by natural consequence, causes actual damage.

3           Cal. Civ. Code § 46. Libel is a false and unprivileged  
4           publication by writing, printing, picture, effigy or other fixed  
5           representation to the eye. Cal. Civ. Code § 45. A statement is  
6           libelous per se if it defames the plaintiff on its face, that is,  
7           without the need of extrinsic evidence to explain the statement's  
8           defamatory nature. Cal. Civ. Code § 45a.

9  
10           CCA contends that Plaintiff's defamation claim is not pled  
11           with the requisite specificity. The Complaint alleges that  
12           Plaintiff was subject to "false accusations of inappropriate  
13           relationship with an inmate and giving away equal or value to an  
14           inmate." Doc. 1, Ex. 1 ¶ 10. The Complaint does not provide  
15           additional detail about these allegations, including whether they  
16           were made orally or through written publication to qualify as  
17           slander or libel.

18  
19           CCA's motion to dismiss Plaintiff's fifth cause of action  
20           for lack of specificity is GRANTED WITHOUT PREJUDICE. Plaintiff  
21           is GRANTED LEAVE TO AMEND the fifth cause of action to properly  
22           allege a claim for defamation.

23  
24           3. California Civil Code § 47(c)

25           "An employer has a qualified privilege of communication to a  
26           listener with a common interest." *Robomatic, Inc. v. Vetco*  
27           *Offshore*, 225 Cal.App.3d 270, 276, 275 Cal.Rptr. 70 (1990).

1 California Civil Code § 47(c) provides in pertinent part:

2 A privileged publication or broadcast is one made: In a  
3 communication, without malice, to a person interested  
4 therein, (1) by one who is also interested, or (2) by one  
5 who stands in such a relation to the person interested as to  
6 afford a reasonable ground for supposing the motive for the  
7 communication to be innocent, or (3) who is requested by the  
8 person interested to give the information. This subdivision  
9 applies to and includes a communication concerning the job  
10 performance or qualifications of an applicant for  
11 employment, based upon credible evidence, made without  
12 malice, by a current or former employer of the applicant to,  
13 and upon request of, one whom the employer reasonably  
14 believes is a prospective employer of the applicant.

15 Cal. Civ. Code § 47(c).

16 To defeat this privilege, a plaintiff must specifically  
17 allege malice. *Robomatic*, 225 Cal.App.3d 270 at 276. "[M]alice is  
18 not inferred from the communication." Cal. Civ. Code § 48. "The  
19 malice necessary to defeat a qualified privilege is 'actual  
20 malice' which is established by a showing that the publication  
21 was motivated by hatred or ill will towards the plaintiff or by a  
22 showing that the defendant lacked reasonable grounds for belief  
23 in the truth of the publication and therefore acted in reckless  
24 disregard of the plaintiff's rights." *Noel v. River Hills  
25 Wilsons, Inc.*, 113 Cal.App.4<sup>th</sup> 1363, 1370, 7 Cal.Rptr.3d 216  
26 (2003) (quoting *Sanborn v. Chronicle Pub. Co.*, 18 Cal.3d 406, 413,  
27 134 Cal.Rptr. 402 (1976)). Mere negligence is not enough to  
28 constitute malice. "It is only when the negligence amounts to a  
reckless or wanton disregard for the truth, so as to reasonably  
imply a willful disregard for or avoidance of accuracy, that

1 malice is shown." *Noel*, 113 Cal.App.4<sup>th</sup> at 1371 (quoting *Roemer v.*  
2 *Retail Credit Co.*, 3 Cal.App.3d 368, 371-372, 83 Cal.Rptr. 540  
3 (1970).

