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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

MAALO UZOMAH and KAMIKA BENJAMIN, Plaintiffs, v. T.W.T. GROUP, INC. dba THE WOLFS TRUCKING, a Corporation; ARTAK OGANESYAN, an Individual, and DOES 1 through 50, Defendants.	**CASE NO. CIV SB 2304013** **NOTICE OF MOTION AND MOTION OF ARTAK OGANESYAN FOR SUMMARY JUDGMENT; SUPPORTING POINTS AND AUTHORITIES** [SERVED CONCURRENTLY WITH SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS, COMPENDIUM OF EXHIBITS, REQUEST FOR JUDICIAL NOTICE, DECLARATION OF JEFFREY D. NADEL; [PROPOSED] ORDER] DATE: TIME: DEPT.: **Filing Date:** **Reservation ID:**

TO PLAINTIFFS MAALO UZOMAH and KAMIKA BENJAMIN AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on XXXXXXX at 8:30 a.m., or as soon thereafter as the matter may be heard in Department X of San Bernardino County Superior Court, located at Central Justice Center, 247 W. 3rd St., San Bernardino CA 92415, Defendant,

Artak Oganesyan ("Oganesyan"), will, and hereby does, move this Court for an order granting summary judgment against Plaintiffs, Maalo Uzomah ("Uzomah") and Kamika Benjamin ("Benjamin"). This motion is made pursuant to California Code of Civil Procedure section 437c and on the grounds that Plaintiffs' Complaint fails because Plaintiffs cannot establish that Defendant Oganesyan was the employer of Plaintiffs at any time and therefore California labor laws prohibiting retaliation by employers against employees are inapplicable against Defendant Oganesyan. Additionally, Plaintiffs' claims fail because Plaintiffs cannot make a prima facie case of retaliation because Plaintiffs did not participate in any protected activity nor were Plaintiffs subjected to an adverse employment action. Accordingly, Defendant is entitled to judgment as a matter of law. This motion is based on this Notice, the attached Memorandum of Points and Authorities, the Separate Statement of Undisputed Material Facts served concurrently herewith, the Compendium of Evidence served concurrently herewith, the Request for Judicial Notice served concurrently herewith, the Declaration of Jeffery D. Nadel served concurrently herewith, and the documents, papers, and Exhibits attached thereto, all filed concurrently herewith, all documents on file herein, and upon such other oral evidence as may be presented prior to and at the time of the hearing on this motion.

DATED January 1, 2025

LAW OFFICES OF JEFFREY D. NADEL

By: _____
JEFFREY D. NADEL
Attorney for Defendant Artak Oganesyan

[PROOF OF SERVICE]

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I. INTRODUCTION

Plaintiffs have asserted claims under the Labor Code against their employer, T.W.T. Group, Inc. ("T.W.T."), and individually against Oganesyan, the former Chief Executive Officer of T.W.T., which has ceased operations. Summary judgment is appropriate for both Uzomah and Benjamin's claims against Oganesyan because Oganesyan is not an "employer" under the Labor Code. Additionally, summary judgment is necessary because neither of the Plaintiffs were retaliated against for engaging in any activities protected under the Labor Code.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff Uzomah was employed as a port driver by T.W.T. from May 2021 to October 2021. (UMF 1) Plaintiff Benjamin was employed as a port driver by T.W.T. from May 2021 until November 2022. (UMF 2) While Plaintiffs Uzomah and Benjamin (collectively, "Plaintiffs") were employed with T.W.T., Defendant Oganesyan was employed by T.W.T. as Chief Executive Officer. (UMF 3) T.W.T. paid Plaintiffs' salary, benefits and social security taxes. (UMF 4) T.W.T. owned the trucks driven by Plaintiffs. (UMF 5) T.W.T. carried the required U.S. Department of Transportation licensing and insurance required to operate a trucking business at the port. (UMF 6) T.W.T. owned the property where Plaintiffs reported to work. (UMF 7) At all times relevant, Uzomah was an at-will employee of T.W.T. (UMF 8) On October 19, 2021, Uzomah sent text messages to Oganesyan requesting overtime pay and Oganesyan responded to Uzomah to explain how Uzomah was not entitled to overtime pay under the applicable laws. (UMF 9) During the applicable pay period, Uzomah worked 22 total hours, and therefore was not entitled to overtime pay. Uzomah was paid accurately by T.W.T. and Benjamin is not owed any unpaid wages. (UMF 10) On October 25, 2021, the truck that Uzomah was assigned to drive was not operational. (UMF 11) On October 25, 2021, Uzomah was laid off due to equipment failure. (UMF 12) At all times relevant, Benjamin was an at-will employee of T.W.T. (UMF 13) In June 2022, Benjamin sent text messages to Oganesyan inquiring about holiday pay and Oganesyan responded

