

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MOSES OLADELE ABIOLA,
Plaintiff,
v.
ESA MANAGEMENT, LLC,
Defendant.

Case No. 13-cv-03496-JCS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FOURTH AMENDED COMPLAINT, VACATING MOTION HEARING AND CHANGING TIME OF CASE MANAGEMENT CONFERENCE FROM 9:30 AM TO 2:00 PM ON MAY 30, 2014

Re: Dkt. No. 79

I. INTRODUCTION

On March 3, 2014, the Court issued an order granting in part and denying in part Defendant's motion to dismiss Plaintiff's Third Amended Complaint. Docket No. 70. The Court dismissed Claims Three, Four, Eight, Nine and Ten with prejudice on the grounds that the defects in those claims could not be cured. The Court dismissed Claims Two, Seven, Eleven and Twelve without prejudice and granted leave to amend as to those claims, instructing that "[i]n [the] amended complaint Plaintiff may *only* amend Claims Two, Seven, Eleven and Twelve." *Id.* at 14 (emphasis in original). The Court further ordered that Plaintiff "may *only* amend those claims to address the deficiencies identified above." *Id.* (emphasis in original). Plaintiff, who is *pro se*, understood from the Court's admonition that in his amended pleading he should not re-plead the surviving causes of action that were contained in the Third Amended Complaint and that were not subject to amendment. Consequently, Plaintiff's Fourth Amended Complaint includes additional allegations to support the claims as to which he was given leave to amend but does not include Plaintiff's claims for violations of §§ 203 and 1198.5 of the California Labor Code (Claims Five

1 and Six of the Third Amended Complaint) or for violation of ERISA (Claim One of the Third
2 Amended Complaint).¹

3 Defendant now brings a Motion to Dismiss Plaintiff’s Fourth Amended Complaint, or in
4 the Alternative, Motion for a More Definite Statement (“Motion”). In the Motion, Defendant
5 contends the ERISA and California Labor Code claims should be dismissed, citing Civil Local
6 Rule 10-1, which provides that “[a]ny party filing or moving to file an amended pleading must
7 reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by
8 reference.” Because Plaintiff did not include in his Fourth Amended Complaint the surviving
9 claims from the previous complaint that were not subject to amendment, Defendant contends those
10 claims should be dismissed or, in the alternative, that the Court should order Plaintiff to provide a
11 more definite statement as to those claims pursuant to Rule 12(e) of the Federal Rules of Civil
12 Procedure. Defendant further contends that the amendments in Plaintiff’s Fourth Amended
13 Complaint as to Claims Seven (Intentional Infliction of Emotional Distress), Eleven (Wrongful
14 Termination) and Twelve (Defamation) are not sufficient to state a claim.

15 The Court finds that the Motion is suitable for determination without a hearing and
16 therefore **vacates the Motion hearing set for May 30, 2014 at 9:30 a.m. The case**
17 **management conference set for the same date shall be moved from 9:30 a.m. to 2:00 pm on**
18 **May 30, 2014.** For the reasons stated below, the Motion is GRANTED in part and DENIED in
19 part.²

20 **II. ANALYSIS**

21 **A. Claim Seven (Intentional Infliction of Emotional Distress)**

22 **1. Background**

23 In the Third Amended Complaint, Plaintiff asserted a claim for Intentional Infliction of
24

25 ¹ The Court also reads Plaintiff’s Fourth Amended Complaint as dropping the California state law
26 false advertising claim, asserted as Claim Two in the Third Amended Complaint. At page 2 of the
27 Fourth Amended Complaint, Plaintiff states this claim “was dismissed” and at page 4 he states that
as a pro se plaintiff he is “not positioned to seek this relief under California Code section 17500”
and therefore that the claim is “excluded” from the Fourth Amended Complaint. Accordingly,
Claim Two is DISMISSED without prejudice.

28 ² The parties have consented to the jurisdiction of the undersigned United States magistrate judge
pursuant to 28 U.S.C. § 636(c).

1 Emotional Distress based on allegations that: 1) his manager intentionally provided him with the
2 wrong safe combination and ridiculed him in front of subordinates for his inability to open the
3 safe, Third Amended Complaint, ¶¶ 27, 35; 2) Defendant failed to provide to Plaintiff the 7-day
4 written notice of intention to terminate that is required under its internal policies, *id.*, ¶¶ 23(c), 35;
5 3) Defendant did not provide Plaintiff with a copy of the Employment Notice, *id.*, ¶¶ 23(a), 35; 4)
6 Defendant did not provide Plaintiff with a written copy of its bonus plan, *id.*, ¶¶ 23(e), 35; and 5)
7 Plaintiff informed his employer of his “use of prescribed medicine, that causes certain condition
8 as disclosed on the medication label” and that “lengthy exposure to the sunlight at the direct order
9 of the Defendant during the renovation work makes the matter worsen.” *Id.* ¶¶ 35, 39(e).

