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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

TERESSA KELLEY, an individual,)	CV F 10 – 1294 AWI JLT
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER ON
v.)	DEFENDANTS’ MOTION TO
)	DISMISS PLAINTIFF’S FIRST
CORRECTIONS CORPORATION OF)	CLAIM FOR RELIEF AND
AMERICA, and DOES 1 through 50,)	CLAIMS FOR PUNITIVE
inclusive,)	DAMAGES
)	
Defendants.)	Doc. # 33

This is an action in diversity for damages under California’s Fair Employment and Housing Act (“FEHA”) by plaintiff Teressa Kelley (“Plaintiff”) against Defendant CCA of Tennessee, LLC (“Defendant”). On September 30, 2010, the court filed a memorandum opinion and order dismissing Plaintiff’s first claim for employment discrimination in violation of Cal. Gov’t Code § 12940(a), and Plaintiff’s fourth claim for retaliation in violation of Gov’t Code § 1240(h). Both claims were dismissed with leave to amend. In addition, the court dismissed Plaintiff’s prayer for punitive damages, which was alleged with respect to each claim for relief. On October 18, 2010, Plaintiff filed her First Amended Complaint (“FAC”). In the instant motion, Defendant seeks dismissal Plaintiff’s first claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure and dismissal of Plaintiff’s amended claims for punitive damages. Diversity jurisdiction exists pursuant to 28 U.S.C. § 1332. Venue is proper in this court.

1 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 In its memorandum opinion and order filed September 30, 2010, (the “September 30
3 Order”) the court set forth the factual background of Plaintiff’s complaint. Plaintiff’s FAC
4 expands, but does not contradict, the allegations made in the original complaint. The general
5 background facts alleged in the original complaint and recounted in the September 30 Order
6 need not be repeated here. Because Defendant’s instant motion seeks dismissal of only
7 Plaintiff’s first claim for relief for unlawful discrimination based on physical disability, the
8 court will focus only on those factual allegations that relate to Plaintiff’s first claim for relief,
9 and in particular those facts that are alleged in the FAC that were not alleged in Plaintiff’s
10 original complaint. Plaintiff’s allegations with regard to punitive damages will be set forth
11 *infra* in the section of this order discussing that issue. All allegations set forth in the FAC are
12 taken as true for purposes of this analysis.

13 There is no dispute that Plaintiff was employed by Defendant in 2002 as a Count
14 Clerk at the California City Correctional Center, a California correctional institution owned
15 and operated by Defendant. It is also not disputed that, following carpal tunnel release
16 surgery in 2007, Plaintiff experienced increasingly severe neurologic symptoms in her right
17 and left hands that ultimately caused her to be taken off work by Dr. George Balfour on or
18 about December 19, 2008. At the time of her carpal tunnel release surgery in 2007,
19 Plaintiff’s duties as Records Supervisor/Movement Coordinator included:

20 communicating with inter-facility departments via email, preparing packets for
21 incoming inmates, reviewing incoming inmates’ criminal history, answering
22 inmates’ requests for information, supervising records clerks, providing
23 training to records clerks, verifying timely release dates for inmates, preparing
inmate transfer documentation, researching inmate jail credit, creating inmate
jail credit time lines, generating computer data entry of records, placing
telephone calls, reading, handwriting notes, typing and use of a mouse.

24 Doc. # 31 at ¶ 8.

25 In 2008, as Plaintiff’s symptoms were worsening, a Certified Ergonomic Specialist
26 and Field Case Manager made several suggestions to mitigate Plaintiff’s condition. The
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1 suggestions included an adjustable keyboard platform and an ergonomic mouse, both of
2 which were provided by Defendant. The Ergonomic Specialist also recommended an
3 ergonomic chair, a headset, and an in-line document holder. The latter items were not
4 provided by Defendant although Plaintiff alleges Defendant had assured Plaintiff that those
5 items would be provided.

6 About ten months after Plaintiff was removed from work by Dr. Balfour, Plaintiff
7 submitted to a Qualified Medical Examination (“QME”) by Dr. Vincent Gumbs, M.D. Dr.
8 Gumbs concluded that Plaintiff’s condition was “Permanent and Stationary,” and that she
9 could return to work subject to a number of work restrictions that included avoiding
10 repetitive gripping, grasping, pushing, pulling and repetitive typing. Plaintiff was also
11 advised to rest ten minutes every hour to relieve symptoms. Dr. Gumbs also opined that
12 Plaintiff might require a number of medical interventions in the future including medications,
13 braces and further surgeries.

