UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDREW VARGAS,

Plaintiff,

v.

BP AMERICA, INC., JEFF FERIS, JILL GEORGIKAS, STEVE HONIG, TOM HORN, DEB PORTELLO, WAYNE MALIK, and DOES 1 through 50, inclusive,

Defendants.

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NO. CIV. S-10-3130 LKK/GGH

O R D E R

Plaintiff, a former gasoline truck driver for BP America,[1] brings a claim of termination in violation of public policy and

[1] By stipulation of the parties, the individual defendants in this case were dismissed without prejudice on March 4, 2011. The Second Amended Complaint, filed in May, continues to name the individual defendants, and to refer to them as defendants. During oral argument on September 12, 2011, plaintiff represented to the court that he does not intend to reassert claims against the individual defendants. Accordingly, any references to the individual defendants as defendants are stricken from the Second Amended Complaint.

breach of his employment contract. Pending before the court is a motion to dismiss the Second Amended Complaint ("SAC"). For the reasons stated below, the motion is DENIED in its entirety.

I. Background

A. Factual Background[2]

Plaintiff Andrew Vargas was hired as a gasoline tank truck driver for Atlantic Richfield Co. on or about 1988. SAC 3:14-16. Atlantic Richfield was acquired by British Petroleum America ("BP") in 2000. SAC 3: 17-18. Plaintiff's work was based at a distribution center from which gasoline and petroleum products were distributed to gas stations throughout the Sacramento area.

As a petroleum product supplier, BP was subject to laws and regulations including the Federal Motor Carrier Act, the California Vehicle Code, the California Labor Code, and Cal OSHA. These and other laws and regulations to which BP was subject were intended to protect the general public, users of public roads and highways, gasoline customers, and drivers and employees from safety hazards associated with the storage, transportation, and delivery of petroleum products. The laws and regulations were also intended to protect the environment from these hazards. During the time Plaintiff worked for BP, he received a handbook, letters, and emails from BP relating to safety regulations and procedures. SAC

[2] The factual assertions in this section are based on the allegations in Plaintiff's Second Amended Complaint unless otherwise specified. For the purposes of this pleading only, Plaintiff's facts as asserted will be taken as true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

5: 20-27.

At various times during his employment,[3] Plaintiff was instructed to ignore or violate the safety practices established in the handbook, letters, or emails. Specifically, on numerous occasions Plaintiff was instructed to conceal the fact that a gasoline spill in excess of five gallons had occurred and to engage in the practice of dumping gasoline.[4] Defendant frequently coerced and pressured Plaintiff to operate improperly-balanced tanker trucks.[5] Defendant coerced and pressured Plaintiff to deliver loads of gasoline to gas stations where the storage tanks were not in appropriate condition to store additional gasoline. Plaintiff was disciplined for declining to deliver gasoline under such conditions, even though the stated policy of the company was to not deliver gasoline to storage tanks that were not in appropriate condition. Plaintiff was frequently criticized by his employer for refusing to transport "split loads," even though the official company policy was that drivers such as plaintiff had the discretion to not deliver a split load when conditions made it a hazard to do so.[6] Plaintiff was compelled by his employer to override the "skully" device, a safety device intended to prevent

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[3] The SAC does not provide dates for each of these alleged incidents.

[4] What dumping is, and whether it is prohibited by law or regulation, is not addressed in the complaint.

[5] Once again, what an improperly balanced tanker truck is and whether it is prohibited, is not addressed in the complaint.

[6] Again, the complaint does not address what a split load is.

over-filling of gasoline. Plaintiff was required to take breaks and eat lunch while waiting for his truck to load or unload. Eating near the loading rack is prohibited by Cal OSHA due to risk of exposure to toxic fumes. Plaintiff was instructed to paint over cracked frame rails to conceal the cracks after he reported the cracks during pre-trip inspections of trucks he was driving. Plaintiff was deprived of fifteen-minute rest breaks, creating a higher danger to other drivers on the roads. Plaintiff was threatened with loss of work hours for complaining about a safety hazard caused by a crack in the weld of the rear bulkhead of the truck he was scheduled to drive.

On repeated occasions, Plaintiff complained to Atlantic Richfield and to BP about these hazardous conditions, and about being instructed to violate the company's policies. In addition, in 2000, Plaintiff testified about BP's unfair labor practices before the National Labor Relations Board. SAC 10. On several occasions, Plaintiff anonymously complained about the safety procedure violations via "Open Talk," a website established by BP to report various safety violations. SAC 11:23-27.

On February 5, 2007, Plaintiff received a letter from BP president and chairman Robert A. Malone in response to Plaintiff's anonymous[7] posting on Open Talk. SAC Ex. 1. The letter refers to comments Plaintiff made at some point before October 9, 2006, and

[7] It is not clear how Malone delivered the letter to Plaintiff, given the anonymous nature of the Plaintiff's web postings. It is also not clear how Malone knew Plaintiff had made the series of anonymous postings.

requests Plaintiff's assistance in investigating dangerous practices at BP. The letter states, "I can guarantee you that you will not be retaliated against for raising safety concerns. It is against our policy, against my personal principles, and against the law." Plaintiff disclosed his identity to Mr. Malone and participated in the investigation. Plaintiff met with a BP attorney to discuss safety violations, as well as Plaintiff's allegations of retaliation. The attorney and Mr. Malone made representations to plaintiff that the retaliation would cease and that the safety violations would be investigated and corrected.

In response to Plaintiff's internal and external complaints, defendant retaliated against plaintiff by requiring him to perform hard labor even though defendants had knowledge that Plaintiff was on light duty status due to a back injury that occurred in 2006. For example, Plaintiff was required to pick up debris, move equipment weighing 60 to 80 pounds, pull weeds, scrape pigeon excrement off of concrete, and to clean the uncooled warehouse when temperatures were more than 100 degrees, all of which aggravated Plaintiff's back injury and interfered with the efficacy of Plaintiff's medication. Additionally, Plaintiff was instructed not to talk to other employees. The complaint does not allege specific dates for these incidents other than that they occurred after plaintiff injured his back in 2006.

On November 10, 2006, Plaintiff was informed by human resources manager Jill Georgikas that he was being put "out on disability." Plaintiff alleges that starting on November 10, 2006,

Defendant engaged in a course of conduct intended to retaliate against Plaintiff and to cause him to quit his job. This course of conduct included contradictory and ambiguous communications regarding Plaintiff's employment status and accommodations; withholding Plaintiff's mail and memos; and withholding plaintiff's medical benefits, short and long term disability payments, and workers' compensation benefits between October or November, 2006 until June 8, 2009 when Plaintiff was terminated.[8]

Relying on Mr. Malone's promise to protect plaintiff from retaliation, Plaintiff complained to BP that he was not receiving responses to his requests for medical benefits. Plaintiff was "cut off" from worker's compensation benefits in March, 2007, and from his medical and dental benefits in May, 2007. Thereafter, plaintiff contacted BP manager Wayne Malik, Jill Georgikas, Dan Place and other BP employees for assistance securing long-term disability medical benefits. Plaintiff received no response. Plaintiff was ultimately denied long-term disability medical benefits on January 24, 2008.[9]

Other allegedly retaliatory conduct by Defendant includes withholding of vacation pay; an order for Plaintiff to stay off BP property; characterizing Plaintiff's employment status as

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[8] While the court is obliged to give every reasonable inference to the non-moving party, since workers' compensation is not controlled by the defendant, the court cannot give this assertion of retaliation any credence.

[9] Again, this conduct appears to be controlled by the Workers' Compensation agency and attribution to it seems implausible.