10 The Court found that Plaintiff’s allegations in the Third Amended Complaint were
11 insufficient to state a claim because Plaintiff did not allege facts showing that Defendant’s conduct
12 was outrageous; in particular, the Court pointed out that the bulk of the alleged conduct related to
13 personnel management and further found that the allegations concerning the safe combination did
14 not constitute more than a “annoyance or a petty oppression.” Docket No. 70 at 8. As to the
15 allegations concerning Plaintiff’s medical condition, the Court concluded that they were too vague
16 and conclusory to state a claim. *Id.*

17 In his Fourth Amended Complaint, Plaintiff again alleges that Defendant engaged in
18 outrageous conduct based on Defendant’s “[f]ailure to write declaration on ‘Employment
19 Notice,’” and “failure to respect Plaintiff’s medical condition,” Fourth Amended Complaint at 5.
20 He also alleges that Defendant engaged in outrageous conduct by failing to warn him of the
21 “possible presence of granite filtrate used during construction” (which Plaintiff contends amounts
22 to an OSHA violation), denying Plaintiff access to his employment file, failing to pay required
23 wages under Cal. Labor Code § 203 and “plaintiff’s general work and working activities.” *Id.* at
24 5-6. Plaintiff has dropped his allegations regarding the safe combination.

25 Defendant argues that Plaintiff has failed to state a claim for intentional infliction of
26 emotional distress because: 1) the claim is preempted by the Workers’ Compensation Act to the
27 extent that all of the alleged conduct arises from Plaintiff’s normal job duties; 2) the alleged
28 conduct consists of personnel management and therefore cannot be extreme and outrageous; 3) the

1 allegation that Defendant failed to respect Plaintiff’s medical condition is too vague to state a
2 claim; and 4) the claim is barred on statute of limitations grounds to extent it is based on the
3 alleged failure to warn of granite filtrate because this amounts to a new claim that does not relate
4 back to the original complaint.

5 **2. Discussion**

6 As the Court stated in its previous order,

7 Liability for intentional infliction of emotional distress generally
8 “‘does not extend to mere insults, indignities, threats, annoyances,
9 petty oppressions, or other trivialities,’ but only to conduct so
10 extreme and outrageous ‘as to go beyond all possible bonds of
11 decency, and to be regarded as atrocious, and utterly intolerable in a
12 civilized community.’” *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d
13 493, 499 (quoting Rest. 2d Torts, § 46, com. d). Further,
14 “[m]anaging personnel is not outrageous conduct beyond the bounds
15 of human decency, but rather conduct essential to the welfare and
16 prosperity of society.” *Janken v. GM Hughes Electronics*, 46
17 Cal.App.4th 55, 80 (1996). Therefore, “[a] simple pleading of
18 personnel management activity is insufficient to support a claim of
19 intentional infliction of emotional distress, even if improper
20 motivation is alleged.” *Id.*

21 Plaintiffs new allegations are based largely on personnel management activities: failure to include
22 a declaration on an Employment Notice, denial of access to Plaintiff’s employee file, failure to pay
23 required wages, exposing Plaintiff to “granite filtrate” when the property was under renovation
24 and Plaintiff’s general working conditions. As stated in the Court’s previous order, such
25 allegations do not satisfy the requirement that Plaintiff must allege conduct that is “atrocious” or
26 “extreme and outrageous.” Further, as to Defendant’s alleged disregard of Plaintiff’s medical
27 condition, Plaintiff has alleged no further facts showing that Defendant engaged in outrageous
28 conduct in this regard. Therefore, this allegation remains too vague and conclusory to state a
claim.

Accordingly, the Court dismisses Plaintiff’s claim for intentional infliction of emotional
distress with prejudice.

B. Claim Eleven (Wrongful Termination)

1. Background

In the Third Amended Complaint, Plaintiff asserts a claim for wrongful termination,

1 alleging that Defendant’s conduct was outrageous because it subjected Plaintiff to “lengthy
2 exposure to the sunlight,” designated him as ineligible for rehire based on alleged false entries in
3 his employment file regarding his performance, including “false safe box issue,” denied him
4 access to his employment file and did not give Plaintiff the required 7-day notice of its intent to
5 terminate Plaintiff. *Id.* The Court found that Plaintiff failed to state a claim for wrongful
6 termination because Plaintiff failed to allege facts which would establish that any of this conduct
7 was related to Plaintiff’s termination. Docket No. 70 at 12.

8 In his Fourth Amended Complaint, Plaintiff alleges that he was wrongfully terminated
9 because he was terminated after: 1) he wrote a letter to his supervisor on April 30, 2012 (“the
10 April 30 Letter”) addressing issues that needed to be addressed, including how the property was
11 being managed, Plaintiff’s work load and the property’s curb appeal; 2) Defendant failed to
12 provide a sanitary workplace and exposed Plaintiff to granite filtrate; 3) Plaintiff was denied
13 access to his employment file; and 4) he demanded to be reimbursed for use of his own funds to
14 purchase a name tag. Fourth Amended Complaint at 11-14; *see also* Third Amended Complaint,
15 Ex. I (April 30 Letter).³ The April 30 Letter complains about the “negative feedbacks being
16 accumulated by this property due to lack of operating guidelines” and makes a series of
17 recommendations under the following subheadings: “General Operation” (“A single brand
18 standard must be used at all times as the conflict that currently exist in the use of Homestead
19 Suites Hotel, and the new brand Extended Stay Hotel is creating confusion for guests as well as
20 the staff”), “Customer Care/Employee” (“Most of the employees are not properly trained in
21 regards to customer care etiquette”), “Amenities” (“We should strive to provide complete sets of
22 amenities . . . so that we can eliminate most negative feedback”), “Image Concept” (“We must use
23 Extended Stay Hotels, and all that is applicable to the operation standard to the brand”),
24 “Management” (“The workload assigned to me personally are too intense to assume that such
25 could be accomplished within a reasonable and approved labor work standard”; “All matters
26

27 ³ Although the April 30, 2012 letter was attached as an exhibit to the Third Amended Complaint,
28 Plaintiff did not rely on the letter in support of his wrongful termination claim until he amended
his wrongful termination claim, in his Fourth Amended Complaint.

1 applicable to the employment status benefit and incentive must be declared in full so that we may
2 know where we stand, and what we are working for”), “Curb Appeal” (“The general curb appeal
3 needs to be improved”). Third Amended Complaint, Exhibit I. The letter does not cite to any
4 local, state or federal laws and does not refer to any alleged violations of any law.

5 Defendant asserts Plaintiff’s amendments to the wrongful termination claim fail to save the
6 claim because Plaintiff still has not alleged any facts showing a causal connection between the
7 alleged conduct and Plaintiff’s termination. Motion at 12. With respect to the April 30 Letter,
8 Defendant contends the letter sent by Plaintiff relates “to Plaintiff’s own employment with
9 Defendant and does not implicate matters of public policy.” *Id.* Defendant further notes that the
10 letter does not reference any state or federal statute and argues that Plaintiff fails to allege any
11 facts showing that at the time he sent the letter he had a good faith belief that any statute was being
12 violated. *Id.*

13 **2. Discussion**

14 The majority of Plaintiff’s allegations regarding the wrongful termination claim are
15 duplicative of his earlier allegations and fail to state a claim for wrongful termination because
16 Plaintiff has not alleged facts showing the alleged conduct was causally related to his termination.
17 Plaintiff’s allegation in the Fourth Amended Complaint that he was terminated after sending a
18 letter to his supervisor protesting various practices of Defendant is new, however. Construing the
19 allegations liberally, and in light of the allegations indicating that Plaintiff sent the letter to his
20 supervisor within a month before he was terminated, the facts alleged could support an inference
21 of causation. Therefore, the Court must address whether Plaintiff’s letter could establish that
22 Plaintiff was terminated for his efforts to protect important public policy such that he has stated a
23 cognizable claim under *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 178 (1980).

24 In *Tameny*, the California Supreme Court held that “an employer’s authority over its
25 employee does not include the right to demand that the employee commit a criminal act to further
26 its interests, and an employer may not coerce compliance with such unlawful directions by
27 discharging an employee who refuses to follow such an order.” 27 Cal.3d 167, 178 (1980). In the
28 wake of *Tameny*, California courts have held, “implicitly and explicitly, that discharge of an

1 employee in retaliation for resisting employer violations of laws that secure important public
2 policies contravenes those policies, and gives rise to a common law action in tort.” *Blom v.*
3 *N.G.K. Spark Plugs (U.S.A.), Inc.*, 3 Cal.App.4th 382, 389 (1992). For example, “California
4 courts have long recognized wage and hours laws ‘concern not only the health and welfare of the
5 workers themselves, but also the public health and general welfare.’” *Barbosa v. Impco*
6 *Technologies, Inc.*, 179 Cal.App.4th 1116, 1122 (2009) (quoting *Gould v. Maryland Sound*
7 *Industries, Inc.*, 31 Cal.App.4th 1137, 1148–1149 (1995) (internal citation omitted)). Thus, in
8 *Barbosa*, the court found that an employee’s efforts to collect overtime pay that he reasonably and
9 good faith belief was owed to him under California wage and hour laws was sufficient to support a
10 *Tameny* claim. *Id.*

11 Not all conduct protesting what the employee believes to be a violation of the law is
12 sufficient to support a *Tameny* claim, however. See *Green v. Ralee Engineering Co.*, 19 Cal. 4th
13 66, 75 (1998). The California Supreme Court explained as follows:

14 In *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 669, 254
15 Cal.Rptr. 211, 765 P.2d 373 (*Foley*), we underscored the term
16 “public” in *Tameny*’s public policy exception by observing that the
17 employee’s actions must further a policy affecting the public
18 interest, which must be fundamental or substantial when the
19 company discharges the employee. (*Foley, supra*, 47 Cal.3d at p.
20 670, fn. 11, 254 Cal.Rptr. 211, 765 P.2d 373.) In rejecting a tort
21 claim based on an employee’s discharge after he reported to
22 management his supervisor’s history of embezzlement, we held that
23 alleged violations of internal practices that affect only the
24 employer’s or employee’s interest, and not the general public’s
25 interest, will not give rise to tort damages. (*Foley, supra*, 47 Cal.3d
26 at pp. 669–671, 254 Cal.Rptr. 211, 765 P.2d 373.) In other words,
27 courts must focus not on compensation to employees, but rather on
28 the “general social policies being advanced.” (*Foley, supra*, 47
Cal.3d at p. 668, 254 Cal.Rptr. 211, 765 P.2d 373.) Even then, not
all statutes (or constitutional provisions) will support a *Tameny*
claim. “[M]any statutes simply regulate conduct between private
individuals, or impose requirements whose fulfillment does not
implicate fundamental public policy concerns.” (*Foley, supra*, 47
Cal.3d at p. 669, 254 Cal.Rptr. 211, 765 P.2d 373.)

Id.

26 The instruction of *Green v. Ralee Engineering Co.* is particularly pertinent to Plaintiff’s
27 April 30 Letter to his supervisor because all of the complaints and suggestions offered in that letter
28 are aimed at either the employee’s interest (Plaintiff’s work load and the negative feedback

1 Plaintiff experienced from departing customers) or the employer’s interest (the confusion
2 allegedly created among guest due to the failure to use a “single brand standard,” the alleged
3 insufficient training of staff in customer care standards, the failure to provide complete amenities
4 and the “general curb appeal” of the property). Indeed, Plaintiff prefaces his specific complaints
5 by stating that he is offering his “suggestions to reverse the negative feedback being accumulated
6 by this property due to the lack of operating guidelines.” Although Plaintiff makes a demand that
7 “[a]ll matters applicable to the employment status benefit and incentive must be declared in full so
8 that we may know where we stand, and what we are working for,” the Court finds this statement is
9 simply too vague to support a reasonable inference that it constituted an effort to secure any
10 particular right under California’s wage and hour laws. Therefore, the Court concludes that the
11 April 30 Letter does not save Plaintiff’s wrongful termination claim because there is nothing in the
12 letter that can be construed as protecting any “fundamental public policy.”

13 Accordingly, the Court dismisses Plaintiff’s wrongful termination claim with prejudice.

14 **C. Claim Twelve**

15 **1. Background**

16 In the Third Amended Complaint, Plaintiff asserted a claim for Calumny/Defamation,
17 which the Court construed as a defamation claim. He alleged in support of his claim that
18 Defendant classified Plaintiff as “non-eligible for rehiring” based on “false entries of invalid
19 performance data, and such has become a platform for continuous slander through negative
20 references to general public.” Third Amended Complaint, ¶ 40. The Court dismissed the claim
21 with leave to amend, finding that Plaintiff failed to state a claim for defamation because he had not
22 alleged facts sufficient to support a reasonable inference that the statements that were published
23 were false *and* that they were not privileged because they were made with malice. Docket No. 70
24 at 14.

25 In his Fourth Amended Complaint, Plaintiff alleges in support of his defamation claim that
26 1) “Defendant willfully gave the plaintiff wrong combination numbers to operate the safe box and
27 jokes about it with subordinates;” 2) Defendant willfully told a Wells Fargo Bank employee about
28 the incident and Plaintiff became the target of derision when he patronized the bank; 3) Plaintiff

1 was subject to “verbal scolding” by third parties because Defendant failed to reimburse him for
2 trips and mileage; and 4) Plaintiff was subjected to verbal reprimands from guests while he was
3 performing his employment-related duties for defendant. Fourth Amended Complaint at 16-17.
4 Defendant contends Plaintiff’s amended allegations in support of the defamation claim in the
5 Fourth Amended Complaint continue to be deficient. Motion at 13-15.

6 **2. Discussion**

7 As the Court stated in its previous order,

8 Under California law, the tort of defamation may be libel or slander.
9 *See* Cal. Civ. Code §§ 45-46. “The tort [of defamation] involves
10 the intentional publication of a statement of fact that is false,
11 unprivileged, and has a natural tendency to injure or which causes
12 special damage.” *Smith v. Maldonado*, 72 Cal.App.4th 637, 645
13 (1999)(citing Cal. Civ. Code, §§ 45, 46; 5 Witkin, Summary of Cal.
14 Law (9th ed. 1988) Torts § 471, pp. 557-558). “Publication means
15 communication to some third person who understands the
16 defamatory meaning of the statement and its application to the
17 person to whom reference is made.” *Id.*

14 Docket No. 70 at 13. Plaintiff’s new theories in support of his defamation claim do not save the
15 claim. He has alleged no facts showing that any false statements were made. Nor has he cited any
16 authority indicating that an employer may be liable for defamation based on statements made by
17 third parties to an employee during the course and scope of the employee’s employment, even
18 assuming the statements were otherwise actionable. Nor does the Court find any such authority.

19 Accordingly, Plaintiff’s defamation claim is dismissed with prejudice.

20 **D. ERISA and California Labor Code Claims**

21 In its previous motion to dismiss addressing the sufficiency of Plaintiff’s claims under
22 Rule 12(b)(6) of the Federal Rules of Civil Procedure Defendant did not challenge Plaintiff’s
23 claims under ERISA and the California Labor Code (Claims One, Five and Six). Defendant now
24 contends, however, that because Plaintiff failed to include the claims in his amended complaint,
25 those claims should be dismissed or alternatively, that the Court should require that Plaintiff
26 should order Plaintiff to provide a more definite statement of his claims.

27 It is apparent from Plaintiff’s Opposition brief (as well as the Fourth Amended Complaint)
28 that he believed in good faith that the Court’s Order *prohibited* him from addressing in his

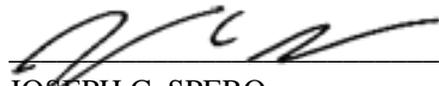
1 amended complaint any claims other than those as to which the Court had granted leave to amend.
2 Defendant has cited no authority that persuades the Court that under these circumstances,
3 Plaintiff's failure to include all of his surviving claims in his amended complaint, as required
4 under Civil Local Rule 10-1, is a sufficient basis for dismissal of the omitted claims. Further, in
5 light of Plaintiff's pro se status and the history of this case, the Court does not find that ordering
6 Plaintiff to file yet another pleading pursuant to Rule 12(e) of the Federal Rules of Civil Procedure
7 is likely to add significant clarity as to the nature of Plaintiff's claims. Therefore, Defendant's
8 request for a more definite statement is denied.

9 **III. CONCLUSION**

10 For the reasons stated above, the Motion is GRANTED in part and DENIED in part. The
11 Court DISMISSES Plaintiff's claims for Intentional Infliction of Emotional Distress (Claim
12 Seven), Wrongful Termination (Claim Eleven) and Defamation (Claim Twelve) with prejudice.
13 Claim Two (False Advertising under California Law), which Plaintiff states in the Fourth
14 Amended Complaint he no longer wishes to pursue, is dismissed without prejudice. Plaintiff's
15 claims for violation of ERISA (Claim One), and of the California Labor Code (Claims Five and
16 Six) shall go forward. Any allegations in Plaintiff's Third Amended Complaint and Fourth
17 Amended Complaint that support those claims shall be deemed to be part of the operative
18 complaint in this action.

19 **IT IS SO ORDERED.**

20
21 Dated: May 27, 2014

22
23 
24 _____
JOSEPH C. SPERO
United States Magistrate Judge

25
26
27
28