to explain that days off for holidays were not paid by T.W.T. (UMF 14) In June 2022, Benjamin sent text messages to Oganesyan inquiring about pay for time Benjamin spent reporting to work and taking a tractor from the mechanic house to the yard. (UMF 15) In June and July 2022, Benjamin sent text messages to Oganesyan complaining of favoritism in scheduling and unpaid holiday pay. (UMF 16) In November 2022, Benjamin sent text messages to Oganesyan requesting to be paid for time when Benjamin was allegedly denied a working tractor assignment. (UMF 17) During the applicable pay periods in June, July, and November 2022, Benjamin was paid accurately by T.W.T. and Benjamin is not owed any unpaid wages. (UMF 18) On November 29, 2022, Benjamin resigned from T.W.T. (UMF 19)

III. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted when the moving party demonstrates that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). The moving party must support the motion with evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may be taken. *Aguilar v. Atl. Richfield Co*., 25 Cal. 4th 826, 855, 24 P.3d 493, 513 (2001), as modified (July 11, 2001) (quoting Code Civ. Proc. § 437c(b)).

A defendant moving for summary judgment bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established," or that "there is a complete defense" thereto. *Aguilar*, 25 Cal. 4th at 850, 24 P.3d at 510, as modified (July 11, 2001) (citing Code Civ. Proc. § 437c(o)(2)).

> In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element—for example, himself prove *not X*.

(*Id.* at 854-55, 24 P.3d at 512(footnote omitted).) In ruling on the motion, the court must consider all evidence and all inferences reasonably drawn therefrom and must view such evidence and such

inferences in the light most favorable to the opposing party. *Id.* at 843 (citations omitted). If it appears from the examination of the evidence filed that no triable issue of material fact exists, summary judgment is proper. *Id.* Summary judgment has "a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit." *Nazir v. United Airlines*, Inc. 178 Cal. App. 4th 243, 248, 100 Cal. Rptr. 3d 296, 302 (2009).

IV. LEGAL ARGUMENT

Summary judgment is appropriate for both Uzomah and Benjamin's claims against Oganesyan because Oganesyan is not an "employer" under the Labor Code. Additionally, summary judgment is necessary because neither of the Plaintiffs were retaliated against for engaging in any activities protected under the Labor Code.

A. Oganesyan is not a joint employer; the Labor Code does not apply

Plaintiffs have alleged whistleblower retaliation by Defendants Oganesyan and T.W.T. in violation of Labor Code Sections 98.6, 1102.5, and 6310. Each of these statutes applies only to an employer, and because Oganesyan was not an employer of Plaintiffs, these claims fail as a matter of law. Both Labor Code sections 98.6 and 1102.5 prohibit an employer from discriminating or retaliating against an employee for filing a complaint or disclosing information about a safety violation. Cal. Lab. Code §§ 98.6(a), 1102.5(b). Similarly, Labor Code section 6310 protects an employee from discharge or other discrimination by the employer for filing a complaint about workplace safety. Cal. Lab. Code § 6310.

While Labor Code Section 98.6(a) states that a "person," may not retaliate, section 98.6(b) specifies that an aggrieved employee "shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer." Cal. Lab. Code § 98.6(b). And only "an employer who violates this section" may be liable for a civil penalty not to exceed $10,000. *Id.* Practically, only an employer can reinstate and reimburse an employee for lost wages and work benefits. An individual company director may not. Thus, the only reasonable interpretation of Section 98.6 is that only an employer (and not an individual or a "person" such

as Oganesyan) may be liable under the statute. Similarly, Section 1102.5 prohibits retaliation against an employee for disclosing a violation of state or federal law by the employer. Cal. Lab. Code § 1102.5(b). Section 1102.5 states that "[a]n employer, or any person acting on behalf of the employer, shall not retaliate against an employee" for the protected activity. *Id.* A claim under section 1102.5(b) can only be brought by an employee against their employer. *See St. Myers v. Dignity Health*, 44 Cal. App. 5th 301, 311, 257 Cal. Rptr. 3d 341, 350 (2019); *see also Bennett v. Rancho Cal. Water Dist*., 35 Cal. App. 5th 908, 921, 248 Cal. Rptr. 3d 21, 31 (2019) (explaining that a "prerequisite to asserting a violation of Labor Code section 1102.5 is the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred") (*citing Hansen v. Department of Corrs. & Rehab.*, 171 Cal. App. 4th 1537, 1546, 90 Cal. Rptr. 3d 381 (2008) ("a prerequisite to asserting a Labor Code section 1102.5 violation is the existence of an employer-employee relationship at the time the allegedly retaliatory action occurred"); *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384, 37 Cal. Rptr. 3d 113 (2005); *see also Barr v. Lab. Corp. of Am. Holdings*, No. 19-cv-1887-MMA-MDD, 2021 WL 3856487, at *5 (S.D. Cal. Aug. 30, 2021).

In *St. Myers*, a nurse asserted whistleblower claims under Sec. 98.6, 1102.5, and 1278.5 (whistleblower protection for healthcare workers) against her employer medical center and the company that provided revenue cycle services to the medical center. *Id.* at 305. The appellate court affirmed the trial court's finding that the revenue company, which did not pay the plaintiff's salary or benefits or social security taxes, did not own the equipment that the plaintiff used when she performed her work, did not have the authority to hire, demote, discipline or discharge the plaintiff, and did not set her schedule or amount of pay, could not be considered a "joint employer" liable to the plaintiff under the Labor Code. *St.* Myers, 44 Cal. App. 5th at 311–12. The appellate court explained that "the precise contours of an employment relationship can only be established by a careful factual inquiry." *Id.* at 311.

> Factors to be taken into account in assessing the relationship of the parties include payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to

> performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment. [Citations.] '"Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.'"

(*Id.* at 311–12) (citing *Vernon v. State of California*, 116 Cal. App. 4th 114, 124–125, 10 Cal. Rptr. 3d 121 (2004), fn. omitted. (*Vernon*).) While no single factor is determinative, the most important factor is "the defendant's right to control the means and manner of the workers' performance." *Id.* at 312. In *Lloyd v. County of Los Angeles*, 172 Cal. App. 4th 320 (2009), the court held that "[a]n individual who is not an employer cannot commit the tort of wrongful discharge ...." *Id.* at 330 (quoting *Miklosy v. Regents of Univ. of California*, 44 Cal. 4th 876, 900, 188 P.3d 629, 644 (2008)) (superseded by statute on other grounds as stated in *Taswell v. Regents of Univ. of California*, 23 Cal. App. 5th 343, 358–359, 232 Cal. Rptr. 3d 628 (2018)). Rather, a "supervisor, when taking retaliatory action against the employee, is necessarily exercising authority the employer conferred on the supervisor ...." *Id.* at 901, 188 P.3d at 645 (quoting *Miklosy*, 44 Cal. 4th at 900). In *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158, 72 Cal. Rptr. 3d 624 (2008), the California Supreme Court held that non-employer individuals cannot be held personally liable for their role in alleged retaliation under the Fair Employment and Housing Act. *Id.* at 1164. Liability extends exclusively to the employer. *Id.* The employee argued that the plain language used in § 12940, subd. (h), to describe who could not retaliate—specifically, the use of the word "person"—meant that all persons who engaged in prohibited retaliation were personally liable, not just the employer.

Id. The California Supreme Court disagreed and held that nonemployer individuals were not personally liable for their role in retaliation for which the employer was liable. *Id.* Here, unless this Court finds that Oganesyan is an "employer," he cannot be liable under Sections 98.6, 1102.5(b) or 6310 of the Labor Code even if he were a "person" who committed the violation. Oganesyan did not pay either Plaintiffs' salary or benefits or social security taxes, did not own the equipment that Plaintiffs used when they performed their work, did not have the necessary licensing to operate a trucking business, did not own the property where Plaintiffs reported to work, and did not directly control the manner of Plaintiffs' work, which was to drive commercial trucks from the port to various locations. While Oganesyan, as an employee of T.W.T., did set Plaintiffs' work schedules, according to T.W.T.'s workflow policies, this supervisory role does not transform Oganesyan's role from that of a supervisor and CEO to an employer under the Labor Code. Oganesyan was not a joint employer with T.W.T. and as a matter of law, Plaintiffs' claims against Oganesyan fail and should be dismissed.

