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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PATRICIA HARRELL,
Plaintiff,
v.
CITY OF GILROY, et al.,
Defendants.

Case No. 17-CV-05204-LHK

**ORDER GRANTING IN PART,
DENYING IN PART, AND DEFERRING
RULING ON IN PART MOTION TO
STRIKE THE FIRST AMENDED
COMPLAINT**

Re: Dkt. No. 17

Before the Court is Defendants City of Gilroy and Gilroy Police Department’s motion to strike the first amended complaint. ECF No. 17. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court grants in part, denies in part, and defers ruling on in part the motion to strike.

I. BACKGROUND

Plaintiff Patricia Harrell (“Harrell”) worked as a Public Safety Communicator for the Gilroy Police Department (“GPD”) for about 26 years. First Amended Complaint (“FAC”), ECF No. 16 ¶ 19. Harrell was terminated on March 21, 2016, based on Harrell’s alleged misconduct toward Harrell’s trainees. *Id.* ¶ 68. Harrell disputes that she mistreated her trainees.

1 Harrell alleges that the GPD had a pervasive culture of sexual misconduct and that she was
2 fired in retaliation for her refusal to condone or engage in the culture of sexual misconduct. *Id.*
3 ¶¶ 23-26. Harrell alleges a range of sexual misconduct, including police officers having sex with
4 members of the Gilroy Explorers, a group for 14 to 21 year olds; sexually explicit conversations
5 between employees at work; supervisors watching pornography in front of their employees; and
6 nudity at work-sponsored social events, among other things. *Id.* ¶ 24. Harrell alleges that in 2008
7 she received a written reprimand after warning Julie Ines, a GPD employee, to be careful around
8 two other GPD employees that Harrell alleges are frequently involved in sexual misconduct. *Id.*
9 ¶¶ 43-50. Harrell contends that she received threatening notes in her mailbox at work and on her
10 car. The note on her car allegedly said, “Better watch your back, bitch.” *Id.* ¶ 72. Harrell alleges
11 that she was investigated without justification again in 2015 and was terminated on March 21,
12 2016. *Id.* ¶¶ 51-68.

13 Harrell also alleges that she was discriminated based on her age and gender. *Id.* ¶ 38-42.
14 The Court need not recount Harrell’s factual allegations in greater detail at this time because they
15 are not necessary for resolving the instant motion to strike.

16 On August 7, 2017, Harrell filed a complaint in state court against the City of Gilroy, GPD
17 (which is a department of the City of Gilroy), the American Federation of State, County and
18 Municipal Employees (“AFSCME”), and Does 1-50. ECF No. 1-1 at 6. The state court complaint
19 contained 13 causes of action: (1) age discrimination (Cal. Gov. Code § 12940); (2) gender
20 discrimination (Cal. Gov. Code § 12940); (3) sexual harassment (Cal. Gov. Code § 12940); (4)
21 failure to prevent discrimination and harassment (Cal. Gov. Code § 12940(k)); (5) whistleblower
22 retaliation (Cal. Labor Code § 1102.5); (6) retaliation (Cal. Gov. Code § 12940); (7) wrongful
23 termination in violation of public policy; (8) breach of duty of fair representation; (9) negligent
24 and intentional misrepresentation; (10) negligent and intentional infliction of emotional distress;
25 (11) breach of written and implied-in-fact contract; (12) breach of the implied covenant of good
26 faith and fair dealing; and (13) federal civil rights violation (42 U.S.C. § 1983). The first through
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1 seventh and thirteenth causes of action were against the City of Gilroy and GPD. The eighth and
2 ninth causes of action were against AFSCME. The tenth through twelfth causes of action were
3 against all defendants. On September 8, 2017, the City of Gilroy and GPD (collectively, “the
4 Gilroy Defendants”) removed the case to federal court. ECF No. 1.

