

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

DEPARTMENT 20

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FILED
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Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ (For Clerk's Use Only) DEPUTY

CASE NO.: 19CV361037

DATE: 27 October 2020

TIME: 9:00 am

Trieu Pham v. Apple, Inc.

LINE NUMBER: 1

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 21 October 2020. Please specify the issue to be contested when calling the Court and Counsel.

**ORDER ON DEFENDANT APPLE INC.'S
DEMURRER TO FIRST AMENDED COMPLAINT**

I. Statement of Facts.

Plaintiff Trieu Pham ("Pham"), an American man of Vietnamese national origin and ancestry, worked for defendant Apple, Inc. ("Apple") as an iOS App Reviewer ("App Reviewer") from 13 October 2014 until his wrongful termination on 18 March 2019. (First Amended Complaint ("FAC"), ¶¶4 and 10.) As an App Reviewer, plaintiff Pham was responsible for determining whether software applications ("Apps") were reliable, performed as expected, and were free of offensive material. (FAC, ¶12.) Plaintiff Pham reviewed Apps based on a pre-set of technical, content, and design criteria provided by defendant Apple; and plaintiff Pham determined whether to accept, reject, or hold each App. (*Id.*)

Defendant Apple imposes daily quotas on App Reviewers to accept, reject, or hold between 50 and 100 Apps per day. (FAC, ¶15.) A daily quota of 80 App reviews was imposed upon plaintiff Pham, which equates to approximately one App review every 6 minutes over the course of an 8-hour shift. (*Id.*) Plaintiff Pham was consistently a top performer, typically ranking among the top three App Reviewers each week, regularly reviewing between 120 and 180 apps each day. (FAC, ¶19.) In addition to his status as a top performer, plaintiff Pham also garnered praise for his accomplishments in his annual reviews, as his performance regularly achieved or exceeded expectations. (FAC, ¶20.)

In 2017, defendant Apple reshuffled its App Review Department resulting in plaintiff Pham joining a team lead by another manager, Richard Chipman ("Chipman"), on 7 September 2017. (FAC, ¶21.) That same day, Chipman reprimanded plaintiff Pham claiming plaintiff Pham's pace was too fast and told plaintiff Pham to review Apps more slowly. (Complaint, ¶22.) As a new member of the team, plaintiff Pham complied with Chipman's directive. (*Id.*) Toward the end of plaintiff Pham's shift that day, a manager from a different App Review team confronted plaintiff Pham in front of his new team and told plaintiff Pham he must work faster than the pace mandated by Chipman. (FAC, ¶23.)

In the weeks following, defendant Apple's App Review management team continued to harass plaintiff Pham about his performance singling plaintiff Pham out for issues that affected the entire team. (FAC, ¶24.) Only plaintiff Pham was singled out and reprimanded and not plaintiff Pham's Caucasian co-workers. (*Id.*) Chipman also began taking more harassing and intimidating actions by singling out plaintiff Pham. (FAC, ¶25.) For example, Chipman would stand directly behind plaintiff Pham's chair while plaintiff Pham was working and stare at plaintiff Pham's computer screen without speaking which he did not do to other team members. (*Id.*)

On 19 September 2017, plaintiff Pham filed a formal complaint with Brandon Wied ("Wied"), a Human Resources Business Partner at defendant Apple. (FAC, ¶26.) Plaintiff Pham told Wied that he felt discriminated against by the management team, comprised entirely of older Caucasian males, and offered to provide work data and examples of the discriminatory treatment he faced. (*Id.*) However, no action was taken by Wied or defendant Apple's Human Resources. (FAC, ¶27.) Instead, after filing the complaint, defendant Apple's App Review management team increased its harassing conduct towards plaintiff Pham. (FAC, ¶28.)

A series of managers continually confronted plaintiff Pham about the quality of his work and his error rate despite plaintiff Pham's performance being on par with or better than other employees in the App Review Department who were not subjected to the same treatment. (*Id.*) These managers scrutinized Pham's work in retaliation for the complaints he made against defendant Apple for discrimination and harassment. (FAC, ¶29.) When Pham discussed the managers' harassing and intimidating behavior with other team members, the team members told plaintiff Pham that one of the managers told them that Chipman and other managers were trying to get rid of plaintiff Pham and, therefore, would be scrutinizing his work. (FAC, ¶30.)