B. Uzomah's claim for retaliation under Cal. Lab. Code § 98.6 fails

Uzomah's argument for retaliation under Labor Code § 98.6 is premised on the allegation that Uzomah "complained of his rights to wages and was consequently discharged." Complaint for Damages, p. 7, para. 44. Labor Code § 98.6 provides, in pertinent part:

> A person shall not …retaliate, or take any adverse action against any employee… because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to their rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that they are owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of themselves or others of any rights afforded them.

(Cal. Lab. Code § 98.6(a).) To establish a prima facie whistleblowing case under section 98.6, a plaintiff must show that (1) he engaged in a protected activity, (2) his employer subjected him to an adverse employment action, and (3) there is a causal link between the two. *Moreno v. UtiliQuest*, LLC, 29 F.4th 567, 575 (9th Cir. 2022) (citing *St. Myers*, 44 Cal. App. 5th 301, 257 Cal. Rptr. 3d 341, 352).

Section 98.6 prohibits an employer from retaliating against an applicant or employee because the applicant or employee exercised a right afforded him or her under the Labor Code. The phrase "any rights" refers to rights provided under the Labor Code. *Garcia-Brower v. Premier Auto. Imports of CA, LLC*, 55 Cal. App. 5th 961, 972, 269 Cal. Rptr. 3d 856, 864 (2020) (citing *Grinzi v. San Diego Hospice Corp*., 120 Cal. App. 4th 72, 87, 14 Cal. Rptr. 3d 893 (2004)). Uzomah's "whistleblower" claim under Labor Code section 98.6 fails because he has not established the first element, that he engaged in a protected activity under the statute. Uzomah's alleged protected activities consisted of text messages to Oganesyan asking about applicable overtime laws and requests for overtime pay that Uzomah was not entitled to because he had only worked twenty-two hours in a seven-day pay period. *See* Exhibit A. It is undisputed that Uzomah did not report to a government agency and did not exercise any other rights under the Labor Code. The only question is whether Uzomah's complaints to Oganesyan constituted "a written or oral complaint that they are owed unpaid wages." Cal. Lab. Code § 98.6(a). While there does not appear to be any state court jurisprudence on this specific issue, the federal district court cases of *Hollie v. Concentra Health Services, Inc.*, No. C 10-5197 PJH, 2012 WL 993522 (N.D. Cal. Mar. 23, 2012) and *Weingand v. Harland Fin. Solutions, Inc.,* No. C-11-3109 EMC, 2012 WL 3537035 (N.D. Cal. Aug. 14, 2012) are instructive as the facts are nearly identical to the present case. In *Hollie*, the employee argued that his oral complaints about the company's overtime policy and his conduct in leaving his place of employment at the end of an eight-hour shift in refusal to work

under the company's overtime policy were protected activities under § 98.6 (and §1102.5). The district court held as a matter of law that the plaintiff's "actions do not constitute protected activities under either Labor Code § 1102.5 or Labor Code § 98.6." *Hollie*, 2012 WL 993522, at *5. Similarly, in *Weingand*, the employee alleged he engaged in protected activity under § 98.6 when he complained about and threatened to escalate his complaints about overtime pay. *Weingand,* 2012 WL 3537035, at *7. The district court granted a motion to dismiss the claim as the employee's complaints did not constitute protected activity under the statute. *Id.*

None of Uzomah's complaints to Oganesyan are protected under the Labor Code. Even if Uzomah's complaints were protected activities, T.W.T., Uzomah's employer, has demonstrated a legitimate, independent business reason for terminating Uzomah—lack of available work due to equipment failure and less demand for trucking services. Exhibit C. As such, Uzomah's cause of action for a violation of section 98.6 fails as a matter of law and summary judgment is appropriate.