5 On September 15, 2017, the Gilroy Defendants filed a motion to dismiss the complaint
6 pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike portions of the complaint
7 pursuant to Federal Rule of Civil Procedure 12(f). ECF No. 6 (“MTD”). The Gilroy Defendants
8 argued that Harrell’s seventh, eleventh, and twelfth causes of action failed as a matter of law
9 because Harrell was a public employee. MTD at 3-4. The Gilroy Defendants also argued that
10 Harrell’s fifth, seventh, tenth, eleventh, and twelfth causes of action must be dismissed because
11 Harrell failed to allege timely compliance with the California Tort Claims Act. *Id.* at 4-5. Finally,
12 the Gilroy Defendants argued that Harrell’s prayer for punitive damages should be stricken
13 pursuant to Rule 12(f) because punitive damages cannot be recovered against a public entity as a
14 matter of law. *Id.* at 5-6.

15 Harrell’s response to the motion to dismiss and strike was due September 29, 2017.
16 Harrell did not file a response. On October 6, 2017, the City of Gilroy and GPD filed a reply
17 noting Harrell’s failure to oppose the motion to dismiss and strike. ECF No. 13.

18 On November 28, 2017, Harrell’s counsel wrote a letter to the Court explaining that
19 Harrell elected not to oppose the motion to dismiss and strike because Harrell intended to file an
20 amended complaint “to address the issues raised by Defendants.” ECF No. 46. Harrell requested
21 that “the Court refrain from ruling on the Motion to Dismiss” because Harrell believed “that the
22 amended pleading w[ould] resolve most, if not all of the objections raised by Defendants.” *Id.*
23 The Gilroy Defendants’ counsel responded with a letter that same day, in which the Gilroy
24 Defendants’ counsel explained that Harrell’s counsel had offered on October 12, 2017 to send a
25 proposed amended complaint for the Gilroy Defendants’ review. ECF No. 47. However, as of
26 November 28, 2017, the Gilroy Defendants had not received any proposed amended complaint for
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1 review. The Gilroy Defendants stated that Harrell would not be allowed to amend her complaint
2 without stipulation or the Court’s permission pursuant to Rule 15. *Id.*

3 On November 30, 2017, the Court granted the Gilroy Defendants’ motion to dismiss with
4 leave to amend. ECF No. 15. Specifically, the Court stated that “Plaintiff shall file an amended
5 complaint within 30 days. If Plaintiff fails to file an amended complaint within 30 days or to cure
6 the deficiencies identified in Defendants’ September 15, 2017 motion, the Court will dismiss
7 Plaintiff’s case with prejudice.” *Id.*

8 On December 29, 2017, Harrell filed the FAC. ECF No. 16. The FAC added several
9 individual defendants, all of whom Harrell sued individually and in their official capacities.
10 Specifically, the FAC added Denise Turner, Chief of the GPD; Royce Heath, Joseph Deras, and
11 Kurt Svardal, GPD officers; Steve Ynzunza, a GPD communications supervisor; Leeann
12 McPhillips, the human resources director for the City of Gilroy; and John Tucker, the business
13 agent of AFSCME. The FAC also dropped the whistleblower retaliation, wrongful termination,
14 breach of duty of fair representation, breach of contract, and breach of covenant of good faith and
15 fair dealing causes of action. *Compare* FAC at 1 *with* ECF No. 1-1 at 6. However, the FAC
16 added the following 7 causes of action:

- 17 • Failure to investigate or take corrective action (Cal. Gov. Code § 12940), asserted
18 against the Gilroy Defendants;
- 19 • Retaliatory termination (Cal. Gov. Code § 12940(h)), asserted against the Gilroy
20 Defendants;
- 21 • Negligent supervision, asserted against AFSCME;
- 22 • Negligence, asserted against Turner, Heath, Deras, Svardal, Ynzunza, McPhillips,
23 AFSCME, and Tucker;
- 24 • Assault, asserted against Heath, Deras, and Ynzunza;
- 25 • Supervisory liability (42 U.S.C. § 1983), asserted against Turner, Heath, Deras,
26 Svardal, Ynzunza, and McPhillips; and

- 1 • Retaliation (Title VII of the Civil Rights Act of 1964), asserted against the Gilroy
2 Defendants.