On 20 June 2018, Chipman chastised plaintiff Pham for approving a gaming App called, "Game of Love," which Chipman said should not have been approved because it contained pornographic material. (FAC, ¶31.) The game App, in fact, does not contain pornographic material and remains available in defendant Apple's App store. (*Id.*) Between July 2018 and September 2018, defendant Apple conducted an audit of plaintiff Pham's App Reviews, identified reviews by plaintiff Pham that were purportedly erroneous, and issued plaintiff Pham a Documented Coaching Plan ("DCP"). (FAC, ¶32.) Upon reviewing his purported errors at defendant Apple's request to offer a rebuttal, plaintiff Pham was unable to determine any decisions that were accurately classified as errors on his part and pointed this out to defendant Apple. (FAC, ¶33.) Following plaintiff Pham's rebuttal, defendant Apple reversed their classification of several of plaintiff Pham's purported errors. (*Id.*)

The most serious error identified in plaintiff Pham's DCP was plaintiff Pham's approval of a Guo Media App which was forbidden from defendant Apple's China App store. (FAC, ¶34.) The same App was reviewed and approved by a series of other Apple employees, including three Chinese App Reviewers, yet none of them were disciplined for approval of the App as plaintiff Pham was. (*Id.*) All of the Apps identified by defendant Apple's management team as being "erroneously approved" by plaintiff Pham in the DCP remained on defendant Apple's App store following the audit and remain there to date. (FAC, ¶35.)

Guo Media was established by Guo Wengui ("Guo"), a Chinese dissident who fled China in 2014 to seek asylum in the United States. (FAC, ¶36.) Guo remains wanted by the Chinese government for a series of alleged crimes. (*Id.*) Guo regularly uses Guo Media to publicize claims of corruption against Chinese government officials and members of the Chinese Communist Part. (*Id.*) After plaintiff Pham approved the Guo Media App, the Chinese government contacted defendant Apple and demanded that the Guo Media App be removed from defendant Apple's App store. (FAC, ¶37.) Defendant Apple then performed an internal investigation and identified plaintiff Pham as the App Reviewer who approved the Guo Media App. (*Id.*)

In or around late September 2018, shortly after defendant Apple provided plaintiff Pham with the DCP, plaintiff Pham was called to a meeting to discuss the Guo Media App with multiple defendant Apple supervisors and managers. (FAC, ¶¶38 – 39.) At this meeting, defendant Apple supervisors stated that the Guo Media App is critical of the Chinese government and, therefore, should be removed from the App store. (FAC, ¶39.) Plaintiff Pham responded stating the Guo Media App publishes valid claims of corruption against the Chinese government and Chinese Communist Party and, therefore, should not be taken down. (FAC, ¶39.) Plaintiff Pham further told his supervisors that the Guo Media App does not contain violent content or incite violence; does not violate any of defendant Apple's policies and procedures regarding Apps; and, therefore, it should remain on the App store as a matter of free speech. (FAC, ¶40.)

22Plaintiff Pham also stated at this meeting that removing the Guo Media App under pressure from the Chinese government amounts to censorship. (FAC, ¶41.) A few days later, plaintiff Pham met with Chipman and again reiterated that the Guo Media App should not be taken down and Guo is entitled to publish his opinions. (FAC, ¶42.) In the following weeks, plaintiff Pham discussed the Guo Media App with colleagues and relayed what transpired in his meetings with defendant Apple managers. (FAC, ¶43.) Defendant Apple became aware of plaintiff

Pham's criticism and defendant Apple's managers responded by retaliating against plaintiff Pham and ultimately terminating plaintiff Pham. (FAC, ¶44.)

Plaintiff Pham believes the DCP was pretextual and created by defendant Apple to appease the Chinese government and to signal to China that defendant Apple did not approve an App created by Guo. (FAC, ¶45.) The DCP was created to punish and retaliate against employees who spoke out against censorship or complained and refused to remove Apps that the Chinese government objected to on political grounds. (FAC, ¶46.)

