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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JEREMY GILMORE AND DANA
12 GILMORE,

13 Plaintiffs,

14 v.

15 UNION PACIFIC RAILROAD COMPANY,
16 DENNIS MAGURES, JOHN PARKER,
17 ANDREW RIBBING, and LEO MARIN
and DOES 1 to 10, inclusive,

18 Defendants.
19 _____/

Case No. 09-cv-02180-JAM-DAD

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS

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21 This matter comes before the Court on Defendants' Union
22 Pacific Railroad Company, Dennis Magures, John Parker, and Leo
23 Marin ("Defendants'") Motion to Dismiss (Doc. #27) Plaintiffs'
24 Jeremy Gilmore and Dana Gilmore's ("Plaintiffs'") Second Amended
25 Complaint ("SAC") (Doc. #20) for failure to state a claim
26 pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants
27 also move to strike portions of the SAC pursuant to Federal Rule
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1 of Civil Procedure 12(f). Plaintiffs oppose the motion to
2 dismiss and strike.¹

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5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Plaintiffs' SAC alleges a claim for relief for violation of
7 the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51 et
8 seq., as well as state law claims for relief, stemming from
9 Defendants' discipline and dismissal of Plaintiffs from their
10 jobs at Union Pacific. Plaintiffs' First Amended Complaint
11 ("FAC") was brought in Superior Court, and removed to federal
12 court by Defendants under federal question jurisdiction.
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14 Defendants previously brought a motion to dismiss and strike
15 claims from the FAC. The Court granted in part and denied in
16 part the motion to dismiss, and denied the motion to strike.
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18 Specifically, the Court denied the motion to dismiss with
19 respect to Plaintiffs' claims for wrongful discharge and
20 invasion of privacy. The Court granted the motion to dismiss,
21 without prejudice, with respect to Plaintiff's claims for
22 marital status discrimination, and with prejudice with respect
23 to the claims for intentional infliction of emotional distress.
24 Defendant Carolyn Will was dismissed from the suit.
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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

1 Plaintiffs were granted leave to amend the FAC, and
2 consequently filed the SAC. Plaintiffs also filed a Motion for
3 Reconsideration of the dismissal of the intentional infliction
4 of emotional distress claims. The Court denied the Motion for
5 Reconsideration (Docket #43). Plaintiffs re-plead the
6 intentional infliction of emotional distress claims in the SAC,
7 and Defendants have asked the Court to again dismiss these
8 claims with prejudice. The Court reiterates its previous order
9 dismissing those claims with prejudice.
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12 The present Motion to Dismiss seeks dismissal of
13 Plaintiff's amended marital status discrimination claim,
14 dismissal or striking of the new claim for retaliation, and
15 dismissal of individual defendants from the suit. Defendants
16 also request Judicial Notice of the original complaint filed by
17 Plaintiffs in Superior Court.
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20 II. OPINION

21 A. Legal Standard

22 A party may move to dismiss an action for failure to state
23 a claim upon which relief can be granted pursuant to Federal
24 Rule of Civil Procedure 12(b)(6). In considering a motion to
25 dismiss, the court must accept the allegations in the complaint
26 as true and draw all reasonable inferences in favor of the
27 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
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1 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
2 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
3 are mere "legal conclusions," however, are not entitled to the
4 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
5 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
6 (2007). To survive a motion to dismiss, a plaintiff needs to
7 plead "enough facts to state a claim to relief that is plausible
8 on its face." Twombly, 550 U.S. at 570. Dismissal is
9 appropriate where the plaintiff fails to state a claim
10 supportable by a cognizable legal theory. Balistreri v.
11 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

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14 Upon granting a motion to dismiss for failure to state a
15 claim, the court has discretion to allow leave to amend the
16 complaint pursuant to Federal Rule of Civil Procedure 15(a).
17 "Dismissal with prejudice and without leave to amend is not
18 appropriate unless it is clear . . . that the complaint could
19 not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
20 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

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22 "Rule 12(f) provides in pertinent part that the Court may
23 order stricken from any pleading any insufficient defense or any
24 redundant, immaterial, impertinent, or scandalous matter. . .
25 Motions to strike are disfavored and infrequently granted. A
26 motion to strike should not be granted unless it is clear that
27 the matter to be stricken could have no possible bearing on the
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1 subject matter of the litigation." Bassett v. Ruggles et al.,
2 2009 WL 2982895 at *24(E.D. Cal. Sept. 14, 2009)(internal
3 citations omitted).