3 *Compare* FAC at 1 *with* ECF No. 1-1 at 6.

4 On January 11, 2018, the Gilroy Defendants filed the instant motion to strike the FAC.
5 ECF No. 17 (“Mot.”). On January 12, 2018, the Gilroy Defendants filed an answer to the FAC.
6 ECF No. 18. On January 25, 2018, Harrell filed an opposition to the motion to strike. ECF No.
7 19 (“Opp’n”). On February 1, 2018, the Gilroy Defendants filed a reply. ECF No. 20 (“Reply”).
8 On February 28, 2018, AFSCME and Tucker filed a notice of non-opposition to the Gilroy
9 Defendants’ motion to strike. ECF No. 35.

10 On February 21, 2018, AFSCME and Tucker filed a motion to dismiss the FAC. ECF No.
11 32. On February 27, 2018, Deras, Heath, McPhillips, Turner, Ynzunza, and Svardal filed a motion
12 to dismiss the FAC. ECF No. 34. Harrell filed oppositions to both of those motions, ECF Nos.
13 40, 41, and the relevant defendants filed replies, ECF Nos. 42, 44.

14 **II. LEGAL STANDARD**

15 **A. Motion to Strike Pursuant to Federal Rule of Civil Procedure 12(f)**

16 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an
17 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
18 Civ. P. 12(f). “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and
19 money that must arise from litigating spurious issues by dispensing with those issues prior to
20 trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike
21 are generally disfavored and “should not be granted unless the matter to be stricken clearly could
22 have no possible bearing on the subject of the litigation If there is any doubt whether the
23 portion to be stricken might bear on an issue in the litigation, the court should deny the motion.”
24 *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (citations
25 omitted). “With a motion to strike, just as with a motion to dismiss, the court should view the
26 pleading in the light most favorable to the nonmoving party.” *Id.* “Ultimately, whether to grant a
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1 motion to strike lies within the sound discretion of the district court.” *Cruz v. Bank of New York*
2 *Mellon*, No. 12-846, 2012 WL 2838957, at *2 (N.D. Cal. July 10, 2012) (citing *Whittlestone, Inc.*
3 *v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)).

4 **B. Leave to Amend**

5 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely
6 granted when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate
7 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d
8 1122, 1127 (9th Cir. 2000) (en banc) (ellipses omitted). However, a court “may exercise its
9 discretion to deny leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the
10 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
11 to the opposing party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*,
12 629 F.3d 876, 892-93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S.
13 178, 182 (1962)).

14 **III. DISCUSSION**

15 The Gilroy Defendants argue that the Court should strike the entire FAC because Harrell’s
16 addition of new defendants and new causes of action exceeded the scope of the Court’s November
17 30, 2017 order granting leave to amend and violated Rule 15. Mot. at 2, 6-10. The Gilroy
18 Defendants also assert that two of the new causes of action against the Gilroy Defendants are
19 redundant of other causes of action. *Id.* at 7 nn.8-9. Finally, the Gilroy Defendants assert that the
20 FAC does not cure the deficiencies identified in the motion to dismiss. Specifically, the Gilroy
21 Defendants argue that although Harrell abandoned five causes of action that the Gilroy Defendants
22 previously identified as deficient because Harrell did not allege timely compliance with the
23 California Tort Claims Act, *id.* at 4, Harrell also added three causes of action against individual
24 defendants that suffer the same deficiency, *id.* at 7. In her opposition, Harrell responds to these
25 arguments and also seeks permission to file a second amended complaint. The Court addresses
26 these arguments in turn.