14 Plaintiff alleges Defendant received Plaintiff’s workers compensation notification,
15 including a copy of Dr. Gumbs’ QME, and that directly thereafter Plaintiff received
16 notification of her termination. Plaintiff alleges that, at the time of her termination, she was:

17 both “qualified and “otherwise qualified” and could have performed the
18 essential functions of her job as Records Supervisor/Movement Coordinator
19 with accommodation. [Plaintiff] successfully could have performed her job
20 with the assistance of, without limitation, the ergonomic chair, head set, and
21 in-line document holder that CCA promised but failed to provide and by being
allowed to take hourly breaks, during which she could have read inmate files
and performed other non-manual work while resting her hands. [Plaintiff] also
would have benefitted from a rolling portable file holder to ease the burden of
carrying heavy files.

22 On or about the date of [Plaintiff’s] termination, the California City
23 Correctional Center also had several other open positions for which [Plaintiff]
24 was qualified and could have performed , with or without reasonable
25 accommodations, and into which she could have been reassigned, including
26 the positions of Unit Secretary, Education Secretary and Records Clerk. The
27 positions of Unit Secretary, Education Secretary and Records Clerk involved
28 lighter duties that [Plaintiff’s] Records Supervisor/Movement Coordinator
position.

At the time of her termination, [Plaintiff] also was qualified for and could

1 have been reassigned to available Corrections Officer jobs, the essential
2 functions of which she could have performed, with or without reasonable
3 accommodation. Upon hire at CCA, [Plaintiff] completed the new hire
4 academy training, which included Corrections Officers training. CCA
5 secretaries, including [Plaintiff], often crossed over to assume work as
6 Corrections Officers to garner a higher pay grade. The Corrections Officers
7 positions also involved lighter duties than [Plaintiff's] Records
8 Supervisor/Movement Coordinator position.

9 Doc. # 31 at ¶¶ 20-22.

10 LEGAL STANDARDS

11 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
12 can be based on the failure to allege a cognizable legal theory or the failure to allege
13 sufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc.,
14 749 F.2d 530, 533-34 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule
15 12(b)(6), a complaint must set forth factual allegations sufficient “to raise a right to relief
16 above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)
17 (“Twombly”). While a court considering a motion to dismiss must accept as true the
18 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425
19 U.S. 738, 740 (1976), and must construe the pleading in the light most favorable to the party
20 opposing the motion, and resolve factual disputes in the pleader's favor, Jenkins v.
21 McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969), the allegations must be
22 factual in nature. See Twombly, 550 U.S. at 555 (“a plaintiff’s obligation to provide the
23 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a
24 formulaic recitation of the elements of a cause of action will not do”). The pleading standard
25 set by Rule 8 of the Federal Rules of Civil Procedure “does not require ‘detailed factual
26 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me
27 accusation.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (“Iqbal”).

28 The Ninth Circuit follows the methodological approach set forth in Iqbal for the
assessment of a plaintiff’s complaint:

“[A] court considering a motion to dismiss can choose to begin by identifying

1 pleadings that, because they are no more than conclusions, are not entitled to
2 the assumption of truth. While legal conclusions can provide the framework
3 of a complaint, they must be supported by factual allegations. When there are
well-pleaded factual allegations, a court should assume their veracity and then
determine whether they plausibly give rise to an entitlement to relief.”

4 Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th Cir. 2009) (quoting Iqbal, 129 S.Ct. at
5 1950).

6 Plaintiff’s FAC was filed on October 19, 2010. Defendant’s instant motion to dismiss
7 was filed on November 1, 2010. Plaintiff’s opposition was filed on November 22, 2010, and
8 Defendant’s reply was filed on November 29, 2010. The court vacating the hearing date and
9 took the matter under submission as of December 6, 2010.

10 DISCUSSION

11 I. Plaintiff’s First Claim for Relief for Unlawful Discrimination

12 As in the original complaint, Plaintiff’ first claim for relief in the FAC alleges
13 Defendant unlawfully discriminated against Plaintiff on the basis of her disability in violation
14 of Cal. Gov’t Code § 12940 *et seq.* The court presumes Plaintiff’s first claim for relief is
15 alleged pursuant to section 12940(a). Defendant again challenges the sufficiency of
16 Plaintiff’s first claim for relief on the ground that Plaintiff has failed to allege she is a
17 “qualified individual” within the meaning of Green v. State of California, 42 Cal.4th 254
18 (2007).