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5 Generally, the Court may not consider material beyond the
6 pleadings in ruling on a motion to dismiss for failure to state
7 a claim. Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D.
8 Cal. Mar. 30, 2009) (internal citations omitted). There are two
9 exceptions: when material is attached to the complaint or relied
10 on by the complaint, or when the court takes judicial notice of
11 matters of public record, provided the facts are not subject to
12 reasonable dispute. Id. Accordingly, the Court takes judicial
13 notice as requested by Defendants of Plaintiffs' original
14 Superior Court complaint, as it is a matter of public record.
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18 B. Marital Status Discrimination claim

19 Plaintiff Dana Gilmore ("Dana") amended her marital
20 status discrimination claim, and now cites Union Pacific's work
21 rules and conflict of interest policy as sources of
22 discrimination, in addition to her previous allegations. As
23 explained in the Court's previous order, marital status
24 discrimination cases fall into two categories: status cases
25 (where the person is discriminated against for being married,
26 single, etc.) and conduit cases where the discrimination is
27 based on the identity of who the person is married to. See Chen
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1 v. County of Orange, 96 Cal. App. 4th 926, 939-43 (2002). In
2 conduit cases, the marital status serves only as a conduit for
3 some other kind of animus. Such cases may be divided into cases
4 where the animus is unlawful (such as race discrimination), and
5 cases where the animus is not unlawful (such as political
6 animus). Id. at 949. In conduit cases, "the plaintiff is the
7 object of adverse action because of something about his or her
8 spouse... However, conduit cases not based on some wrongful
9 animus... have been universally met with rejection as valid
10 marital status discrimination claims. Perhaps the best
11 explanation for that is this: In such cases, the marriage *qua*
12 marriage is irrelevant to the adverse action taken by the
13 employer. What the employer really cares about is the
14 substantive relationship between the plaintiff and someone
15 else." Id.

16
17 Here, Dana continues to advance her marital status
18 discrimination claim under both status and conduit theories, but
19 ultimately fails to state a claim under either theory. Dana did
20 not plead facts alleging an unlawful animus towards Jeremy based
21 on his identity. Nor do the quoted workplace rules or conflict
22 of interest policy form the basis of a marital status
23 discrimination claim. Rule 1.6 states that, "Any act of
24 hostility, misconduct or willful disregard or negligence
25 affecting the interest of the company of its employees is cause
26 for dismissal and must be reported. Indifference to duty, or to
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1 the performance of duty, will not be tolerated." Rule 1.2.7
2 states that, "Employees must not withhold information or fail to
3 give all the facts to those authorized to receive information
4 regarding unusual events, accidents, personal injuries or rule
5 violations." Lastly, the conflict of interest policy states
6 that, "A conflict of interest is a conflict between the private
7 interests of an employee and his or her responsibilities as an
8 employee for the corporation. All such conflicts should be
9 avoided. No employee shall place himself or herself in a
10 position that would have the appearance of being, or be
11 construed to be, in conflict with the interests of the
12 corporation. Full disclosure of all facts must be made to the
13 corporation in advance and a determination made to protect the
14 corporation's interest."

15 Dana alleges that while these rules appear facially
16 neutral, they unfairly affect married employees, when both
17 spouses work for Union Pacific. She alleges that in situations
18 where both spouses work at Union Pacific, they are forced to
19 either follow the rules and breach "the marital duty of
20 loyalty," or break the rules and face discipline or termination.
21 Thus, Dana alleges that the rules constitute marital
22 discrimination.

23 While discrimination on the basis of marital status is
24 unlawful pursuant to California Government Code 12940(a), an
25 employer can reasonably regulate married employees. See Cal.
26 Govt. Code § 12940(a)(3)(A) ("Nothing in this part relating to
27 discrimination on account of marital status shall do either of
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1 the following: (A) Affect the right of an employer to reasonably
2 regulate, for reasons of supervision, safety, security, or
3 moral, the working of spouses in the same department, division
4 or facility, consistent with the rules and regulations adopted
5 by the commission. . .")