1 **A. The Motion to Strike the Entire FAC is Overbroad**

2 As an initial matter, the Gilroy Defendants argue that the entire FAC should be stricken
3 and the case dismissed with prejudice based on the addition of new parties and new causes of
4 action and Harrell’s failure to cure the deficiencies identified in the motion to dismiss. *See* Mot. at
5 10. Harrell responds that such a request is overbroad because the original complaint contained
6 causes of action for age and gender discrimination, sexual harassment, retaliation, failure to
7 prevent discrimination, and violation of the Federal Civil Rights Act that the Gilroy Defendants
8 never challenged in their September 15, 2017 motion to dismiss. Opp’n at 12. Accordingly,
9 Harrell argues that there is no legal basis for striking those causes of action now, even assuming
10 that the addition of new parties and new causes of action was improper. *Id.* In reply, the Gilroy
11 Defendants argue only that dismissal of the entire case with prejudice would be consistent with the
12 Court’s November 30, 2017 order granting the motion to dismiss, which stated that “[i]f Plaintiff
13 fails to file an amended complaint within 30 days or to cure the deficiencies identified in
14 Defendants’ September 15, 2017 motion, the Court will dismiss Plaintiff’s case with prejudice.”
15 Reply at 3, 10; ECF No. 15 at 1.

16 The Court acknowledges that its language in the November 30, 2017 order was imprecise.
17 Because the Gilroy Defendants did not challenge all causes of action in the motion to dismiss, the
18 Court should have stated that failure to file an amended complaint or to cure the deficiencies
19 identified in the motion to dismiss would result in dismissal with prejudice only of the dismissed
20 causes of action.

21 Having so clarified, the Court agrees with Harrell that there is no legal basis for striking
22 the entire FAC under Rule 12(f). The Gilroy Defendants do not argue that the causes of action
23 that were not challenged in the September 15, 2017 motion to dismiss are “redundant, immaterial,
24 impertinent, or scandalous,” which are the bases to strike material under Rule 12(f). Nor do the
25 Gilroy Defendants allege that Harrell amended the previously unchallenged causes of action in
26 violation of the scope of the Court’s order granting leave to amend. Moreover, seeking “to strike
27 the entirety of the FAC[] because it was improperly filed without leave to amend . . . is an

1 impermissible use of Rule 12(f), because it seeks to use Rule 12(f) as a substitute for Rule
2 12(b)(6).” *Cruz*, 2012 WL 2838957 at *2; *see also Whittlestone*, 618 F.3d at 974 (“Were we to
3 read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a
4 pleading . . . , we would be creating redundancies within the Federal Rules of Civil Procedure,
5 because a Rule 12(b)(6) motion (or a motion for summary judgment at a later stage in the
6 proceedings) already serves such a purpose.”); *Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir.
7 1977) (stating that Rule 12(f) is not an authorized or a proper way to procure the dismissal of all or
8 a part of a complaint). As a result, the Gilroy Defendants’ motion to strike the FAC is DENIED to
9 the extent it seeks dismissal of the first, second, third, fourth, sixth, and fourteenth causes of action
10 for age discrimination, gender discrimination, sexual harassment, failure to prevent discrimination
11 and harassment, retaliation, and violation of federal civil rights, none of which the Gilroy
12 Defendants previously challenged.

13 **B. The Addition of New Parties and Causes of Action Did Not Violate the Court’s Order**