On 20 September 2018, the day after the DCP was issued, plaintiff Pham requested a meeting with a representative from defendant Apple's HR department to discuss the erroneous conclusions in the DCP as well as the harassment plaintiff Pham experienced from the App Review team managers. (FAC, ¶50.)

On 10 October 2018, plaintiff Pham met with Mike Gillaspie from defendant Apple's Human Resources Department to discuss the erroneous conclusions of the DCP and explained the audit felt arbitrary because none of the errors listed in the DCP required any follow-up correction and all the "erroneous" Apps were still listed on the App store. (FAC, ¶51.) Despite expressing these concerns, no corrective action process followed the DCP and all Apps identified by defendant Apple's management team as being erroneously approved by plaintiff Pham remain on defendant Apple's App store to date. (FAC, ¶53.)

The discrimination, harassment, and retaliation impacted plaintiff Pham's physical and mental health and based on the recommendation of his doctor, plaintiff Pham requested and took a medical leave of absence from defendant Apple commencing 21 October 2018. (FAC, ¶54.) On 14 December 2018, plaintiff Pham received a text message from a colleague indicating defendant Apple's management team and Department Administrator intended to terminate plaintiff Pham's employment upon his return from medical leave. (FAC, ¶55.)

On 15 February 2019, plaintiff Pham returned from medical leave and immediately resumed providing the high quality and quantity of work that had consistently made him a top performing App Reviewer. (FAC, ¶56.) On 15 March 2019, plaintiff Pham received a memorandum from Chipman terminating plaintiff Pham's employment with defendant Apple as of 18 March 2019. (FAC, ¶57.) The stated reasons for termination were plaintiff Pham's purported failure to "successfully meet the objectives and expectations" of the position he successfully held for approximately four and a half years and plaintiff Pham's purported failure to "meet other Apple standards." (*Id.*)

Following his termination, on 15 March 2019, plaintiff Pham requested a review of the decision to terminate his employment on the grounds that it was discriminatory and retaliatory and motivated by his national origin, as well as his vocal support for the Guo Media App and stated opposition to defendant Apple's willingness to accept censorship of its Apps by the Chinese government and Chinese Communist Party. (FAC, ¶58.) On 18 June 2019, following an investigation and multiple interviews, defendant Apple upheld its decision to terminate plaintiff Pham's employment. (FAC, ¶61.)

On 31 December 2019¹, plaintiff Pham filed a complaint against defendant Apple asserting causes of action for:

- (1) Discrimination Based on Political Affiliation in Violation of Labor Code §§ 98.6, 1101 and 1102
- (2) Retaliation Based on Political Affiliation in Violation of Labor Code §§ 98.6, 1101 and 1102
- (3) Discrimination and Retaliation Based on Political Affiliation in Violation of the Unruh Civil Rights Act
- (4) Discrimination Based on National Origin in Violation of FEHA: Disparate Treatment
- (5) Discrimination Based on National Origin in Violation of FEHA: Disparate Impact
- (6) Discrimination Based on Medical Condition in Violation of FEHA
- (7) Harassment Based on National Origin in Violation of FEHA

¹ This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (Government Code, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil Rules of Court, Rule 3.714(b)(1)(C) and (b)(2)(C).)

- (8) Retaliation in Violation of FEHA
- (9) Failure to Prevent Harassment, Discrimination, or Retaliation in Violation of FEHA
- (10) Wrongful Termination in Violation of Public Policy
- (11) Unlawful, Unfair, and/or Fraudulent Business Practices in Violation of Business and Professions Code §§ 17200, *et seq.*

On 25 February 2020, defendant Apple filed a demurrer to the first, second, fourth, fifth, seventh, ninth, and eleventh causes of action in plaintiff Pham's complaint.

On 26 February 2020, plaintiff Pham filed a request for dismissal of his third cause of action.

On 27 February 2020, defendant Apple filed a motion to strike portions of plaintiff Pham's complaint.

On 7 July 2020, the court, among other things, sustained defendant Apple's demurrer to the first, second, fifth, and seventh causes of action of plaintiff Pham's complaint.