4 The Complaint contains detailed allegations of Defendants'  
5 ill will towards Plaintiff, including that Mr. Guzman  
6 "communicated his dislike for Plaintiff because of her race and  
7 was continuously abusive of Plaintiff." Doc. 1, Ex. 1 ¶ 8. The  
8 Complaint also alleges that the inmate allegedly had sexual  
9 relations with someone named Ana, and that although Plaintiff's  
10 name is Anita, she was singled out for investigations and  
11 harassment. *Id.* at ¶ 10. Whether California Civil Code § 47(c)'s  
12 qualified privilege applies is a question of fact and will be  
13 subject to proof. The Complaint sufficiently alleges malice to  
14 survive a claim of privilege under California Civil Code § 47(c)  
15 on a motion to dismiss.  
16  
17

18 CCA's motion to dismiss Plaintiff's sixth cause of action on  
19 privilege grounds is DENIED.

20 **G. Motion to Strike Punitive Damages**

21 The Complaint, in its concluding prayer for relief, seeks  
22 "punitive damages against Defendant in an amount to be proven at  
23 trial." Doc. 1, Ex. 1 at 8. CCA moves to dismiss Plaintiff's  
24 claim for punitive damages, contending that the Complaint fails  
25 to plead facts sufficient to support a claim of punitive damages.  
26 CCA's motion to dismiss this allegation may be treated as a  
27  
28

1 motion to strike. *Demoura v. Ford*, 2010 WL 2673865, \*5 (E.D. Cal.  
2 2010). In her Opposition, Plaintiff does not address CCA's motion  
3 to dismiss the claim for punitive damages.

4 Rule 12(f) provides that the court "may order stricken from  
5 any pleading any insufficient defense or any redundant,  
6 immaterial, impertinent, or scandalous matter." Fed. R. Civ. P.  
7 12(f). Motions to strike are disfavored and infrequently granted.  
8 *Neveu v. City of Fresno*, 392 F.Supp.2d 1159, 1170 (E.D. Cal.  
9 2005). A motion to strike should not be granted unless it is  
10 clear that the matter to be stricken could have no possible  
11 bearing on the subject matter of the litigation. *Id.* The function  
12 of a Rule 12(f) motion to strike is to avoid the expenditure of  
13 time and money that might arise from litigating spurious issues  
14 by dispensing with those issues prior to trial. *Fantasy, Inc. v.*  
15 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other*  
16 *grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

17 It is well settled that California's punitive damages  
18 statute, Civil Code § 3294, applies to actions brought under  
19 FEHA. *Weeks v. Baker & McKenzie*, 63 Cal.App.4<sup>th</sup> 1128, 1147-1148,  
20 74 Cal.Rptr.2d 510 (1998).

21 California Civil Code § 3294 provides in pertinent part:

- 22  
23  
24 (a) In an action for the breach of an obligation not  
25 arising from contract, where it is proven by clear and  
26 convincing evidence that the defendant has been guilty  
27 of oppression, fraud, or malice, the plaintiff, in  
28 addition to the actual damages, may recover damages for

1 the sake of example and by way of punishing the  
2 defendant.

3 (b) An employer shall not be liable for damages pursuant to  
4 subdivision (a), based upon acts of an employee of the  
5 employer, unless the employer had advance knowledge of  
6 the unfitness of the employee and employed him or her  
7 with a conscious disregard of the rights or safety of  
8 others or authorized or ratified the wrongful conduct  
9 for which the damages are awarded or was personally  
10 guilty of oppression, fraud, or malice. With respect to  
11 a corporate employer, the advance knowledge and  
12 conscious disregard, authorization, ratification or act  
13 of oppression, fraud, or malice must be on the part of  
14 an officer, director, or managing agent of the  
15 corporation.