14 “Pursuant to Rule 12(f), a court may strike claims from any pleading for failure to comply
15 with the court’s orders.” *Naranjo v. Bank of Am. Nat’l Ass’n*, No. 14-CV-2748-LHK, 2015 WL
16 4463851, at *13 (N.D. Cal. July 21, 2015) (citing *Siskiyou Reg’l Educ. Project v. U.S. Forest*
17 *Serv.*, No. CIV. 03-3013-CO, 2005 WL 2675189, at *2 (D. Or. Oct. 19, 2005), *aff’d*, 565 F.3d 545
18 (9th Cir. 2009)). The Gilroy Defendants argue that the addition of new parties and new causes of
19 action violated the Court’s November 30, 2017 order that granted the motion to dismiss and
20 allowed leave to amend. The Gilroy Defendants base this argument on the Court’s admonition
21 that if Harrell failed to cure the deficiencies identified in the Gilroy Defendant’s September 15,
22 2017 motion, the next dismissal would be with prejudice. *See* Mot. at 8-10. The Gilroy
23 Defendants also cite cases in which courts struck portions of amended pleadings where the
24 amendment went beyond the scope of the order granting leave to amend. *See id.* at 8 (citing
25 *Albano v. Cal-Western Reconveyance Corp.*, No. 4:12-cv-4018 KAW, 2013 WL 772665 (N.D.
26 Cal. Feb. 28, 2013); *Choudhuri v. Wells Fargo Bank, N.A.*, No. C 11-518 SBA, 2011 WL

1 5079480, at *3 n.6 (N.D. Cal. Oct. 25, 2011); *McReynolds v. HSBC Bank USA*, No. 5:11-cv-5245
2 EJD, 2012 WL 5868945, at *5 (N.D. Cal. Nov. 19, 2012)).

3 Harrell responds that the Court’s order did not limit the scope of permissible amendment.
4 Opp’n at 1, 3-5. Harrell cites *Forest Ambulatory Surgical Associates, L.P. v. Ingenix, Inc.*, 2013
5 WL 11323601 (C.D. Cal. Dec. 13, 2013), in which the court rejected an argument similar to the
6 one that the Gilroy Defendants advance here. Specifically, in *Forest*, the court’s order granting
7 leave to amend specified a deadline for amendment but did not explicitly limit the scope of
8 amendment. The defendants in *Forest* argued that the plaintiff had violated the Court’s order and
9 Rule 15 by adding new causes of action, rather than simply correcting deficiencies in the previous
10 causes of action. *Id.* at *3. The court disagreed, in part because the language granting leave to
11 amend did not limit the scope of the amendment and in part because the defendants had not shown
12 that they would suffer any prejudice as a result of the new causes of action. *Id.* at *3-4; *see also*
13 *Nissou-Rabban v. Capital One Bank (USA), N.A.*, 285 F. Supp. 3d 1136, 1144 (S.D. Cal. 2018)
14 (denying similar motion to strike because order granting leave to amend contained no limitations
15 on scope of amendment).

16 Here, like in *Forest* and *Nissou-Rabban* and unlike in *McReynolds*, the Court’s order
17 granting leave to amend did not limit the scope of the amendment. *See* ECF No. 15; *McReynolds*,
18 2012 WL 5868945 at *5 (“In fact, the court specifically advised Plaintiff that he could not assert
19 additional causes of action in an amended complaint without complying with Rule 15.”).

20 Accordingly, the Gilroy Defendants’ motion to strike is DENIED to the extent that it seeks
21 to strike all new parties and causes of action.

22 **C. The Sixth and Seventh Causes of Action are Redundant**

23 Again, Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an
24 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
25 Civ. Proc. 12(f). “Redundant matter is defined as including a needless repetition of allegations.”
26 *Nguyen v. CTS Elecs. Mfg. Solutions Inc.*, 301 F.R.D. 337, 342 (N.D. Cal. 2014) (citing *Thornton*
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1 *v. Solutionone Cleaning Concepts, Inc.*, No. 06-1455, 2007 WL 210586 (E.D. Cal. Jan. 26, 2007)).
2 “Accordingly, courts utilize Rule 12(f) to strike parts of complaints which are redundant to other
3 causes of action.” *Id.* (citing *Wilkerson v. Butler*, 229 F.R.D. 166, 172 (E.D. Cal. 2005)).

4 The Gilroy Defendants assert that the FAC’s fourth cause of action for failure to prevent
5 discrimination and harassment is redundant of the fifth cause of action for failure to investigate or
6 take corrective action. Mot. at 7 & n.8. The Gilroy Defendants also contend that the FAC’s sixth
7 cause of action for retaliation is redundant of the seventh cause of action for retaliatory
8 termination. Mot. at 7 & n.9. Harrell does not respond to these assertions.