7 Based on the allegations in the SAC, it appears that
8 whether or not Dana and Jeremy were married or in any other type
9 of relationship, Dana would be required to proffer to Defendant
10 any information that she had regarding his accident, pursuant to
11 the workplace rules. While the rules no doubt leave Dana and
12 other married co-employees in an awkward position should they be
13 required to share information on a co-employee spouse, Dana does
14 not plead facts showing that the rules unlawfully penalize the
15 status of marriage so as to amount to a marital status
16 discrimination claim. As Defendants point out, marital privacy
17 is not a protected status. Indeed, Dana alleges that the work
18 rules penalize the status of marriage, but only if the married
19 couple are both Union Pacific Employees. However, if Dana were
20 married to someone who was not an employee at Union Pacific, the
21 work rules would not penalize or affect her status as a married
22 person. Whether an employee is married, divorced or single makes
23 no difference with respect to the rules.

27 Dana has had several opportunities to plead her claim, and
28 has been unable to do so. Accordingly, Defendants motion to

1 dismiss the marital discrimination claim is GRANTED, with
2 prejudice.
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5 C. Retaliation Claim

6 Defendants argue that Dana may not bring the California Fair
7 Employment and Housing Act ("FEHA") retaliation claim, as it is
8 a new claim that was not brought in the FAC, nor was it brought
9 in the original superior court complaint. Defendants argue that
10 Dana must get permission from the Court to add an additional
11 claim. They request that the Court strike or dismiss this claim.
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13 The Court's previous order granting in part and denying in
14 part Defendants' motion to dismiss granted Plaintiffs leave to
15 amend the FAC. The Court's order was not limited to amendment of
16 existing claims, and Defendants do not demonstrate that they
17 would be prejudiced by the addition of this claim. Furthermore,
18 though Defendants argue that a scheduling order has been issued,
19 thus requiring good cause to amend the pleadings, Defendants
20 fail to notice that Plaintiffs' SAC was filed before the
21 scheduling order was issued. Thus the SAC is not subject to the
22 requirement for leave of the court and good cause to amend a
23 pleading. Accordingly, the Court will not strike Dana's FEHA
24 retaliation claim and will evaluate the claim on the merits.
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27 California Government Code 12940(h) makes it unlawful for
28 employers to retaliate against employees who have acted to

1 protect rights afforded by FEHA. Section 12940(h) states that it
2 is unlawful, "For any employer, labor organization, employment
3 agency or person to discharge, expel, or otherwise discriminate
4 against any person because the person has opposed any practices
5 forbidden under this part or because the person has filed a
6 complaint, testified, or assisted in any proceeding under this
7 part."
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9 To establish a prima facie case of retaliation under the FEHA,
10 a plaintiff must show that (1) he or she engaged in a "protected
11 activity," 2) the employer subjected the employee to an adverse
12 employment action, and (3) the causal link existed between the
13 protected activity and the employer's action. Yanowitz v.
14 L'Oreal USA, Inc., 36 Cal.4th 1028, 1042 (2005).
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16 "To plead a claim for retaliation, plaintiffs must plead that
17 they were retaliated against for complaining of conduct that
18 either is prohibited by FEHA or that they reasonably and in good
19 faith believed was prohibited by FEHA. As long as the mistake
20 was reasonable and in good faith, it does not matter whether the
21 mistake was one of law or fact." Chapin v. Aguirre, 2007 WL
22 1660740 at *3 (S.D. Cal. June 7, 2007) (internal citations
23 omitted). "It is well established that a retaliation claim may
24 be brought by an employee who has complained of or opposed
25 conduct that the employee reasonably believes to be
26 discriminatory, even when a court later determines the conduct
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1 was not actually prohibited by the FEHA... Strong policy
2 consideration support this rule. Employees often are legally
3 unsophisticated and will not be in a position to make an
4 informed judgment as to whether a particular practice or conduct
5 actually violates the governing antidiscrimination statute."
6 Yanowitz, 36 Cal.4th at 1047-48. When an employee refuses to
7 follow an order that she believes to be discriminatory, courts
8 look to the totality of the circumstances to determine whether
9 an employer knew that the employee was acting in opposition to
10 believed FEHA discrimination. Id.