19 To state a *prima facie* claim for unlawful discrimination on account of disability, a
20 plaintiff must allege; (1) that she is disabled within the statutory definition; (2) that she is
21 qualified to perform the essential functions of the job with or without reasonable
22 accommodations; and (3) that she has suffered a discriminatory employment action on
23 account of the disability. Le Bourgeois v. Fireplace Manufacturers, Inc., 68Cal.app.4th 1049,
24 1058 (1988). The analytic framework for claims of employment discrimination proceeds in
25 three steps. Id. at 1048. The plaintiff has the initial burden to show a *prima facie* case of
26 discrimination after which the employer must offer “a legitimate nondiscriminatory reason
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1 for the adverse employment decision. Finally, the plaintiff bears the burden of proving the
2 employer's reason was pretextual.' [Citation.]" Id. (quoting Brundage v. Hahn, 57
3 Cal.App.4th 228, 236 (1997)). As was the case in Defendant's prior challenge to Plaintiff's
4 discrimination in the original complaint, Defendant here alleges that Plaintiff has failed to
5 allege that she was a "qualified individual" who was able to perform the essential functions
6 of the job with or without accommodations. Plaintiff contends the allegations set forth in the
7 FAC sufficiently set forth facts to support the elements of a claim for discrimination such that
8 dismissal is not warranted. Again, the question for the court to answer is whether Plaintiff's
9 complaint meets the minimum pleading standard with regard to Plaintiff's claim for unlawful
10 discrimination.

11 While FEHA "prohibits discrimination based on an employee's physical disability,"
12 Green, 42 Cal.4th at 262, it "does not prohibit an employer from refusing to hire or
13 discharging an employee with a physical or mental disability ... where the employee, because
14 of his or her physical or mental disability, is unable to perform his or her essential duties even
15 with reasonable accommodations, or cannot perform those duties in a manner that would not
16 endanger his or her health or safety or the health or safety of others even with reasonable
17 accommodations." Cal. Gov.Code § 12940(a)(1). In other words, an "employer may
18 discharge or refuse to hire a person who, because of a disability or medical condition, is
19 unable to perform his or her essential duties even with reasonable accommodation." Ross v.
20 RagingWire Telcom. Inc., 42 Cal.4th 920, 926 (2008). Again, the court borrows its working
21 definition of "qualified individual" from the Americans With Disabilities Act. Pursuant to
22 29 C.F.R. § 1630(m) a "qualified individual" is an individual with a disability who (1)
23 "satisfies the requisite skill, experience, education and other job-related requirements of the
24 employment position," and (2) "who, with or without reasonable accommodation , can
25 perform the essential functions of such position." Id.

26 There continues to be no question that Plaintiff's FAC adequately alleges facts to
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1 satisfy the first prong of the “qualified individual” analysis. The focus of the court’s analysis
2 is on the question of whether Plaintiff’s FAC corrects the deficit identified in the original
3 complaint by adequately alleging that she was/is capable of performing the essential
4 functions of her job with or without reasonable accommodation. Although the plaintiff’s
5 burden in a civil rights case is minimal with regard to the facts that must be alleged to show a
6 *prima facie* case, Caldwell v. Paramount Unified School Dist., 41 Cal.App.4th 189, 197 (2nd
7 Dist. 1995), at least some minimal factual basis to support the conclusion can perform the
8 essential functions of the job with or without accommodation is necessary. See Vermillion v.
9 Corrections Corp. of America, 2008 WL 4755329 (E.D. Cal. 2008) at *5 (amended complaint
10 alleging factual basis for possible accommodation is sufficient to escape resolution under
11 F.R.C.P. Rule 12(b)(6)).

12 The court’s September 30 Order found Plaintiff’s original complaint was deficient in
13 that it was replete with alleged facts to establish her disability, but gave little or no
14 information as to the essential job functions that Plaintiff could perform with or without
15 reasonable accommodations. Plaintiff’s FAC substantially addresses the deficiency that was
16 present in the original complaint. Plaintiff’s FAC alleges what specific functions her job
17 entailed, those being essentially various aspects of an active clerical job involving walking,
18 typing, filing and so on. While the functions alleged in the FAC and quoted above may not
19 be “essential job functions” in the sense of being expressed in technical terms as might be
20 required in a job description formulated for ADA purposes, the court finds the functions
21 alleged in the FAC suffice to convey the essentials of what Plaintiff’s job demanded from a
22 physical perspective.