On 17 July 2020, plaintiff Pham filed the operative FAC which now asserts causes of action for:

- (1) Discrimination Based on Political Affiliation in Violation of Labor Code §§ 98.6, 1101 and 1102
- (2) Retaliation Based on Political Affiliation in Violation of Labor Code §§ 98.6, 1101 and 1102
- (3) Discrimination Based on National Origin in Violation of FEHA: Disparate Treatment
- (4) Discrimination Based on Medical Condition in Violation of FEHA
- (5) Harassment Based on National Origin in Violation of FEHA
- (6) Retaliation in Violation of FEHA
- (7) Failure to Prevent Harassment, Discrimination, or Retaliation in Violation of FEHA
- (8) Wrongful Termination in Violation of Public Policy
- (9) Unlawful, Unfair, and/or Fraudulent Business Practices in Violation of Business and Professions Code §§ 17200, *et seq.*

On 18 August 2020, defendant Apple filed the motion now before the court, a demurrer to the first, second, and fifth causes of action in plaintiff Pham's FAC.

II. Analysis.

A. Defendant Apple's Demurrer to the First and Second Causes of Action (Discrimination and Retaliation) are OVERRULED.

Plaintiff Pham's first and second causes of action are premised upon Labor Code section 98.6, subdivision (a) which states:

A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in ... Chapter 5 (commencing with Section 1101) of Part 3 of Division 2.

In turn, Labor Code section 1101 states, "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

Labor Code section 1102 states, "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

1. Discriminatory/ Retaliatory Intent.

In ruling on defendant Apple's earlier demurrer to plaintiff Pham's original complaint², the court sustained defendant Apple's demurrer to the first two causes of action explaining:

...plaintiff Pham has made no allegations that defendant Apple had actual knowledge that plaintiff Pham was engaging in political activity when he approved the Guo Media app nor are there any allegations from which defendant Apple's knowledge can be inferred. To the contrary, plaintiff Pham alleges only that his approval of the Guo Media app represented "his *implicit* support of a Chinese political dissident." (Complaint, ¶43; emphasis added.) There are no allegations from which this court could infer that defendant Apple could or should distinguish plaintiff Pham's approval of the Guo Media app as being political activity rather than an error in judgment by an App Reviewer in applying the "pre-set of technical, content, and design criteria provided by defendant Apple." (Complaint, ¶12.) Absent any facts to show defendant Apple's knew or should have known that plaintiff Pham was making a political statement by approving an app by a Chinese dissident, plaintiff Pham cannot properly and conclusively allege defendant Apple had some discriminatory/retaliatory motive or some other causal link between plaintiff Pham's protected activity and defendant Apple's employment action(s).

Defendant Apple contends its demurrer to the first two causes of action of plaintiff Pham's FAC should be sustained on the same grounds and that any new allegations by plaintiff Pham concerning defendant Apple's knowledge that plaintiff Pham was engaging in political activity are sham allegations. Among other decisions, defendant Apple cites *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1491 where the court wrote, "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false."

In the FAC, plaintiff Pham has omitted his prior allegation that his approval of the Guo Media app represented his *implicit* support of a Chinese political dissident. In place of this prior allegation, plaintiff Pham now includes allegations of his *express* support for Guo which defendant Apple contends are entirely contradictory. (See FAC, ¶¶39 – 44.)

In *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384, the court wrote:

It is axiomatic that the function of a demurrer is to test the legal sufficiency of the pleading by raising questions of law. [Citation.] It is also well established that, when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint. (Ibid.) However, an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.

² The request for judicial notice in support of plaintiff's opposition to defendant Apple, Inc.'s demurrer to the FAC, Exhibit 3 (court order re demurrer to complaint), is GRANTED. The request for judicial notice in support of plaintiff's opposition to defendant Apple, Inc.'s demurrer to the FAC, Exhibits 1 – 2 (complaint and FAC) is GRANTED insofar as the court takes judicial notice of the existence of the documents, not necessarily the truth of matters stated therein. Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact." (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

"The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process... The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751.)

Here, it is this court's opinion that the new allegations found in plaintiff Pham's FAC do not constitute sham pleading and are not necessarily inconsistent or contradictory to the earlier allegation that plaintiff Pham's approval of the Guo Media app represented his implicit support of Guo, a Chinese political dissident. That earlier allegation remains consistent with the new allegations which this court construes as plaintiff Pham's post-DCP explanation to defendant Apple supervisors about the reasons or justification for his approval of the Guo Media app. The consequence, however, is that plaintiff Pham cannot state a claim for discrimination or retaliation *based on the issuance of the DCP* without an allegation that defendant Apple knew plaintiff Pham was engaging in protected activity prior to subjecting plaintiff Pham to the adverse employment action (issuance of DCP).