C. Uzomah's claim for retaliation under Cal. Lab. Code § 1102.5 fails

Uzomah's argument for retaliation under Labor Code § 1102.5 is premised on the allegation that Uzomah informed Oganesyan that he "refused to participate in an unlawful pay scheme and believed [Oganesyan] was participating in an unlawful pay scheme and was subsequently discharged." Complaint for Damages, p. 8, para. 50. Section 1102.5 prohibits employers from retaliating against employees who disclose information to a person with authority over the employee "if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." Cal. Lab. Code §1102.5(b). Uzomah's claim arising under Labor Code section 1102.5 fails because Uzomah's general complaints to Oganesyan about the applicable overtime laws did not disclose information pertaining to any violation of state or federal law. Uzomah's retaliation under Labor Code section 1102.5 claim is subject to the analysis set forth in Labor Code section 1102.6. *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 718, 503

P.3d 659, 667–68 (2022). Uzomah must first demonstrate by a preponderance of the evidence that an activity protected by section 1102.5 was a "contributing factor" in his alleged termination. *Id.* If he can do so, the burden shifts to his employer to demonstrate a high probability that it would have discharged Uzomah even if he had not engaged in activities protected by section 1102.5. Cal. Lab. Code § 1102.6. In order for the activity to be protected, the employee must "reasonably believe she was disclosing a violation of state or federal law." *Fitzgerald v. El Dorado Cnty*., 94 F. Supp. 3d 1155, 1172 (E.D. Cal. 2015) (citing *Patten*, 134 Cal. App. 4th at 1386 (disapproved of on other grounds by *Lawson*, 12 Cal. 5th at 718, fn 2)). To have a reasonably based suspicion of illegal activity, the employee must be able to point to some legal foundation for his suspicion—some statute, rule or regulation which may have been violated by the conduct he disclosed. *Id.* (citing *Love v. Motion Industries, Inc.*, 309 F. Supp. 2d 1128, 1135 (N.D. Cal. 2004)). In *Patten*, a school principal sued under §1102.5 based on four disclosures. 134 Cal. App. 4th at 1382. In one instance, the principal received complaints from female students that a male physical education (P.E.) teacher was peering into the girl's locker room, and she disclosed that information to her district supervisors for personnel action. *Id.* The second relevant disclosure concerned an "off-color remark" made by a science teacher to a female student. *Id.* The principal disclosed that information to her superiors for personnel action. *Id.* The third relevant disclosure involved the issue of school safety. *Id*. At various points in time, including after a student was assaulted on campus, the principal requested additional staff to keep the campus safe. *Id.* In affirming the trial court's finding that none of those disclosures constituted protected activities under §1102.5, the appellate court explained that the principal's complaints were made in the context of internal personnel or administrative matters, rather than in the context of legal violations. *Id.* at 1384–85. "To exalt these disclosures with whistleblower status would create all sorts of mischief." *Id.* Most damagingly, "it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site." *Id. Hollie*, 2012 WL 993522, discussed *supra*, is also instructive here. In *Hollie*, the employee argued that his oral complaints about the company's overtime policy

and his conduct in leaving his place of employment at the end of an eight-hour shift in refusal to work under the company's overtime policy were protected activities under §1102.5. The district court held as a matter of law that the plaintiff's "actions do not constitute protected activities under either Labor Code § 1102.5 or Labor Code § 98.6." *Hollie*, 2012 WL 993522, at *5. Uzomah's text messages to Oganesyan, which consisted of complaints regarding the applicable overtime laws, do not constitute a disclosure of information pertaining to any violation of state or federal law. Exhibit F. Uzomah has offered nothing else, and therefore has failed to make out a prima facie case.

Section 1102.5 also prohibits an employer from retaliating against an employee for "refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." *Id.* at § 1102.5(c). Uzomah argues that he was terminated for refusing to participate in T.W.T.'s alleged unlawful payment scheme. While it is true that it is unlawful under California's labor laws for an employer to refuse to pay hourly non-exempt employees for time they have worked, that is not the case here, and even if T.W.T.'s pay policy did violate overtime laws (which it is undisputed that it did not violate overtime laws) an employee who works without overtime pay is not "participat[ing] in" or engaging in, an unlawful act, as Uzomah claims. *Hollie*, 2012 WL 993522, at *5. Moreover, T.W.T., Uzomah's employer, has demonstrated a legitimate, independent business reason for terminating Uzomah—lack of available work due to equipment failure and lower demand for trucking services at the time. None of Uzomah's complaints to Oganesyan are protected under the Labor Code. As such, Plaintiff's cause of action for a violation of section 1102.5 fails as a matter of law and summary judgment is appropriate.