23 Plaintiff’s FAC also alleges that Plaintiff could have carried out the functions required
24 to perform her job had she been provided certain listed ergonomic equipment, a rolling file
25 cabinet and appropriate hourly rest periods as prescribed by her physician. The FAC also
26 points with some specificity to other job that were allegedly open at the time and that
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1 involved physical activities that were in line with Plaintiff's physical limitations.

2 Defendants contend that Plaintiff's claim is unsupported because "nowhere is it
3 alleged that any [of the duties Plaintiff listed in her FAC] were the essential job functions of
4 the position or what the essential job functions were." Doc. # 33-1 at 2:16 - 18. Defendant
5 provides no authority for the proposition that "essential job functions" must be pled
6 according to any special formula or standard. As noted above, the court does not expect at
7 this pleading stage that a plaintiff is required to meet any particular standard in articulating
8 the essential functions of his/her job beyond a reasonably detailed description of what he/she
9 actually did on the job. Such pleading, while perhaps not technically complete, is sufficient
10 for purposes of notice pleading inasmuch as it provides a factual basis as to Plaintiff's
11 contentions regarding her job requirements that may be opposed either at trial or in summary
12 judgment.

13 Similarly, the court finds that Plaintiff's assertion that she could have carried out the
14 functions listed with the accommodations listed is sufficient for pleading purposes because
15 these pleadings also provide sufficient notice of Plaintiff's basis for her discrimination claim
16 so that Defendant may factually rebut those factual bases either at trial or in a summary
17 judgment motion. Defendant's characterization of Plaintiff's claims that she could perform
18 the required job functions with the listed accommodations as "specious" is misplaced.
19 Plaintiff has alleged in reasonably specific terms what her job functions were and has alleged
20 in reasonably specific terms that she could have performed these functions with specified
21 accommodations. For purposes of a motion to dismiss, these allegations are sufficient. Any
22 challenge to the factuality of Plaintiff's allegations must await either trial or motion for
23 summary judgment.

24 Defendant's motion to dismiss Plaintiff's first claim for relief will be denied.

25 **II. Claims for Punitive Damages**

26 As was the case with Plaintiff's original complaint, the FAC alleges claims for
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1 punitive damages with respect to each of the four claims for relief. As was also the case in
2 the original complaint, each of the four claims for punitive damages is alleged in identical
3 language. The following is quoted from Plaintiff's first claim for relief, but the court can find
4 no significant difference between the claim for punitive damages alleged there and the same
5 claims alleged in each of the other three claims for relief:

6 [Plaintiff] is informed and believes that CCA's acts were carried out
7 by its managerial employees, officers, and directors, and were directed or
8 ratified by CCA with a conscious disregard of [Plaintiff's] rights and with the
9 intent to vex, injure and annoy [Plaintiff] such as to constitute oppression,
10 fraud or malice under California Civil Code [s]ection 3294, entitling
11 [Plaintiff] to punitive damages in a sum appropriate to punish and set an
12 example of CCA. By consciously disregarding known possible
13 accommodations for [Plaintiff], including, but not limited to, job modification,
14 accommodating equipment and alternative positions, Barbara Wagner,
15 Warden of California City Correctional Center, unilaterally terminated
16 [Plaintiff] summarily concluding that, based on [Plaintiff's] work restrictions,
17 she could not perform the essential functions of her job. This was a
18 misrepresentation, because Ms Wagner, who, as warden, plainly exercised
19 substantial discretionary authority over significant aspects of CCA's business,
20 never once talked to [Plaintiff] or otherwise engaged her in the interactive
21 process to determine whether [Plaintiff] could, in fact, perform the essential
22 functions of her job, with or without accommodations, or whether other
23 positions existed, into which [Plaintiff] could have been reassigned.
24 Similarly, Ms. Wagner's conclusory determination that [Plaintiff] simply no
25 longer could do her job and, therefore, no longer could work for CCA,
26 oppressively subjected [Plaintiff] to the ultimate unjust hardship of termination
27 in plain violation of [Plaintiff's] right to have possible reasonable
28 accommodation considered and to be part of that evaluative process.