13 As previously discussed, Dana has not stated a claim for
14 marital status discrimination. However, this does not rule out a
15 retaliation claim, as Dana can still bring such a claim if she
16 acted with a reasonable and good faith belief that Defendants'
17 conduct and policies were unlawful.

19 Here, the SAC alleges that Dana "refused to inform on her
20 husband in violation of her duties of loyalty and
21 confidentiality to Jeremy. In consequence of Dana's objection
22 and refusal to comply with the rules and policies which
23 penalized the status of marriage, Union Pacific retaliated
24 against Dana by removing her from service. . . and thereafter
25 terminated Dana's employment with Union Pacific." SAC, p. 16.
26 The SAC alleges that Defendants knew that Dana was opposing an
27 order that she believed to be discriminatory. Additionally, Dana
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1 alleges she made a claim with the California Department of Fair
2 Employment and Housing as a result of the alleged retaliation,
3 and received a right to sue letter. The SAC alleges that Dana
4 refused to follow orders that she believed to be discriminatory
5 to provide Defendants with information regarding Jeremy's
6 injuries, medical restrictions, activities around the house or
7 elsewhere, doctor's visits, medication use or pain and
8 suffering. She continued to refuse to provide this information
9 even when faced with discipline and termination.
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12 Taking these facts in the light most favorable to Plaintiffs,
13 the Court finds that Dana has sufficiently alleged a cause of
14 action for retaliation. Though Defendants did not engage in
15 marital discrimination, Dana has alleged facts demonstrating a
16 reasonable and good faith belief that Defendants' rules
17 constituted unlawful marital discrimination, thus she may
18 maintain her claim of retaliation at this stage. Defendants
19 motion to dismiss the retaliation claim is DENIED.
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23 D. Dismissal of individual defendants

24 Defendants ask the Court to dismiss all claims brought
25 against individual defendants Dennis Magures ("Magures"), John
26 Parker ("Parker") and Leo Marin ("Marin"). The SAC brings the
27 three previously dismissed claims for intentional infliction of
28 emotional distress, and a claim for invasion of privacy, against

1 Magures, Parker and Marin. However, in Plaintiffs' Opposition,
2 Plaintiffs state that the only claims brought against Magures,
3 Parker and Marin are the claims for intentional infliction of
4 emotional distress. The Court already dismissed the intentional
5 infliction of emotional distress claims with prejudice, and
6 declined to reconsider them, thus the Court reiterates that
7 these claims are dismissed with prejudice from the SAC.
8

9 Because Plaintiffs deny bringing any other claims against
10 the individual defendants, it appears that they either did not
11 intend to bring the invasion of privacy claim against Magures,
12 Parker and Marin, or do not oppose the dismissal of this claim
13 against them. Accordingly, the invasion of privacy claim against
14 Magures, Parker and Marin is dismissed, with prejudice. As there
15 are no longer any claims against them, Magures, Parker and Marin
16 are dismissed from this suit.²
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19 20 III. ORDER

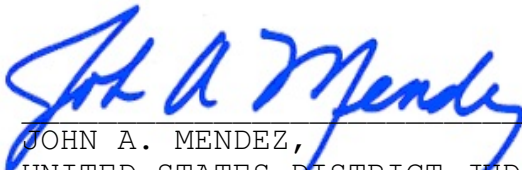
21 For the reasons set forth above, Defendants' Motion to
22 Dismiss is hereby GRANTED in part and DENIED in part. The motion
23 to dismiss the marital status discrimination claim is GRANTED,
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26 ² The Court notes that Defendants have also argued for dismissal
27 of the invasion of privacy claim against defendant Andrew
28 Ribbing. Mr. Ribbing has filed his own motion to dismiss and is
not a party to the current motion. Thus the Court will not
consider arguments made on Mr. Ribbing's behalf, nor does this
dismissal order apply to claims against Mr. Ribbing.

1 WITH PREJUDICE. The motion to dismiss the invasion of privacy
2 claim against Defendants Magures, Parker and Marin is GRANTED,
3 WITH PREJUDICE. Defendants Magures, Parker and Marin are
4 dismissed from this action. The motion to dismiss the
5 retaliation claim is DENIED.
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8 IT IS SO ORDERED.
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10 Dated: May 20, 2010
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12 JOHN A. MENDEZ,
13 UNITED STATES DISTRICT JUDGE
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