As this court previously explained, a prima facie case for employment discrimination requires the following showing:

Generally, the plaintiff must provide evidence that (1) [s]he was a member of a protected class, (2) [s]he was qualified for the position [s]he sought or was performing competently in the position [s]he held, (3) [s]he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive.

(*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1158 (*Slatkin*).

To establish a prima facie case of retaliation, the plaintiff must show (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action.

(*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453.)

For both discrimination and retaliation, a plaintiff must demonstrate some discriminatory/ retaliatory intent. In other words, the alleged discrimination and retaliation (adverse action) must be because of or linked to plaintiff's engagement in some protected activity; here, plaintiff Pham's engagement or participation in political activity or affiliation.

The timing of defendant's knowledge that plaintiff engaged in a protected activity is significant. If defendant is unaware that the plaintiff has engaged in a protected activity (or is a member of a protected class) and subjects the plaintiff to some adverse employment action, there can be no causal link as a matter of law. Such is the case here where plaintiff Pham has not alleged defendant Apple's awareness that plaintiff Pham was engaging in protected political activity prior to issuance of the DCP. There can be no link between the protected activity and the adverse employment action. However, plaintiff Pham's allegations in the FAC are sufficient to establish defendant Apple's awareness that plaintiff engaged in political activity prior to plaintiff Pham's termination. Plaintiff Pham must ultimately prove some causal link between his engagement in protected activity and his termination, but it is not a factual impossibility as it would be where plaintiff fails to allege defendant's knowledge and awareness that plaintiff engaged in protected activity prior to issuance of the DCP.

2. Protected Activity.

Defendant Apple argues further that these first two causes of action fail because plaintiff Pham has not adequately alleged defendant Apple's violation of Labor Code sections 1101 or 1102. The first and second causes of action do not require plaintiff to establish defendant's violation of Labor Code sections 1101 or 1102. Instead, the first and second causes of action cite Labor Code section 98.6 which prohibits an employer for discriminating or retaliating "because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in" Labor Code sections 1101 or 1102.

Defendant Apple acknowledges plaintiff can survive a demurrer if he can "show that he faced an adverse action because he engaged in political activity, or that he was coerced by threat of discharge to adopt or refrain from adopting a course of political activity." (See page 5, lines 20 – 22 of Defendant Apple Inc.'s MPA ISO Demurrer to FAC.) Defendant Apple also acknowledges plaintiff Pham's new allegations and, specifically, plaintiff's "approval of,

and vocal support for, the Guo Media app" created by a political dissident. (FAC, ¶74.) However, despite acknowledging these allegations, defendant Apple contends these allegations should be disregarded as sham. As discussed above, the court does not consider the new allegations to be sham pleadings. Thus, there are now allegations contained in the FAC that plaintiff engaged in protected activity and suffered retaliation and/or termination as a result.

Accordingly, defendant Apple's demurrer to the first and second causes of action in plaintiff Pham's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for discrimination and retaliation, respectively, is **OVERRULED**.

B. Defendant Apple's Demurrer to the Fifth Cause of Action (Harassment) is SUSTAINED.

The elements of the cause of action [for harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome [] harassment; (3) the harassment complained of was based on [national origin]; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior. [Citation omitted.] To be sufficiently pervasive harassment, the acts complained of cannot be isolated or trivial. Rather, there must be a pattern of harassment of a routine or generalized nature.

(*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1122 – 1123.)

Defendant Apple identifies plaintiff Pham's allegations concerning harassment as the one incident where Chipman stood "directly behind Pham's chair while Pham was working and stare[d] at Pham's computer screen without speaking" and plaintiff Pham's allegation that the management team singled him out for unspecified issues even though those issues affected the entire team. (Complaint, ¶¶23 – 25.) As to the latter, defendant Apple contends being singled out for criticism by management cannot constitute harassment.

...harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.

(*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63.)