16 Cal. Civ. Code § 3294.<sup>1</sup>

17 An employer may be liable for punitive damages in an action  
18 arising from the tortious conduct of its employee in three  
19 situations: "(1) when an employee was guilty of oppression, fraud  
20 or malice, and the employer with advance knowledge of the  
21 unfitness of the employee employed him or her with a conscious  
22 disregard of the rights or safety of others, (2) when an employee  
23 was guilty of oppression, fraud or malice, and the employer  
24 authorized or ratified the wrongful conduct, or (3) when the

---

25 <sup>1</sup> Civil Code Section 3294(c) defines "malice," "oppression," and "fraud" as  
26 follows:

- 27 (1) "Malice" means conduct which is intended by the defendant to cause injury  
28 to the plaintiff or despicable conduct which is carried on by the  
defendant with a willful and conscious disregard of the rights or safety  
of others.
- (2) "Oppression" means despicable conduct that subjects a person to cruel and  
unjust hardship in conscious disregard of that person's rights.
- (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of  
a material fact known to the defendant with the intention on the part of  
the defendant of thereby depriving a person of property or legal rights or  
otherwise causing injury.

1 employer was itself guilty of the oppression, fraud or malice."  
2 *Weeks*, 63 Cal.App.4<sup>th</sup> at 1151; see also *Mitchell v. Keith*, 752  
3 F.2d 385, 390 (9<sup>th</sup> Cir. 1985) ("Under California law, an employer  
4 may be made to pay punitive damages based upon the acts of an  
5 employee, where the employer (1) authorized the acts, (2)  
6 ratified the acts, (3) knowingly or recklessly employed an unfit  
7 employee, or (4) employed the person, who did the wrongful acts  
8 in the scope of employment, in a managerial capacity."). For  
9 corporate employers, such as CCA, the advance knowledge and  
10 conscious disregard, authorization, ratification or act of  
11 oppression, fraud, or malice must be on the part of an officer,  
12 director, or managing agent of the corporation. See Cal. Civ.  
13 Code § 3294(b).

14  
15  
16 CCA contends that punitive damages may not be pleaded  
17 generally and that specific factual allegations are required to  
18 support a claim for punitive damages. See *Brousseau v. Jarrett*,  
19 73 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977) (holding that  
20 complaint's conclusory characterization of defendant's conduct as  
21 "intentional, willful and fraudulent" was patently insufficient  
22 to support claim for punitive damages). As federal standards  
23 govern the pleading requirements applicable to this diversity  
24 proceeding, Plaintiff's claim for punitive damages will be  
25 reviewed applying the pleading standards set forth in *Twombly* and  
26  
27  
28

1 *Iqbal. Kelley v. Corrections Corp. of Amer.*, --- F.Supp.2d ---,  
2 \*12-13, 2010 WL 3853182 (E.D. Cal. 2010).

3 The Complaint alleges acts of racial discrimination and  
4 retaliation by Mr. Guzman, CCA's Chief of Security, which are  
5 indicative of malice and oppression. The Complaint alleges that  
6 Plaintiff discussed the situation with the Warden, who in turn  
7 had a conversation with Mr. Guzman. Doc. 1 Ex. 1 ¶ 8. Whether the  
8 Chief of Security and/or Warden is an "officer, director, or  
9 managing agent" of CCA is a question of fact and will be subject  
10 to proof. The Complaint alleges that "Defendants authorized  
11 and/or ratified the conduct of Guzman by retaining him after  
12 learning of his conduct toward Plaintiff and failing and refusing  
13 to discipline or reprimand him." Doc. 1, Ex. 1 ¶ 24. The  
14 Complaint must allege that Mr. Guzman, the Warden, or someone  
15 else who was an officer, director, or managing agent of CCA had  
16 the advance knowledge and conscious disregard, authorization,  
17 ratification or act of oppression, fraud, or malice.

18  
19  
20 CCA's motion to strike Plaintiff's claim for punitive  
21 damages is GRANTED WITH LEAVE TO AMEND.

#### 22 V. CONCLUSION

23 For the reasons stated:

24  
25 1. CCA's motion to dismiss is GRANTED in part and DENIED in  
26 part, as follows.

27 a. CCA's motion to dismiss Plaintiff's first cause of  
28

