

10	Jimenez v. Bryant	<p>Demurrer to the First Amended Complaint: OVERRULED as to the First Cause of Action for Wrongful Discharge; SUSTAINED without leave to amend as to the Second Cause of Action for Invasion of Privacy and the Third Cause of Action for Intentional Infliction of Emotional Distress</p> <p><u>The First Cause of Action for Wrongful Discharge</u></p> <p>In order to establish a claim for wrongful discharge in violation of public policy plaintiff must prove the following: (1) an employer-employee relationship; (2) the termination or other adverse employment action; (3) the termination of the employment was a violation of public policy; (4) the termination was a legal cause of plaintiff's damage; and (5) the nature and extent of plaintiff's damage. <i>Holmes v. General Dynamics Corp.</i> (1993) 17 Cal. App. 4<sup>th</sup> 1418, 1426, n. 8.</p> <p>Plaintiff claims that she was constructively discharged in violation of public policy set forth in laws protecting every person from harm, harassment, insult, and unsafe and unhealthy working conditions, including <i>Article 1, Section 1 of the California Constitution, Civil Code §43, Penal Code §646.9, and Labor Code §§'s 6401 - 6404 (FAC, paragraph 23)</i>. Alternatively, plaintiff alleges that she was constructively discharged in violation of public policy set forth in <i>IWC Order 15-2001</i> prohibiting employers from requiring reimbursement from an employee for any loss or breakage of equipment on the job, and <i>Labor Code §216</i> prohibiting the willful failure to pay with an intent to annoy, harass, oppress or delay payment (<i>FAC, paragraph 24</i>).</p> <p><i>Article 1, Section 1 of the California Constitution</i> provides that all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. It is unclear how the defendants violated this Section. As discussed below, the OSHA Health and Safety Regulations do not apply to the Bryants, and plaintiff has not set forth sufficient facts to show that her privacy was invaded.</p> <p>It is not clear that <i>Penal Code §646.9</i> can be enforced by a private citizen. <i>Penal Code §646.9(a)</i> provides that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison. Nothing is said about</p>
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civil enforcement. Also, no facts are alleged which demonstrate that the Bryants' threatened Ms. Jimenez so that she would fear for her safety or the safety of her family.

*Labor Code §6400(a)* requires that that every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein. The definitions of the types of employment subject to the statutes and the regulations concerning health and safety (Cal-OSHA regulations) are located in *Labor Code §§'s 6300 et seq.* Plaintiff admits that she was a housekeeper performing domestic services for the defendants (*FAC, paragraph 9*). This type of employment is specifically excluded from coverage pursuant to *Labor Code §6303(b)*, which provides as follows:

'Employment' includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.

(Emphasis added).

Since household domestic service is excluded from the definition of "employment", and therefore from the health and safety statutes and regulations, plaintiff has failed to meet her burden that a public policy concerning health and safety was violated. Also, to the extent plaintiff seeks to base the cause of action on the ground that dog feces are hazardous substances, the cause of action fails. Dog feces are not specifically listed in the Hazardous Substance List prepared pursuant to *Labor Code §6380*.

*IWC Order 15-2001* prohibiting employers from requiring reimbursement from an employee for any loss or breakage of equipment on the job, does not provide a basis for the wrongful discharge claim because, by her own admission, plaintiff told Vanessa Bryant that she was quitting before Ms. Bryant demanded that she pay for the blouse. *FAC, paragraph 21*. Similarly, *Labor Code §216*, which prohibits the willful failure to pay with an intent to annoy, harass, oppress or delay payment, is inapplicable because Ms. Bryant did not indicate that she would not pay plaintiff until after plaintiff had informed Ms. Bryant that she was quitting.

Only *Civil Code §43* provides a public policy basis for wrongful discharge in this case. This is enough to save the cause of action.