That plaintiff was singled out for criticism when Caucasian co-workers were not may evidence discriminatory motive, but plaintiff Pham being the subject or target of managerial criticism cannot be the basis for harassment since managerial criticism of employees is a necessary managerial function. Thus, according to defendant Apple, plaintiff Pham's harassment claim is supported only by the single incident where Chipman stood behind plaintiff Pham and stared at his computer screen in silence.

"[T]he required showing of severity . . . of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." (*Davis v. Team Elec. Co.* (9th Cir. 2008) 520 F.3d 1080, 1096.) "If a single incident can ever suffice to support a hostile work environment claim, the incident must be extremely severe." (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 150 (*Herberg*)). "[A] single incident must be severe in the extreme and generally must include either physical violence or the threat thereof." (*Herberg, supra*, 101 Cal.App.4th at p. 151.) *Herberg*, however, discusses hostile work environment in the context of sexual harassment. Here, plaintiff Pham has alleged national origin harassment.

"The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' [Citation.] ... '[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] ... [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. ... The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an

appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.' " (Miller v. Department of Corrections (2005) 36 Cal.4th 446, 462.)

Still, courts have decided, as a matter of law, that conduct was not sufficiently severe or pervasive to create a hostile work environment. (See *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 369.) Here, the court is asked to consider this issue at the pleading stage. Based solely on the allegation that Chipman stood "directly behind Pham's chair while Pham was working and stare[d] at Pham's computer screen without speaking," the court finds, as a matter of law, that such conduct is not sufficiently severe to constitute harassment.

Accordingly, defendant Apple's demurrer to the fifth cause of action in plaintiff Pham's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for harassment is SUSTAINED WITHOUT LEAVE TO AMEND.

III. Conclusion and Order.

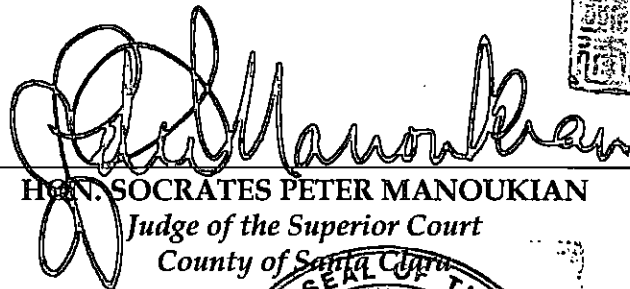
Defendant Apple's demurrer to the first and second causes of action in plaintiff Pham's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for discrimination and retaliation, respectively, is OVERRULED.

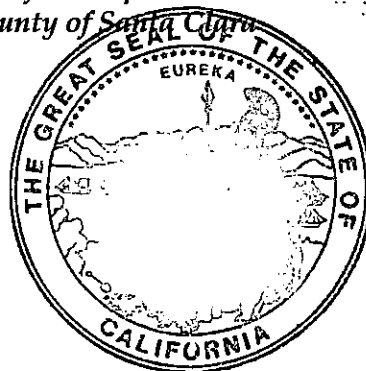
Defendant Apple's demurrer to the fifth cause of action in plaintiff Pham's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for harassment is SUSTAINED WITHOUT LEAVE TO AMEND.

The above tentative ruling was duly posted. There were no challenges to the tentative ruling and no appearances at the hearing. The tentative ruling will be the final order. Raquel Sharp, the court reporter, CSR 10619; phone 925-384-0003; email Raquel@transcriptlegal.com appeared virtually on the Zoom platform.

27 October 2020

DATED:


HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara





**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED
NOV 16 2020

Clerk of the Court
Superior Court of the County of Santa Clara
BY _____ DEPUTY

RE: **Trieu Pham vs APPLE, INC. et al**
Case Number: **19CV361037**

PROOF OF SERVICE

ORDER ON DEFENDANT APPLE INC.'S DEMURRER TO FIRST AMENDED COMPLAINT was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on November 16, 2020. CLERK OF THE COURT, by Hienrang Tranthien, Deputy.

cc: Yosef Peretz Peretz & Associates 22 Battery St Suite 200 San Francisco CA 94111
Anjali Prasad Vadillo Orrick Herrington & Sutcliffe LLP 1000 Marsh Road Menlo Park CA 94025-1015