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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

TONYA D. ENGELBRECHT,
Plaintiff,

v.

KELLY RIPA,
Defendant.

Case No. 1:17-cv-01339-LJO-EPG

ORDER FOR PLAINTIFF TO:

- (1) FILE A FIRST AMENDED COMPLAINT; OR,**
- (2) NOTIFY THE COURT THAT SHE WISHES TO STAND ON HER COMPLAINT, SUBJECT TO FINDINGS AND RECOMMENDATIONS TO THE DISTRICT JUDGE CONSISTENT WITH THIS ORDER**

(ECF No. 1)

THIRTY (30) DAY DEADLINE

Tonya D. Engelbrecht (“Plaintiff”), appearing *pro se* and *in forma pauperis*, commenced this action against Kelly Ripa (“Defendant”) on October 5, 2017. (ECF No. 1). The Court has screened the complaint and has determined that Plaintiff fails to state any cognizable claims. The Court will grant Plaintiff leave to amend her complaint to state a claim. In the alternative, Plaintiff may notify the Court that she wishes to stand on the current complaint, in which case the Court will issue findings and recommendations to the district judge recommending dismissal of this action consistent with this order.

1 **I. LEGAL STANDARD**

2 Under 28 U.S.C. § 1915(e)(2), the Court must conduct a review of a *pro se* complaint to
3 determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or
4 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
5 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* An action
6 is frivolous if it is “of little weight or importance: having no basis in law or fact” and malicious if
7 it was filed with the “intention or desire to harm another.” *Andrews v. King*, 398 F.3d 1113, 1121
8 (9th Cir. 2005). Leave to amend may be granted to the extent that the deficiencies of the
9 complaint can be cured by amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

10 A complaint must contain “a short and plain statement of the claim showing that the
11 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
15 matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
16 at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal
17 conclusions are not. *Id.* at 678.

18 In determining whether a complaint states an actionable claim, the Court must accept the
19 allegations in the complaint as true, *Hosp. Bldg. Co. v. Trs. of Rex Hospital*, 425 U.S. 738, 740
20 (1976), construe *pro se* pleadings liberally in the light most favorable to the Plaintiff, *Resnick v.*
21 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor. *Jenkins*
22 *v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of *pro se* plaintiffs “must be held to less
23 stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342
24 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after
25 *Iqbal*).

26 **II. PLAINTIFF’S ALLEGATIONS**

27 Plaintiff’s complaint states as follows:

28 Torture, Abuse, Defamation of Character while filming

1 “Homemade Millionaire.” Also, W&I Code Violations. . . .
2 Restitution for abuse resulting in torture Kelly Ripa would have
3 producers wake us up all night, then abuse me 15 hours per day. Per
4 diem \$40, Kelly Ripa would give us \$10. I repeatedly requested she
5 pull my episode, she refused.

6 **III. DISCUSSION**

7 Plaintiff’s allegations consist primarily of legal conclusions. Even construing the
8 complaint liberally, Plaintiff fails to sufficiently set forth any factual matter to state a claim that is
9 plausible on its face. The Court is also unable to identify what statute, rule, or regulation Plaintiff
10 refers to as “W&I Code.” Thus, the Complaint fails to state any cognizable claims.

11 The Court will give Plaintiff an opportunity to file an amended complaint. Below the
12 Court sets forth certain legal standards that could apply in this case.

13 **A. Defamation**

14 To allege a cause of action for defamation under California law, plaintiff must set forth
15 allegations establishing the following elements: (1) a publication of a statement by defendant that
16 is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes
17 special damage. *Smith v. Maldonado*, 72 Cal.App.4th 637, 645 (1999). A private figure plaintiff
18 must also establish that a defendant failed to use reasonable care to determine the truth or falsity
19 of the allegedly defamatory statements. *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 749 (1989).
20 “[F]or recovery of either punitive damages or damages for presumed injury. . . . a private figure
21 plaintiff must prove actual malice if the defamatory statement involves matters of public concern.
22 *Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254, 274 (1998), as modified (Dec. 22, 1998) (citing *Dun*
23 *& Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion).
24 However, a private figure plaintiff need not prove actual malice to recover presumed or punitive
25 damages if the defamatory publication was not on a matter of public concern. *Id.* at 274 (citing
26 *Dun & Bradstreet, Inc.*, 472 U.S. at 774 (White, J., concurring)).

27 **B. Intentional Infliction of Emotional Distress**

28 To allege a cause of action for intentional infliction of emotional distress under California
law, a plaintiff must set forth facts establishing the following elements: “(1) extreme and
outrageous conduct by the defendant with the intention of causing, or reckless disregard of the

1 probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional
2 distress; and (3) actual and proximate causation of the emotional distress by the defendant's
3 outrageous conduct." *Sanders v. City of Fresno*, 551 F.Supp.2d 1149, 1179-80 (E.D. Cal. 2008)
4 (citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1001 (1993)). Extreme and
5 outrageous conduct is that which is "so extreme as to exceed all bounds of that usually tolerated
6 in a civilized community," *Potter*, 6 Cal.4th at 1001, and "of a nature which is especially
7 calculated to cause, and does cause, mental distress of a very serious kind." *Christensen v. Super.*
8 *Ct.*, 54 Cal.3d 868, 905 (1991).