D. <u>Benjamin's claim for retaliation under Cal. Lab. Code § 6310 fails</u>

Plaintiff Benjamin's argument for retaliation under Labor Code § 6310 is premised on the allegation that Oganesyan retaliated against Benjamin "by discharging her for complaints of unsafe work conditions." Complaint for Damages, p. 9, para. 59. This claim fails because Benjamin's alleged complaints did not constitute complaints of unsafe working conditions and Benjamin was

not discharged but resigned from her employment with T.W.T. Labor Code section 6310 prohibits an employer from terminating an employee because the employee has made "any oral or written complaint to ... his or her employer ..." about unsafe working conditions or unsafe work practices. Cal. Lab. Code § 6310(a).

"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two." *Muller v. Auto. Club of So. Cal.*, 61 Cal. App. 4th 431, 451, 71 Cal. Rptr. 2d 573, 585–86 (1998), disapproved of on other grounds by *Colmenares v. Braemar Country Club, Inc*., 29 Cal. 4th 1019, 63 P.3d 220 (2003) (citing *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 609, 262 Cal. Rptr. 842 (1989)). Benjamin's alleged activities are protected activities under section 6310 if she "complain[s] of unsafe working conditions or an unsafe workplace." *Rodriguez v. Lab'y Corp. of Am*., 623 F. Supp. 3d 1047, 1056 (C.D. Cal. 2022) (citing *Creighton v. City of Livingston*, 628 F. Supp. 2d 1199, 1223 (E.D. Cal. 2009)); *see also Schulthies v. National Passenger R.R. Corp.,* 650 F. Supp. 2d 994 (N.D. Cal. 2009).

Benjamin has presented no evidence that she submitted any complaints whatsoever regarding unsafe work conditions and Defendant Oganesyan disputes Benjamin's assertion that she ever communicated any safety concerns to T.W.T. or to Oganesyan. Exhibit C. Through discovery, Benjamin has produced 41 pages of text messages between Benjamin and Oganesyan which include zero references to workplace safety. Exhibit H. Benjamin has presented no other evidence, other than her own self-serving testimony, that she complained to anyone about the safety of T.W.T.'s trucks. Even accepting Benjamin's testimony as true, Benjamin's alleged actions do not constitute protected activity under section 6310. Benjamin allegedly stated the following to Oganesyan in June 2021 and throughout her employment: "I don't feel comfortable driving this truck, "it's not pulling the weight," "it keeps cutting off," and "I don't feel safe."

Complaint, p. 5, para. 29. In *Muller*, the appellate court rejected a similar argument when an employee complained that she was frightened at work due to a previous negative encounter with a customer:

> The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. Muller's declaration shows only that she became frightened for her safety as a result of her unfortunate experience with Williams and expressed her fear to Auto Club; it is not evidence that the Auto Club office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, Muller's declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to Auto Club about unsafe working conditions in violation of Labor Code section 6310.

(*Muller*, 61 Cal. App. 4th at 452)

Here, Benjamin allegedly complained that the T.W.T. truck she was assigned to drive made her uncomfortable and she did not feel safe. Benjamin did not present evidence of any actual safety violations or specific workplace safety issues. Thus, Benjamin's alleged complaints did not constitute complaints of workplace safety under § 6310.

Additionally, even if Benjamin's conduct is deemed a protected activity, it is undisputed that Benjamin resigned and was not terminated, and therefore, did not suffer an adverse employment action that could be causally linked to any alleged protected activity. Exhibit H. Benjamin's resignation did not amount to a constructive discharge.

> In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign.

(*St. Myers*, 44 Cal. App. 5th at 315–16, 257 Cal. Rptr. 3d at 353 (citing *Turner v. Anheuser-Busch, Inc*., 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (1994).) "The conditions giving

rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." *Id.* "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." *Id.* The undisputed evidence showed that Benjamin had never been disciplined, suspended, or demoted. At the time of her resignation, Benjamin was not in danger of being terminated. There are no facts supporting a claim of constructive discharge, and thus, no adverse employment action was taken against Benjamin. Accordingly, Benjamin's retaliation claim under Labor Code Section 6310 fails as a matter of law and summary judgment is appropriate.

V. CONCLUSION

For the reasons set forth above, Oganesyan's motion for summary judgment should be granted and Plaintiffs claims against Defendant Oganesyan should be dismissed with prejudice.

Dated: January __, 2025.

LAW OFFICES OF JEFFREY D. NADEL

By: _____

JEFFREY D. NADEL

Attorney for Defendant Artak Oganesyan

[PROOF OF SERVICE]