9 All four of these causes of action are brought pursuant to California Government Code
10 § 12940. As part of her fourth cause of action, Harrell alleges that the Gilroy Defendants and
11 AFSCME “failed to take all reasonable steps necessary to prevent discrimination on the basis of
12 age and gender from occurring. Among other things, Defendants failed to train and adequately
13 supervise its [*sic*] employees in order to ensure that these employees were not violating the Fair
14 Employment and Housing Act in their treatment of other employees.” FAC ¶ 111. Harrell also
15 alleges that “[t]hey further failed to take reasonable steps to prevent the harassment and retaliation
16 that Ms. Harrell suffered because of her disapproval of the sexual misconduct occurring around
17 her.” *Id.* As part of her fifth cause of action, Harrell alleges that “[d]espite Plaintiff’s requests,
18 Defendants, and each of them, failed to investigate her complaints of retaliation, harassment, and
19 hostile work environment, or to take corrective action against Defendant’s employees and
20 directors.” *Id.* ¶ 117. Harrell alleges that “[b]y failing to adequately and timely investigate
21 Plaintiff’s complaints or take corrective action, Defendants allowed their employees and directors’
22 retaliatory conduct to increase, causing greater harm and emotional distress to Plaintiff.” *Id.*
23 ¶ 119. Although there is some overlap between the fourth and fifth causes of action, they are not
24 entirely redundant. The fourth cause of action appears to focus on failing to prevent age and
25 gender discrimination, while the fifth cause of action appears to focus on failing to investigate or
26 stop the alleged retaliation. Accordingly, because the fourth and fifth causes of action are not
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1 entirely redundant, the Gilroy Defendants’ motion to strike is DENIED as to the fourth and fifth
2 causes of action.

3 By contrast, the sixth and seventh causes of action are entirely redundant. In her sixth
4 cause of action, titled “retaliation” and brought pursuant to California Government Code § 12940,
5 Harrell alleges that she “engaged in protected activities, including, but not limited to: refusal to
6 condone the sexual behavior of Defendants’ employees, and filing her DFEH and EEOC
7 complaint. Afterwards, Defendants retaliated by eventually terminating Plaintiff.” FAC ¶ 124.
8 Harrell alleges that as a result, Harrell had to retain attorneys and so is entitled to recover
9 attorney’s fees and litigation expenses, including expert witness fees and costs. *Id.* ¶ 125. Harrell
10 alleges that she suffered lost income, lost benefits, and emotional distress as a result of the alleged
11 wrongful conduct. *Id.* ¶ 126. Similarly, in her seventh cause of action, titled “retaliatory
12 termination” and brought pursuant to California Government Code § 12940(h), Harrell alleges that
13 she “engaged in protected activities, including, but not limited to: refusal to condone the sexual
14 behavior of Defendants’ employees, and filing her DFEH/EEOC complaint. Afterwards,
15 Defendants retaliated by terminating Plaintiff.” *Id.* ¶ 130. Harrell alleges that she is entitled to
16 recover attorney’s fees and litigation expenses, including expert witness fees and costs. *Id.* ¶ 131.
17 Harrell alleges that she suffered emotional distress as a result. *Id.* ¶ 132. The seventh cause of
18 action, which was added in the FAC, is thus wholly redundant of the sixth cause of action, which
19 appeared in the original complaint. As a result, the Gilroy Defendants’ motion to strike is
20 GRANTED with prejudice as to the seventh cause of action for retaliatory termination pursuant to
21 Rule 12(f). The seventh cause of action is stricken with prejudice because it would be futile to
22 allow amendment. *See Carvalho*, 629 F.3d at 892-93. Specifically, the retaliatory termination
23 cause of action pursuant to § 12940(h) is encompassed within the retaliation cause of action
24 pursuant to § 12940, which survives. Thus, any amended retaliatory termination cause of action
25 would also be encompassed within the retaliation cause of action, and thus redundant.