"suspended without pay," causing Plaintiff to be ineligible to take out an emergency loan from his pension; and failing to provide reasonable accommodations for his back injury, such as retraining for other positions.[10]

On March 19, 2009, BP informed Plaintiff that the investigation into Plaintiff's Open Talk safety complaints would be closed. On approximately the same date, BP communicated to plaintiff that it was prepared to offer plaintiff less than $30,000 to "close out" Plaintiff's employment.

On June 8, 2009, Plaintiff received a notice of termination of his employment.

B. Procedural Background

Plaintiff originally filed this case in state court, and the case was removed to this court on November 19, 2010. On March 4, 2011, this court issued an order dismissing the individual named defendants, leaving only BP as defendant.

On March 25, 2011, Defendants filed a motion for judgment on the pleadings. On April 27, 2011, the motion was granted, and Plaintiff was granted leave to amend the complaint. Specifically, the court concluded that Plaintiff had provided sufficient notice to defendant as to the public policy basis for his wrongful termination claim, but that Plaintiff had failed to plead facts allowing the court to infer a nexus between plaintiff's complaints about safety violations and Plaintiff's termination. "At a minimum,

[10] Relative to this claim, plaintiff appears not to be making a claim under the Disability Act.

in order to adequately plead this [retaliation] theory, plaintiff must at least indicate that the retaliatory conduct began after the alleged protected activity. Without approximate dates attached to the alleged retaliatory incidents, the court is not able to draw an inference that the termination is linked to his protected activity." Plaintiff was granted leave to amend his complaint accordingly. April 27, 2011 Order ("April Order") at 9, ECF No. 20.

With respect to plaintiff's breach of contract claim, the court concluded "plaintiff's bare assertion that an implied agreement [to modify the at-will employment presumption] existed is conclusory and insufficient. . . Basic facts such as the names or titles of relevant parties and the type of statements or conduct which is alleged to give rise to the mutual agreement should be set forth in order to give the defendant fair notice of the grounds of the claim, and to make the existence of a mutual agreement plausible." April 27 Order at 10-11.

Plaintiff filed a second amended complaint on May 17, 2011. Defendant's motion to dismiss the complaint is now before the court.

II. Standard for a Motion to Dismiss

A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's compliance with the pleading requirements provided by the Federal Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must give defendant "fair notice of what the claim is and the grounds upon

which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation and modification omitted).

To meet this requirement, the complaint must be supported by factual allegations. Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S. Ct. 1937, 1950 (2009). "While legal conclusions can provide the framework of a complaint," neither legal conclusions nor conclusory statements are themselves sufficient, and such statements are not entitled to a presumption of truth. Id. at 1949-50. Iqbal and Twombly therefore prescribe a two step process for evaluation of motions to dismiss. The court first identifies the non-conclusory factual allegations, and the court then determines whether these allegations, taken as true and construed in the light most favorable to the plaintiff, "plausibly give rise to an entitlement to relief." Id.; Erickson v. Pardus, 551 U.S. 89 (2007).

"Plausibility," as it is used in Twombly and Iqbal, does not refer to the likelihood that a pleader will succeed in proving the allegations. Instead, it refers to whether the non-conclusory factual allegations, when assumed to be true, "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A complaint may fail to show a right to relief either by lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901

F.2d 696, 699 (9th Cir. 1990). Finally, of course, the complaint must be comprehensible.

III. Analysis

A. First Cause of Action: Termination in Violation of Public Policy

Plaintiff alleges that his refusal to participate in, and complaints and reports of illegal and unsafe conduct by BP was a motivating factor for retaliatory conduct by BP, including his termination on June 8, 2009. SAC 24. Defendant argues that the complaint fails to allege a causal connection between any public policy violation and Plaintiff's termination because he fails to allege a specific violation of public policy, and because of the long amount of time that passed between Plaintiff's alleged complaints and his subsequent termination.

In California, a claim of wrongful termination in contravention of public policy requires some basis in policy that is delineated in a constitutional or statutory provision. Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992). The public policy may also be enunciated in an administrative regulation. Green v. Ralee Eng'g Co., 960 P.2d 1046, 1051 (Cal. 1998). The policy violated must be fundamental and affect a public interest rather than only personal or proprietary interests. Id.; Gantt, 824 P.2d at 684. The language of the law or constitutional provision need not prohibit the exact conduct alleged, but must express a "clearly mandated public policy" that is contravened by the alleged conduct. Id. at 1061. "[T]he policy must be public in that it affects society at large rather than the individual, must have been articulated at the

time of discharge, and must be fundamental and substantial." Id. at 1051 (internal quotations omitted); See also Carter v. Escondido Union High School District, 56 Cal. Rptr. 3d 262, 266 (Cal. Ct. App. 2007). Mere violation of an employer's own policies, is not protected by the public policy doctrine. "The tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies or the provisions of its agreements with others." Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1033 (Cal. 1994).[11]

i. The Public Policy

With respect to defendant's first argument--that Plaintiff fails to allege a specific violation of public policy--this court already held in this case that Plaintiff need not plead the specific statute or regulation that was thwarted by his termination. "By alleging that defendant 'was subject to numerous and various laws . . . intended to protect the general public from safety hazards inherent in the storage, transport, delivery, pumping, disposal, and other handling of large quantities of highly toxic, flammable and volatile gasoline fumes,' and 'were intended to protect the environment from damage,' and 'were promulgated and/or enforced by various governmental agencies including but not limited to the United States Congress, Environmental Protection Agency, [and] the State of California . . .' plaintiff has provided sufficient notice to defendant as to the public policy basis for

[11] Of course if the employer's policy reflects a public policy as defined above, the employer's policy may be relevant to demonstrate intentional conduct for purposes of measuring damages.

his wrongful termination claim." April Order 7:14-24. Nonetheless, Defendant argues that Plaintiff fails to state a claim because he "does not allege any specific article or section of any statute to support his claim." Def.'s Mot. 8.

Defendant's continued reference to Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238 (Cal. 1994) is inapposite. There, the California Supreme Court held that the Plaintiff could not survive summary judgment because he did not state the specific statutory provisions delineating a public policy. Plaintiff's "vague charge of 'Alcohol, Tobacco, and Firearms laws' violations," the Court held, was "plainly insufficient to create an issue of material fact justifying a trial." Id. at 1257. The Court's holding on this substantive point of law does not alter the federal pleading requirements, which apply in this case. See, e.g. Tribble v. Raytheon Co., 2011 U.S. App. Lexis 2895 (9th Cir. 2011). Accordingly, the court concludes once again that notice pleading does not require Plaintiff to state in his complaint the statutory or regulatory basis of the claimed violation of public policy in order to survive a 12(b)(6) motion to dismiss.[12]

ii. Nexus

In order to state a claim for termination in violation of public policy, Plaintiff must assert facts allowing the court to plausibly infer that there was a nexus between the public policy and the termination. In the April Order, this court held that

[12] Of course, in response to discovery, plaintiff will have to spell out the statutes and regulations he relies on.

plaintiff, by failing to "allege the approximate dates for any of the incidents alleged to constitute a [retaliatory] course of conduct," had not adequately demonstrated that a retaliation theory was plausible. April Order 9. "At a minimum, in order to adequately plead this theory, plaintiff must indicate that the retaliatory conduct began after the alleged protected activity. Without approximate dates attached to the alleged retaliatory incidents, the court is not able to draw an inference that the termination is linked to [plaintiff's] protected activity." Id. The court dismissed the first cause of action on that basis, and granted Plaintiff leave to amend the complaint accordingly.

In his SAC, Plaintiff alleges that he made complaints about various health and safety violations "from time to time," and "at one point." For example, the SAC states that "on one occasion . . . [plaintiff] stated [to his supervisor] that peening the crack [in a weld on the tanker truck] would not solve the safety hazard." The supervisor then "threatened him with the loss of work hours if he did not do as he was told." SAC 9.[13] The court cannot infer anything about the date of this occurrence, other than that it occurred some time between 1998, when Plaintiff began his employment with BP's predecessor, and approximately November 10, 2006, when Plaintiff went out on disability. SAC 13.

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[13] Even if plaintiff does not recall the dates of the incidents he alleges, he must be able to say that they occurred prior to the retaliation or that they occurred subsequent to the initiation of retaliation, but were a cause to continue or intensify retaliation.

However, the court can infer that Plaintiff was subjected to a retaliatory course of conduct following disclosure of his identity to BP CEO Robert Malone, culminating in termination. At some point shortly before October 9, 2006, Plaintiff anonymously submitted some concerns to Open Talk. BP CEO and president Robert Malone responded via Open Talk on October 9, 2006. Mr. Malone sent a letter to Plaintiff on February 7, 2007. Ex. 1 to SAC.[14] At some point thereafter, Plaintiff disclosed his identity to Mr. Malone. Plaintiff then began meeting with BP's attorney in a series of briefing meetings throughout 2007, after agreeing to be identified with his anonymous safety complaints and cooperating with an investigation. SAC 12: 9-13. Plaintiff had a final briefing meeting with BP in March 2009, three months before Plaintiff was terminated in June 2009. SAC 20: 1-15.

One month after Plaintiff received the letter from PB's president and agreed to come forward with his safety concerns, BP notified him that his worker's comp benefits had been "cut off." SAC 15: 11-22. Prior to this notification in March 2007, Plaintiff

[14] It is unclear to the court how this letter got to plaintiff before plaintiff revealed his identity to Mr. Malone. The SAC states that the letter was "sent" to him, but plaintiff only alleges that he revealed his identity after receiving the letter. Based on the allegations in the complaint, the court can only infer that plaintiff's identity became known to Malone at some point after February, 2009. Similarly, because plaintiff has not attached dates to any of his prior safety complaints made directly to supervisors, the court cannot infer any retaliatory conduct based on those complaints. Therefore, the court only addresses alleged retaliatory conduct that occurred after February 2009.

was not able to get a response about the status of those benefits.[15]

Three months after Plaintiff received the letter from BP's president, BP informed Plaintiff in May 2007 that his medical and dental benefits had been discontinued. SAC 15: 11-22.

For several months after plaintiff received a letter from BP's president, Plaintiff stopped getting any company mail which would have notified him of his long-term disability benefits status. Five months after receiving the BP president's letter and agreeing to come forward, Plaintiff physically visited his mailbox at the Sacramento Terminal in July 2007 and was told to leave because a guard had called the police.

During the eight month period after Plaintiff received the letter from BP's president, he was not able to get information he needed about his long-term disability benefits. This changed when Plaintiff met with BP's attorney Joan Fife and BP's Human Resources employee Stacey Turner in October 2007. In this meeting, Turner told Plaintiff he had one week to file for the benefits or he would be time-barred from applying. SAC 16: 11-48. Those benefits were denied eleven months after Plaintiff received the letter from BP's president and agreed to come forward with his safety complaints. The reason BP's provider denied Plaintiff his long-term disability benefits was because BP's provider could not establish his identity and "why he was taken out of work" on Nov. 13, 2006. SAC 16: 18-28.

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[15] Repeating, it is not clear to the court how conduct by an independent governmental agency can be construed as employer retaliation.

Plaintiff appealed this denial and tried to get the status of his employment by calling Jill Georgikas, Dan Place and other BP employees. Id. He was not successful in getting the information, and was again denied benefits by BP's provider this time, due to lack of medical documentation. SAC 17: 1-13.[16]

Thirteen months after receiving the letter from BP's president, Plaintiff applied for an emergency loan from his BP pension in order to prevent his home from going into foreclosure in March 2008. SAC 18: 12-16. However, he was told by his pension fund manager at Fidelity that he could not receive a loan because his employment status was "suspended without pay." SAC 17:1-13.

The court notes that these incidents are relevant only as evidence of defendant's retaliatory motive for terminating plaintiff. The claim for which plaintiff seeks to recover is wrongful termination, not wrongful denial of any benefits or withholding of information. Plaintiff neither seeks nor pleads facts adequate to support recovery for any allegedly retaliatory conduct other than his termination.

From these allegations, the court can plausibly infer that BP engaged in a retaliatory course of conduct against Plaintiff, culminating in termination of plaintiff in June 2009. It may be that some of the incidents that plaintiff is asserting after he came forward with his identity upon receiving Mr. Malone's letter in February 2007, show that BP retaliated against Plaintiff by in

[16] Again, it is not clear how the result is attributable to defendant.

some way interfering with Plaintiff's workers' compensation benefits, medical and dental benefits, and long-term disability benefits

Defendant asserts that the 31-month gap between November 10, 2006, when Plaintiff went out on disability, and June 8, 2009, when Plaintiff was terminated from his employment, renders any inference of nexus implausible. Defendant describes two alternative theories involving a 28-month, and 23-month gap respectively. Defendant argues that these theories do not plausibly give rise to an inference of nexus between any protected activity by Plaintiff and Plaintiff's termination. However, during what the defendant describes as a "gap" in time between Plaintiff's safety complaints and his ultimate termination, Defendant was allegedly engaged in a series of escalating tactics intended to make Plaintiff voluntarily quit his job, such as withholding information necessary for plaintiff to get disability benefits. Plaintiff's theory apparently is that when he did not quit, he was terminated. By attaching dates to his health and safety complaints via Open Talk and to Mr. Malone, as well as the dates of "retaliatory" conduct that followed, Plaintiff has adequately pled a nexus between his alleged protected activity and the asserted retaliatory termination.

iii. Preemption

Defendant argues that Plaintiff's claims, insofar as they are premised on denial of workers' compensation, medical, and dental benefits are preempted by ERISA and by the California Workers' Compensation Act. Plaintiff's wrongful termination claim, however,

is not premised on the denial of those benefits. Allegations about interference with those benefits serve to explain the lag in time between Plaintiff's health and safety complaints and his ultimate termination, and to demonstrate a pattern of retaliatory conduct. Plaintiff does not seek remedies intended to compensate him for the loss of those benefits.

Accordingly, defendant's motion to dismiss the first cause of action is DENIED.

B. Second Cause of Action: Breach of Employment Contract

As his second cause of action, Plaintiff alleges that he was employed pursuant to an "oral and/or implied agreement that Defendants [sic] would continue Plaintiff's employment for an indefinite period of time into the future so long as Plaintiff fulfilled his duties and obligations under the employment agreement, and that Plaintiff's employment would not be terminated, except for good cause." SAC 26: 10-16. Plaintiff alleges that he was terminated without cause on June 8, 2009, in violation of this employment contract. Defendant argues that even if there as a for-cause employment contract, plaintiff's termination does not constitute a breach of contract since, according to defendants, plaintiff's "100% permanent disability" constitutes good cause for termination. Def.'s Mot. to Dismiss 23, ECF No. 22-1.

i. "Good cause" employment contract

In California, employment is presumed to be at-will. California Labor Code § 2922. The presumption of at-will contract may be overcome by express contract, or where the parties' conduct

demonstrates an implied promise not to terminate without good cause. Guz v. Bechtel National, 9 P.3d 1089, 1100 (Cal. 2000). Courts look to the totality of the circumstances to determine if an employment agreement exists, including the "personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. Foley v. Interactive Data Corp., 765 P.2d 373, 387 (Cal. 1988) (quoting Pugh v. See's Candies, 116 Cal. App.3d 311, 327 (1981). "Whether the employee has shown that the totality of the circumstances establish an implied employment contract sufficient to overcome the presumption of at-will employment generally is a question of fact to be determined by a jury." 3 Witkin Summary of California Law § 233 (10th ed. 2005)(citing Foley, 765 P.2d 381).

Further, at-will provisions in personnel handbooks or manuals do not necessarily overcome other evidence of the employer's contrary intent, "particularly where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights." Guz, 9 P.3d 1089, 1103 (Cal. 2000).

In this case, Plaintiff alleges that sections of the BP Code of Conduct Policy Manual, the BP Business Policies Manual, BP's Workplace Performance Development Program, and observations of his supervisors engaging in progressive discipline with coworkers constitute an implied contract not to terminate Plaintiff without cause.

Plaintiff alleges that BP Group Chief Executive John Browne stated that the BP Code of Conduct "sets out standards for each individual. Failure to observe the code is a cause for disciplinary action which could involve dismissal. All employees must follow this code. Failure to do so is taken very seriously and may result in disciplinary action up to and including dismissal." SAC 26-27. According to Plaintiff, the Business Policies Manual explains, among other things, "Our policy expectations with regard to individuals is that we will act fairly and justly." SAC 27. The Workplace Performance Development Program states:

> when people do their jobs well, they've earned the right to be recognized for their work. When they don't, they deserve the right to be told about it and given the chance to correct the problem. . . BP believes that most of the time, when problems arise, they can be solved simply by bringing the situation to the individual['s] attention, discussing the issues and seeing an agreement to change and improve performance...There are three formal levels in the Workplace Performance Development Program: 1. Verbal reminder. 2. Written warning. 3. Decision-making leave.

SAC 28.

These manuals were given to Plaintiff during his employment, and he "was told that they represented the company's and its management's promises to him." SAC 28-29. Plaintiff also states that he saw managers Jill Georgikas and Jeff Ferris use this progressive discipline approach with other employees. SAC 29: 3-8.

Defendant counters that the policies and code of conduct "expressly reserves [to BP] the option to summarily terminate its employees or engage in progressive discipline." Def.'s Mot. 21. Defendant quotes from the same Workplace Performance Development

Plan that "[d]ecisions are handled on a case-by-case basis." Def.'s Mot. 22. Additionally, the plan states that the progressive disciplinary steps can be bypassed. Id. Defendant argues that BP did not restrict its right to terminate employees without notice and without cause.

Defendant argues that plaintiff selectively cited sections of the employment manuals, see, e.g., Mot. 22. But that is of no import at this stage. Defendant alleges that the manuals also provide that "disciplinary or termination decisions are handled on a case-by-case basis," and that the progressive discipline steps "may be bypassed." Id. Defendant's allegations are, however, unavailing. "When ruling on a motion to dismiss, we may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Colony Cove Properties, LLC v. City Of Carson, 640 F.3d 948, 955 (9th Cir. 2011). It is true, as defendant asserts, that the court "need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint," id., but the policy manuals quoted in Plaintiff's complaint are not before the court and the allegations in Defendant's motion are not entitled to any presumption of truth.

By alleging that policy manuals distributed by Defendant established a progressive discipline system, promised "fair and just" treatment, and promised employees an opportunity to improve performance before termination, Plaintiff has alleged sufficient facts from which a jury might infer an agreement not to terminate

without good cause. Of course, on a motion for summary judgment, the defendant can tender the manual. [17]

ii. Whether plaintiff's termination was for good cause

Defendant argues that even if it had an obligation to only terminate plaintiff for cause, plaintiff's complaint fails to state a claim because the complaint concedes that plaintiff was unable to perform his job due to a disability, constituting good cause for the termination. See Def.'s Mot. to Dismiss 23, ECF No. 22. The paragraph of the complaint cited by defendant doesn't exactly make such a concession. The paragraph states that plaintiff was "frustrated by British Petroleum's continuing refusal and/or inability to confirm Plaintiff's true employment status. . . regarding (1) the date Plaintiff was medically determined by a qualified medical doctor to be 100% permanently disabled form working. . . as a truck driver." SAC ¶ 51. The court can reasonably infer that plaintiff, rather than admitting that he was permanently disabled, was describing his process of seeking information from

[17] The court notes that Plaintiff has also adequately pled an express written agreement that defendant would not retaliate against plaintiff for his health and safety complaints, separate from any agreement that may provide for termination only with cause. In the February 5, 2007 letter, Mr. Malone stated "I can guarantee you that you will not be retaliated against for raising safety concerns. It is against our policy, against my personal principles, and against the law. I will offer you these assurances with no strings attached." Ex. A to SAC. Regardless of whether or not defendant agreed not to terminate Plaintiff without good cause, it appears that defendant agreed not to terminate plaintiff in retaliation for his complaints. In other words, even if defendant preserved the right to fire Plaintiff for some arbitrary reason, defendant may have promised not to fire plaintiff for a retaliatory reason.

defendant about defendant's determination that plaintiff was permanently disabled. This reading is consistent with plaintiff's asserted theory that he was terminated in retaliation for his health and safety complaints, but that defendant engaged in a course of conduct to "terminate plaintiff in a way that would appear to be consistent with the law and their personnel policies. . . to prevent him from any legal recourse." SAC ¶ 52.

Defendant's motion to dismiss the claim for breach of contract is DENIED.

C. Third Cause of Action: Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff's third cause of action is for breach of the covenant of good faith and fair dealing. SAC 30. Plaintiff alleges he was terminated for pretextual reasons after he testified for the Labor Board, complained of BP's health and safety hazards, and refused to ratify BP's regulatory violations. SAC 30: 25-28, 31: 1-5. Plaintiff argues that BP was required to perform the terms and conditions of the employment agreement fairly and in good faith, and refrain from doing any act that would impede Plaintiff from performing on the conditions of the contract. SAC 30: 7-15. Defendant counters there was no underlying employment agreement that prevented BP from terminating plaintiff without cause. Def.'s Mot. 24: 7-28.

Every contract imposes a duty of good faith and fair dealing on its parties, but a claim for breach of the implied covenants is distinguishable from a breach of contract claim in that the implied

covenants provide a "safety valve to which judge may turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language." Foley, 765 P.2d at 389 (internal quotations omitted). The implied covenants prevent a party from acting in bad faith to frustrate the purpose of the mutual agreement. Guz 8 P.3d at 1112 n. 18. A breach of the implied covenants may not, however, enforce obligations beyond the terms of the agreement. Id. at 1112.

Here plaintiff has pled a claim for breach of contract, and therefore may make out a claim for violation of the implied covenants on the facts alleged. Plaintiff alleges that he relied on company policies aiming "for a radical new openness" where workers "have open and constructive conversations about the[ir] performance and to be fairly treated." SAC 27: 9-13. Plaintiff also alleges that he relied upon the individualized promises made by BP President Robert Malone in his February 2007 letter requesting Plaintiff's help. SAC 12: 24-28, 13: 3-17, Ex. 1.

Plaintiff alleges he relied on representations made in employment manuals and by Mr. Malone that he would not be punished for communicating openly about health and safety concerns, but that he was terminated for doing just that. Such conduct by Defendant, according to Plaintiff, constitutes bad faith. The determination of whether the employer engaged in bad faith is a question of fact. 3 Witkin Summary of California Law § 239 (10th ed. 2005).

On similar allegations, California courts have found a triable issue as to whether there was a breach of the implied covenant. For

example, in Kelecheva v. Multivision Cable T.V. Corp., 18 Cal.App.4th 521 (1993), the court found that allegations that an employer failed to follow its own personnel policies relating to safety and progressive discipline provide a basis for a claim of breach of the implied covenant of good faith and fair dealing.

Accordingly, Defendant's motion to dismiss the third cause of action is DENIED.

IV. Conclusion

For all the above reasons, defendant's motion to dismiss, ECF No. 22 is DENIED in its entirety.

IT IS SO ORDERED.

DATED: September 20, 2011.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT