

United States District Court  
For the Northern District of California

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

FREDERICK CASISSA,  
Plaintiff,  
v.

No. C 09-04129 CW  
ORDER DENYING  
DEFENDANT'S MOTION  
TO DISMISS  
(Docket No. 32)

FIRST REPUBLIC BANK, a division of,  
MERRILL LYNCH BANK & TRUST COMPANY,  
FSB,  
Defendant.

ELIZABETH RIGGINS,  
Plaintiff,  
v.

(consolidated with  
09-4129)

FIRST REPUBLIC BANK, a division of,  
MERRILL LYNCH BANK & TRUST COMPANY,  
FSB,  
Defendant.

Plaintiffs Frederick Casissa and Elizabeth Riggins bring claims against Defendant First Republic Bank concerning the termination of their employment. Defendant moves to dismiss Plaintiffs' Second Amended Complaint (2AC). Plaintiffs oppose the motion. The motion was heard on July 1, 2010. Having considered oral argument and all the papers submitted by the parties, the Court DENIES Defendant's Motion.

BACKGROUND

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2 Plaintiffs are California residents who were employees of  
3 Defendant. During the relevant period, Defendant appears to have  
4 been a division of Merrill Lynch Bank and Trust, FSB. The  
5 following allegations are contained in Plaintiffs' complaint.

6 Defendant employed Casissa as "the Bank Secrecy Act/Anti-Money  
7 Laundering . . . compliance officer" and Riggins as a "Bank Anti-  
8 Money Laundering Analyst." 2AC ¶¶ 7 and 10. Plaintiffs maintain  
9 they were under legal duties to, among other things, report  
10 evidence of suspicious activity to the Financial Crimes Enforcement  
11 Network (FCEN), a bureau of the U.S. Department of the Treasury.

12 On or about October 31, 2007, Riggins learned through a news  
13 article that two of Defendant's customers were "suspected of  
14 operating an unlawful 'Ponzi' scheme" and that their assets had  
15 been seized by law enforcement authorities. 2AC ¶ 17. The article  
16 indicated that Defendant held "\$40 million in defaulted loans" by  
17 the two customers. 2AC ¶ 17. Riggins informed Casissa of the  
18 report. In turn, Casissa contacted Edward Dobranski, his immediate  
19 supervisor and vice president and general counsel for Defendant.  
20 Casissa informed Dobranski that Defendant was required to file a  
21 Suspicious Activity Report (SAR) regarding the two customers.  
22 Dobranski instructed Plaintiffs "to take no actions" concerning the  
23 report. 2AC ¶ 20. Plaintiffs then told Dobranski that they  
24 "refused to participate in any conduct contrary to law and  
25 regulations governing their duties and responsibilities at the  
26 Bank, including specifically not filing a SAR regarding" these two  
27 customers. 2AC ¶ 21. Thereafter, Plaintiffs investigated the  
28 customers' accounts, at the behest of Merrill Lynch executives.

1 Plaintiffs complain that their investigation was impeded by the  
2 deliberate withholding of documents.

3 On or about March 11, 2008, Riggins learned that, in August,  
4 2007, Defendant had been served with a subpoena for the banking  
5 records of another customer. This subpoena "had been deliberately  
6 withheld from" Plaintiffs by Dobranski and other employees. 2AC  
7 ¶ 25. When Casissa asked Dobranski about the subpoena, Dobranski  
8 acknowledged its existence and instructed Plaintiffs "not to worry  
9 and to take no action." 2AC ¶ 28. Plaintiffs believed that the  
10 subpoena required the filing of a SAR and again stated to Dobranski  
11 that they refused to participate in any conduct contrary to law.

12 On March 14, 2008, Casissa informed Robert Werner at Merrill  
13 Lynch about his concerns regarding the subpoena. Werner stated  
14 that he had no prior knowledge of the subpoena. Plaintiffs again  
15 reiterated that they refused to participate in any conduct contrary  
16 to law.

17 Beginning in or about March, 2008, Defendant engaged in acts  
18 of retaliation against Plaintiffs that prevented them from  
19 performing their job duties, including withholding information,  
20 imposing "unnecessary and punitive administrative duties and  
21 responsibilities," hiring "an inexperienced and unqualified  
22 individual as 'Chief Risk Officer,'" and excluding them from  
23 meetings. 2AC ¶ 32. This alleged chain of events culminated in  
24 the termination of Plaintiffs' employment on May 29, 2009.  
25 Defendant indicated to Plaintiffs that the terminations were the  
26 result of restructuring and reorganization. However, Plaintiffs  
27 contend that their positions were "posted on the Internet." 2AC  
28 ¶ 34. Casissa's position was subsequently filled.

1 Plaintiffs bring claims under California law, asserting that  
2 Defendant violated California Labor Code section 1102.5(c) and  
3 terminated their employment in violation of public policy.

4 On April 16, 2010, the Court dismissed Plaintiffs' First  
5 Amended Complaint, but granted them leave to amend to plead factual  
6 allegations in support of their claims. Plaintiffs filed their  
7 current complaint on April 30, 2010.

8 LEGAL STANDARD

9 A complaint must contain a "short and plain statement of the  
10 claim showing that the pleader is entitled to relief." Fed. R.  
11 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
12 claim is appropriate only when the complaint does not give the  
13 defendant fair notice of a legally cognizable claim and the grounds  
14 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
15 (2007). In considering whether the complaint is sufficient to  
16 state a claim, the court will take all material allegations as true  
17 and construe them in the light most favorable to the plaintiff. NL  
18 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

19 However, this principle is inapplicable to legal conclusions;  
20 "threadbare recitals of the elements of a cause of action,  
21 supported by mere conclusory statements," are not taken as true.  
22 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
23 (citing Twombly, 550 U.S. at 555).

24 DISCUSSION

25 I. Claims under California Labor Code Section 1102.5

26 California Labor Code section 1102.5(c) forbids an employer  
27 from taking retaliatory action against an employee for "refusing to  
28 participate in an activity that would result in a violation of

1 state or federal statute, or a violation or noncompliance with a  
2 state or federal rule or regulation." The California Legislature  
3 intended "to protect employees who refuse to act at the direction  
4 of their employer or refuse to participate in activities of an  
5 employer that would result in a violation of law." Act of Sep. 22,  
6 2003, ch. 484, § 1, 2003 Cal. Legis. Serv. 484.

7 To plead a prima facie case under section 1102.5, Plaintiffs  
8 must allege that (1) they engaged in a protected activity,  
9 (2) Defendant subjected them to adverse employment actions and  
10 (3) there is a causal link between the two. Mokler v. County of  
11 Orange, 157 Cal. App. 4th 121, 138 (2007). Defendant contends that  
12 Plaintiffs fail to plead that they engaged in protected activity  
13 and retaliatory causation.

14 Although Plaintiffs failed to plead protected activity in  
15 their first amended complaint, they do so here. Under 31 C.F.R.  
16 § 103.18(a)(1), every bank is required to file "a report of any  
17 suspicious transaction relevant to a possible violation of law or  
18 regulation." See also 12 C.F.R. § 353.3(a)(2) (requiring a report  
19 whenever "the bank detects any known or suspected federal criminal  
20 violation, or pattern of criminal violations . . . involving a  
21 transaction or transactions conducted through the bank, and  
22 involving or aggregating \$5,000 or more in funds or other assets,  
23 where the bank believes it was . . . used to facilitate a criminal  
24 transaction, and the bank has a substantial basis for identifying a  
25 possible suspect or group of suspects"). Plaintiffs cite a news  
26 article, which suggested that two of Defendant's customers were  
27 involved in an unlawful "Ponzi" scheme that may have implicated  
28 funds obtained through a loan held by Defendant. This article

1 could have triggered Defendant's federal reporting obligation. As  
2 a result, Dobranski's direction to Plaintiffs to do nothing could  
3 have prevented Defendant from fulfilling its reporting obligation.  
4 By pleading that they refused to accede to this instruction, which  
5 could have led to the violation of federal law, Plaintiffs allege  
6 protected activity.

7 In addition, Plaintiffs' allegations concerning the grand jury  
8 subpoena support their claims.<sup>1</sup> They cite a manual, published by  
9 the Federal Financial Institutions Examination Council, which  
10 states that "the receipt of a grand jury subpoena should cause a  
11 bank to review account activity for the relevant customer."  
12 See Fed. Fin. Institutions Examination Council, Bank Secrecy  
13 Act/Anti-Money Laundering Examination Manual 70 (2010), available  
14 at [http://www.ffiec.gov/bsa\\_aml\\_infobase/documents/BSA\\_AML\\_Man\\_2010.pdf](http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2010.pdf).<sup>2</sup>  
15 They also allege that, until they confronted him about it,  
16 Dobranski withheld the subpoena from them and his superiors.  
17 Because the subpoena could have triggered Defendant's reporting  
18 obligation, Dobranski's instruction to do nothing, along with the  
19 alleged suppression of the subpoena, could have resulted in the

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21 <sup>1</sup> At the hearing on the motion, Plaintiffs' counsel  
22 represented that Plaintiffs' Second Amended Complaint contains  
23 several allegations, to which he referred. For instance, he  
24 asserted that the complaint avers that the purported subpoena "sat  
25 on the desk of a bank employee whose name is Sunshine Smith for  
26 months." He also suggested that Plaintiffs filed a SAR, in  
27 contravention of Dobranski's instructions. No such allegations  
28 appear in the complaint. Plaintiffs' counsel is reminded of his  
obligation under California Rule of Professional Conduct 5-200(C),  
which requires that attorneys "shall not seek to mislead the judge,  
judicial officer, or jury by an artifice or false statement of fact  
or law."

<sup>2</sup> Notably, however, the manual also states that a subpoena  
"does not, by itself, require the filing of a SAR by the bank."  
Id.

1 violation of federal law. While the allegations concerning the  
2 subpoena are somewhat sparse, they are sufficient to state  
3 protected activity.

4 With regard to adverse employment actions, Plaintiffs allege  
5 that, around March 11, 2008, Defendant began to hamper their  
6 ability to do their jobs. This included the withholding of  
7 information and their exclusion from meetings. These acts could  
8 suffice as adverse employment actions. See Yanowitz, 36 Cal. 4th  
9 at 1054 (stating that adverse employment actions include those  
10 "that are reasonably likely to adversely and materially affect an  
11 employee's job performance"). Plaintiffs assert these acts  
12 culminated in the termination of their employment in May, 2009.  
13 Based on these allegations, Plaintiffs adequately plead that  
14 Defendant took adverse employment actions against them.

15 Concerning causation, Plaintiffs do not allege facts that  
16 support a direct link between their alleged protected activity and  
17 Defendant's alleged retaliatory conduct. Instead, they argue that  
18 the temporal proximity of Defendant's retaliation to their  
19 rejection of Dobranski's instruction supports an inference of  
20 causation. See, e.g., Morgan v. Regents of Univ. of Cal., 88 Cal.  
21 App. 4th 52, 69-70 (2000). Because the alleged retaliatory acts  
22 began around the time Plaintiffs refused to comply with Dobranski's  
23 instruction concerning the subpoena, Plaintiffs sufficiently plead  
24 a causal link.

25 Accordingly, Plaintiffs state claims under section 1102.5(c)  
26 based on their refusal to follow Dobranski's instructions to take  
27 no action concerning the news report and the subpoena.

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1 II. Claims for Wrongful Termination in Violation of Public Policy  
2 Under California law, an employee may maintain a tort cause of  
3 action against his or her employer when the employer's discharge of  
4 the employee contravenes fundamental public policy. Foley v.  
5 Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such claims  
6 are often referred to as Tameny claims, after the decision in  
7 Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177 (1980).  
8 A claim for wrongful termination in violation of public policy must  
9 be based on a fundamental policy established by a constitutional,  
10 statutory or regulatory provision. Green v. Ralee Eng'g Co., 19  
11 Cal. 4th 66, 76, 90 (1998).

12 Plaintiffs' Tameny causes of action rest in part on their  
13 section 1102.5(c) claims. Thus, Plaintiffs' Tameny claims may go  
14 forward to the extent that they implicate the same conduct that  
15 supports their claims under 1102.5(c).

16 CONCLUSION

17 For the foregoing reasons, the Court DENIES Defendant's Motion  
18 to Dismiss. (Docket No. 32.)

19 IT IS SO ORDERED.

20  
21 Dated: July 19, 2010



22 CLAUDIA WILKEN  
23 United States District Judge  
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