1 **D. The Court Will Defer Ruling on the California Tort Claims Act Issue**

2 The Gilroy Defendants next argue that the FAC (or at a minimum the ninth, tenth, and
3 eleventh causes of action) should be dismissed because Harrell failed to cure a deficiency
4 identified in the September 15, 2017 motion to dismiss, which was Harrell’s failure to allege
5 timely compliance with the California Tort Claims Act. Mot. at 6-9. Specifically, the FAC
6 abandoned the five causes of action from the original complaint that the Gilroy Defendants had
7 identified in the September 15, 2017 motion to dismiss as deficient for failure to allege timely
8 compliance with the California Tort Claims Act. See Mot. at 9 n.10; compare FAC at 1 with ECF
9 No. 1-1 at 6. However, Harrell added three new causes of action against individual defendants for
10 negligence, assault, and negligent and intentional infliction of emotional distress. The Gilroy
11 Defendants argue that these causes of action suffer from the same deficiency as the five
12 abandoned claims, which is that Harrell fails to allege timely compliance with the California Tort
13 Claims Act. Mot. at 9. Harrell responds that equitable tolling should apply. Opp’n at 8-11. The
14 Gilroy Defendants reply that the FAC does not contain any allegations related to Harrell’s
15 equitable tolling argument, which means that the issue is not properly before the Court. Reply at
16 9-10.

17 The Gilroy Defendants do not argue that the negligence, assault, and negligent and
18 intentional infliction of emotional distress causes of action are “redundant, immaterial,
19 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Instead, the Gilroy Defendants argue
20 that Harrell’s claims are deficient as a matter of law because Harrell failed to allege timely
21 compliance with the California Tort Claims Act. “Thus, [the Gilroy Defendants’] 12(f) motion
22 [i]s really an attempt to have certain portions of [Harrell’s] complaint dismissed or to obtain
23 summary judgment against [Harrell] as to those portions of the suit—actions better suited for a
24 Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion.” *Whittlestone*, 618 F.3d at
25 974 (*comparing Yamamoto*, 564 F.2d at 1327 (“Rule 12(f) is ‘neither an authorized nor a proper
26 way to procure the dismissal of all or a part of a complaint.’”), with *Rutman Wino Co. v. E. & J.*
27 *Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“The purpose of [Rule] 12(b)(6) is to enable

1 defendants to challenge the legal sufficiency of complaints”) (alterations in original).
2 Framing the argument as Harrell’s failure to cure the deficiencies identified in the September 15,
3 2017 motion to dismiss fares no better. Indeed, defendants regularly bring a second round motion
4 to dismiss to argue that the plaintiff failed to cure the deficiencies that led to a first round
5 dismissal. Accordingly, the Court construes the Gilroy Defendants’ motion to strike the
6 negligence, assault, and negligent and intentional infliction of emotional distress causes of action
7 as a motion to dismiss pursuant to Rule 12(b)(6). *See, e.g., Powell v. Wells Fargo Home Mortg.*,
8 No. 14-cv-4248-MEJ, 2017 WL 2720182, at *7 (N.D. Cal. June 23, 2017) (construing improper
9 motion to strike as a motion to dismiss); *Linares v. CitiMortgage, Inc.*, No. C-14-3435 EMC, 2015
10 WL 2088705, at *8 (N.D. Cal. May 5, 2015) (same).

11 The Court defers ruling on the negligence, assault, and negligent and intentional infliction
12 of emotional distress causes of action so that the Court can consider the California Tort Claims
13 Act issue concurrently with whatever arguments AFSCME and the individual defendants raise in
14 their motions to dismiss, which are scheduled to be heard on July 26, 2018. *See* ECF No. 38.
15 Analyzing all arguments related to these causes of action at one time will be more efficient for the
16 Court. Ruling on the challenges to these causes of action at the same time will also simplify the
17 process for any amendments, if the Court grants leave to amend, and any subsequent motions to
18 dismiss, and thus will be more efficient for the parties and the Court.

19 **E. Harrell’s Request for Leave to File a Second Amended Complaint**

20 Finally, as part of her opposition, Harrell requests leave to file a second amended
21 complaint to reinstate the whistleblower cause of action that Harrell abandoned in the FAC.
22 Opp’n at 12. Harrell explains that after filing the FAC, she “became aware that both the City and
23 the GPD had failed to comply with Government Code § 53051,” which requires public agencies to
24 file certain identifying information with the Secretary of State and the County Clerk. Opp’n at 7.
25 Harrell explains that under the California Supreme Court’s decision in *Wilson v. San Francisco*
26 *Redevelopment Agency*, 19 Cal. 3d 555, 560 (1977), a plaintiff is excused from complying with
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1 the California Tort Claims Act if the public agency has not complied with Government Code
2 § 53051. Opp’n at 7. Thus, Harrell concludes that because the Gilroy Defendants did not register
3 as required by § 53051, Harrell was not required to comply with the California Tort Claims Act.
4 As a result, Harrell requests permission to file a second amended complaint that would revive the
5 whistleblower cause of action that Harrell abandoned in filing the FAC because she thought that
6 cause of action was barred by her failure to comply with the California Tort Claims Act. *Id.* at 7-
7 8, 12.

8 The Gilroy Defendants respond that a city is not a “public agency” as defined by California
9 Government Code § 53050, and thus the City of Gilroy is not required to comply with § 53051.
10 Thus, *Wilson* does not relieve Harrell from complying with the California Tort Claims Act. Reply
11 at 2.

12 Section 53051 requires that “[w]ithin seventy (70) days after the date of commencement of
13 its legal existence, the governing body of each public agency shall file with the Secretary of State
14 on a form prescribed by the Secretary of State and also with the county clerk of each county in
15 which the public agency maintains an office, a statement of” facts including the full legal name of
16 the public agency and the official mailing address of the governing body of the public agency,
17 among other information. Cal. Gov’t Code § 53051(a). Section 53050 states that “[t]he term
18 ‘public agency,’ as used in this article, means a district, public authority, public agency, and any
19 other political subdivision or public corporation in the state, but does not include the state or a
20 county, city and county, or city.” Cal. Gov’t Code § 53050. Thus, the City of Gilroy is not a
21 “public agency” within the meaning of § 53050, which means that it was not required to comply
22 with § 53051. GPD is a department of the City of Gilroy, which means that it also was not
23 required to comply with § 53051. As a result, the premise of Harrell’s request for filing a second
24 amended complaint—that the Gilroy Defendants’ failure to comply with § 53051 excused Harrell
25 from complying with the California Tort Claims Act—is legally incorrect. Accordingly,
26 amendment would be futile. The request for leave to file a second amended complaint to revive
27

1 the whistleblower cause of action is thus DENIED.

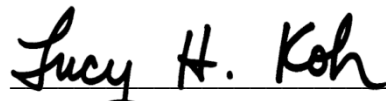
2 **IV. CONCLUSION**

3 For the foregoing reasons, the motion to strike is GRANTED with prejudice as to the
4 seventh cause of action for retaliatory termination. The Court DEFERS RULING on the motion
5 to strike the causes of action for negligence, assault, and negligent and intentional infliction of
6 emotional distress causes of action, which the Court construes as a motion to dismiss. The Court
7 will rule on these causes of action at the time that the Court rules on the motions to dismiss filed
8 by AFSCME and the individual defendants. In all other respects, the motion to strike is DENIED.
9 Harrell's request for leave to file a second amended complaint is DENIED.

10 **IT IS SO ORDERED.**

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12 Dated: May 25, 2018



LUCY H. KOH
United States District Judge

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