Plaintiff has set forth sufficient facts in support of the violations of public policy contained in *Civil Code §43*, which provides that every person has the right of protection from bodily restraint or harm, from personal insult, from defamation and from injury to personal relations. Plaintiff contends that Vanessa Bryant continually verbally abused, harassed and demeaned her by, among other things, yelling and screaming at her and cussing, claiming that Ms. Jimenez had stolen items, making her clean up animal droppings, and demanding that Ms. Jimenez put her hand in a bag of dog feces to retrieve the price tag for a blouse (*FAC, paragraphs 11, 13, 18, 19, and 20*). While no wrongful termination claim for violation of public policy lies for reporting activities that serve only the private interests of the employer (*Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 670-671), here Ms. Jimenez's assertion of her rights potentially benefits all domestic workers who are subject to abusive actions by their employers.

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The Second Cause of Action for Invasion of Privacy

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The invasion of privacy cause of action is based on plaintiff's allegation that Vanessa Bryant watched her on video surveillance cameras when she was changing her blouse in a bathroom (*FAC, paragraph 29 and 30*). Thus the cause of action is based on intrusion, which has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. *Shulman v. Group W Productions, Inc.* (1998) 18 Cal. 4<sup>th</sup> 200, 231.

Plaintiff has not shown that Vanessa Bryant intruded into a private place in a manner highly offensive to a reasonable person. In the original complaint, plaintiff alleges only that she changed into the blouse inside the Bryants' house. The new allegation, that plaintiff changed into the blouse inside a bathroom, can be disregarded because it is inconsistent with the original allegation and is an obvious attempt to avoid the defects in the prior complaint. Also, plaintiff admits that she had observed that the Bryants had video cameras in various areas of the residence which enabled them to watch her inside and outside of the house. *FAC, paragraph 28*. Thus plaintiff should not have expected that any place in the house, including bathrooms, was private. Further, since plaintiff knew of the presence of video cameras, it is not clear how a reasonable person with this knowledge of the video cameras could have been offended by being observed.

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The Third Cause of Action for Intentional Infliction of Emotional Distress

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*Colmenares v. Braemar Country Club* (2003) 29 Cal. 4<sup>th</sup> 1019 is granted. *Evid. Code §452(a)*.

Cross-Defendant's request for judicial notice of the decision of the California Unemployment Insurance Appeals Board concerning Ms. Jimenez is denied. *Unemployment Insurance Code §1960*.

Cross-Complainants' request for judicial notice of the California Employment Development Department's website defining "misconduct" and "duty of loyalty" is granted. *Evid. Code §452(h)*.

The court must engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. *City of Cotati v. Cashman* (2002) 29 Cal. 4<sup>th</sup> 69, 76.

Plaintiff's post-lawsuit statements fall under the protection of *CCP §425.16(e)(2)*, in that they concern issues under consideration by this court, i.e. whether or not Ms. Jimenez's claims against the Bryants are valid.

However, it is clear that Ms. Jimenez made statements prior to the filing of the lawsuit, and the cross-complaint is not limited to statements made by Ms. Jimenez to the media.

Melissa Nicholson states that in late 2007 Ms. Jimenez told her that Vanessa Bryant had demeaned and humiliated her and that the Bryants had reneged on their promise to pay for health insurance. *Motion, Declaration of Melissa Nicholson, paragraphs 3 and 4*. Not only were these statements made prior to the filing of the lawsuit and therefore not protected under *CCP §425.16(e)(2)*, but it has not been shown that they were made in a place open to the public or a public forum and therefore they are not protected under *CCP §425.16(e)(3)*. Also, this speech is not protected under *CCP §425.16(e)(4)* because Ms. Jimenez has not shown that these statements concerned a public issue or an issue of public interest. The speech concerned Vanessa Bryant, who, unlike her husband, has not been shown to be a prominent public personality. Also, "[t]hat a celebrity might be a public figure for purposes of the First Amendment should not mean that all speech about that celebrity is necessarily a public issue or an issue of public interest for purposes of *§ 425.16(e)*." *Rogers v. Home Shopping Network* (C.D. Cal. 1999) 57 F. Supp. 2d 973, 985, n. 7. Thus Ms. Jimenez has not satisfied the first prong of the test.

Defendant is to give notice