18 Doc.# 31 at ¶ 35.

19 Civil Code section 3294 provides, in pertinent part:

20 '(a) In an action for the breach of an obligation not arising from contract,
21 where the defendant has been guilty of oppression, fraud, or malice, the
22 plaintiff, in addition to the actual damages, may recover damages for the sake
23 of example and by way of punishing the defendant.' . . . '(c) As used in this
24 section, the following definitions shall apply: '(1) 'Malice' means conduct
25 which is intended by the defendant to cause injury to the plaintiff or conduct
26 which is carried on by the defendant with a conscious disregard of the rights or
27 safety of others. '(2) 'Oppression' means subjecting a person to cruel and
28 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 In its September 30 Order, the court rejected Plaintiff's contention that the pleading
2 standard for claims for punitive damages requires less specificity than is required under
3 Twombly and Iqbal. Pursuant to those cases, the court's September 30 Order dismissed
4 Plaintiff's punitive damages claims for failing to allege any facts that would support the
5 required finding that Defendant's actions were malicious or oppressive. In the instant motion
6 to dismiss Plaintiff's punitive damages claims from the FAC, Defendant asserts two grounds.
7 First, Defendant contends Plaintiff has failed to allege that any "officer, director or managing
8 agent" of Defendant corporation had advance knowledge of, and disregarded authorized or
9 ratified, any act of oppression, fraud or malice as required by California Civil Code §
10 3294(b). In this regard, Defendant contends that Warden Barbara Wagner is not an officer,
11 director or managing agent of the Defendant corporate entity. Second, Defendant contends
12 that Plaintiff has again failed to allege facts to show any of Defendant's acts were undertaken
13 with malice, oppression or fraud. It does not appear to the court that Plaintiff has set forth
14 any opposition to Defendant's motion to dismiss the punitive damages claims.

15 The court need not decide whether Plaintiff has adequately alleged that the acts
16 undertaken by Defendant were acts known to "an officer, director or managing agent"
17 because the court finds that the acts alleged do not amount to oppression, fraud or malice.
18 The fact remains that here, as in the original complaint, the allegations set forth in the FAC to
19 justify an award of punitive damages are really nothing more than allegations that Defendant
20 failed to abide by FEHA's requirements coupled with the conclusory allegation that
21 Defendant did so "with conscious disregard for [Plaintiff's] rights and with the intent to vex,
22 injure and annoy [Plaintiff]." Doc. # 31 at ¶35. As the court found with regard to the claims
23 for punitive damages in the original complaint, so here the court finds Plaintiff has failed to
24 allege any facts to indicate an intent on the part of Defendant to vex , injure or annoy that
25 could possibly be found to constitute oppression or malice.

26 As the court noted in its September 30 Order, it is the express policy of courts
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1 deciding discrimination cases that “[p]unitive damages are never awarded as a matter of
2 right, are disfavored by the law, and should be granted with the greatest of caution and only
3 in the clearest of cases.” Endurance American Specialty Ins. Co. v. Lance, 2010 WL
4 3619476 (E.D. Cal. 2010) at * 18 (quoting Henderson v. Security Pacific Nat’l Bank, 72
5 Cal.App.3d 764, 771 (1977). Beyond failing to make a clear case for punitive damages, the
6 court finds Plaintiff has failed to make any case. The court finds Plaintiff has failed to set
7 forth any facts that, if proven, would entitle her to an award of punitive damages.

8 Defendant’s motion to dismiss Plaintiff’s claims for punitive damages with respect to each of
9 the four claims for relief will be granted. Because the court articulated the shortcomings of
10 Plaintiff’s attempt to claim punitive damages in its September 30 Order, and because the
11 FAC does not correct the noted deficiencies, the court concludes further amendment would
12 be futile and is therefore not warranted.

13 THEREFORE, for the reasons discussed above, it is hereby ORDERED that:

- 14 1. Defendant’s motion to dismiss Plaintiff’s first claim for relief as alleged in the FAC is
15 hereby DENIED.
- 16 2. Defendant’s motion to dismiss Plaintiff’s prayer for punitive damages as alleged in
17 claims one through four of the FAC is hereby GRANTED. Plaintiff’s prayer for
18 punitive damages is hereby DISMISSED with regard to all claims for relief alleged in
19 the FAC without leave to amend.

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21 IT IS SO ORDERED.

22 Dated: January 12, 2011

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24 CHIEF UNITED STATES DISTRICT JUDGE