9 **C. Breach of Contract**

10 To the extent a plaintiff's wages and hours are established by a contractual relationship,
11 the plaintiff may commence a suit for breach of contract. Under California law, the elements of a
12 breach of contract claim are: 1) existence of a valid contract; 2) performance by the plaintiff or
13 excuse for nonperformance; 3) breach by the defendant; and 4) damages. *First Commercial*
14 *Mortgage Co. v. Reece*, 89 Cal.App.4th 731, 745 (2001). To state a cause of action for breach of
15 contract, plaintiff must plead the terms of the contract either verbatim or according to its legal
16 effect. *Langan v. United Servs. Auto. Ass'n*, 69 F.Supp.3d 965, 979 (N.D. Cal. 2014) (quoting
17 *Twaite v. Allstate Ins. Co.*, 216 Cal.App.3d 239, 252 (1989)).

18 **D. Wage and Hour Violations**

19 Both the Fair Labor Standards Act and California Labor Code establish requirements for
20 wages and hours for certain employers and employees. Under both the FLSA and the California
21 Labor Code, a plaintiff must be an "employee" to assert certain wage and hour. *See*,
22 *e.g.*, *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (FLSA); *Estrada v.*
23 *FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007) (California Labor
24 Code). "The principal test of an employment relationship is whether the person to whom service
25 is rendered has the right to control the manner and means of accomplishing the result desired."
26 *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (citing *S. G.*
27 *Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350 (1989)). Courts, however,
28 also consider the following secondary indicia of the nature of a service relationship: "(1) whether

1 the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of
2 occupation and locality, the work is usually done under the principal's direction or by a specialist
3 without supervision, (3) the skill required, (4) whether the principal or worker supplies the
4 instrumentalities, tools, and place of work, (5) the length of time for which the services are to be
5 performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of
6 the principal's regular business, and (8) whether the parties believe they are creating an employer-
7 employee relationship.” *Estrada*, 154 Cal. App. 4th at 10.

8 **IV. CONCLUSION AND ORDER**

9 The Court finds that the Complaint fails to state any cognizable claims upon which relief
10 may be granted. Under Rule 15(a) of the Federal Rules of Civil Procedure, “leave to amend shall
11 be freely given when justice so requires.” Accordingly, the Court will provide Plaintiff with time
12 to file an amended complaint curing the deficiencies identified above. *Lopez v. Smith*, 203 F.3d
13 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file an amended complaint within
14 thirty days, if she chooses to do so.

15 Plaintiff should note that although she has been given the opportunity to amend, it is not
16 for the purpose of changing the nature of this suit or adding unrelated claims. *George v. Smith*,
17 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

18 Plaintiff is advised that an amended complaint supersedes the original complaint, *Lacey v.*
19 *Maricopa County*, 693 F.3d. 896, 907 n.1 (9th Cir. 2012) (*en banc*), and must be complete in
20 itself without reference to the prior or superseded pleading. Local Rule 220. Therefore, in an
21 amended complaint, as in an original complaint, each claim must be sufficiently plead. Plaintiff
22 should also identify with particularity any statute, rule, or regulation under which she seeks relief.
23 The amended complaint should be clearly and boldly titled “First Amended Complaint,” refer to
24 the appropriate case number, and be an original signed under penalty of perjury.

25 Plaintiff may also choose to stand on her original complaint, in which case the Court will
26 issue findings and recommendations to the assigned district judge recommending that the case be
27 dismissed for failure to state a claim.

28 Based on the foregoing, it is **HEREBY ORDERED** that:

1 1. Plaintiff may file a First Amended Complaint curing the deficiencies identified by
2 the Court in this order if she believes additional true factual allegations would state a claim,
3 within **thirty (30) days** from the date of service of this order;

4 2. If Plaintiff chooses to file an amended complaint, Plaintiff shall caption the
5 amended complaint "First Amended Complaint" and refer to the case number 1:17-cv-01339-
6 LJO-EPG;

7 3. Alternatively, within **thirty (30) days** from the date of service of this order,
8 Plaintiff may notify the Court that she wishes to stand on her original complaint, subject to this
9 Court issuing findings and recommendations to the assigned district court judge recommending
10 that the case be dismissed for failure to state a claim; and

11 4. If Plaintiff fails to file an amended complaint or notify the Court that she wishes to
12 stand on this complaint within **thirty (30) days** from the date of service of this order, the Court
13 will issue findings and recommendations to the assigned district court judge recommending that
14 Plaintiff's case be dismissed for failure to state a claim and failure to comply with a Court order.

15 IT IS SO ORDERED.

16
17 Dated: January 30, 2018

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE