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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

6 DERRICK ROSS,

7 Plaintiff,

NO. C08-00854 TEH

8 v.

ORDER RE HEARING ON
MOTION FOR SUMMARY
JUDGMENT

9 INDEPENDENT LIVING
10 RESOURCE OF CONTRA COSTA
COUNTY,

11 Defendant.

12

13 This matter is scheduled for hearing on Monday, July 19, 2010, at 10:00am, on
14 Defendant's motion for summary judgment. The parties shall be prepared to address the
15 following questions at the motion hearing:

16

17 **For Both Parties**

- 18 1. Defendant characterizes this as a mixed-motives case, and argues that the Supreme
19 Court's decision in *Gross v. FBL Financial Services* should apply. However, Plaintiff
20 alleges in the Third Amended Complaint ("TAC") that the "reason given to Plaintiff
21 for his termination was a pretext." TAC ¶ 12. In light of Plaintiff's pretext theory,
22 should the Court analyze this case under the *McDonnell Douglas* standard? See
23 *Brown v. City of Tucson*, 336 F.3d 1181, 1186 (9th Cir. 2003) (observing that courts
24 "have almost uniformly adopted the burden-shifting analysis set forth by the Supreme
25 Court in *McDonnell Douglas*" in examining ADA retaliation claims). On what basis
26 should this Court determine whether to analyze Plaintiff's retaliation claim under
27 *Gross* or *McDonnell Douglas*?
- 28

1 2. If the Court grants summary judgment to Defendant as to Plaintiff’s claim under
2 section 1101 of the California Labor Code, would that decision also dispose of the
3 prayer for attorneys’ fees pursuant to the Private Attorneys General Act?
4

5 **For Defendant**

6 3. You appear to believe that Ross’s prosecution of the Basketball Town lawsuit could
7 only be political if he had been actively publicizing the case. However, the definition
8 of “political” endorsed in *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d
9 458, 487 (1979), requires only the espousal of a cause plus “some degree of action to
10 promote the acceptance thereof by other persons.” Can’t Ross’s pursuit of the lawsuit
11 *by itself* meet the low threshold of “some degree of action,” especially in light of the
12 publicity that was in fact generated by the action he undertook?
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14 4. If the ADA retaliation claim survives summary judgment, do you concede that the
15 claim for the tort of wrongful termination survives, as well?
16

17 **For Plaintiff**

18 5. You argue that the existence of a policy controlling employees’ political activity
19 should be inferred from Plaintiff’s termination and statements by ILR managers
20 disapproving litigation advocacy. However, Plaintiff’s termination represents a single
21 episode – not a policy – and the statements cited demonstrate only ILR’s policy not to
22 prosecute ADA claims *as an agency*. How, based on this evidence, could a fact-finder
23 infer the existence of a policy controlling *employees’* political activities?
24

25 **IT IS SO ORDERED.**

26
27 Dated: 7/15/10



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THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT