2d Civil No. B089833

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALACOQUE B. COLETTE KELLY,

Plaintiff and Appellant,

vs.

METHODIST HOSPITAL OF SOUTHERN CALIFORNIA, ELLEN BLACKSTOCK and DOES 1 through 20, inclusive,

Defendants and Respondents.

On Appeal From The Superior Court of Los Angeles County
Honorable Coleman A. Swart, Judge
L.A.S.C. No. GC 005963

RESPONDENTS' BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff improperly seeks to rewrite both the applicable statute and her contract of employment. She asks this Court to apply the Fair Employment and Housing Act's ("FEHA"'s) statutory prohibition against age discrimination to a non-profit religious corporation that FEHA expressly exempts from its coverage. Likewise, she asks this Court to imply a promise of long-term employment terminable only for cause, even though her employer expressly informed her, and she understood, that she was an at-will employee.

The trial court properly rejected plaintiff's attempts to expand FEHA and her employment contract far beyond their express limits and granted summary judgment to defendants. The judgment should be affirmed for multiple reasons:

1. A claim for age discrimination in employment is wholly statutory. In Jennings v. Marralle (1994) 8 Cal.4th 121, the Supreme Court held that where the statute, FEHA, does not apply, there is no cause of action for age discrimination. On its face, FEHA broadly exempts all non-profit religious corporations from its purview. The Legislature specifically rejected efforts to narrow this exemption to only certain types or activities of non-profit religious corporations. Undisputed evidence establishes that the Methodist Hospital of Southern California is, as its very name suggests, a non-profit institution owned and controlled by the Methodist denomination. By the plain language of FEHA, no claim for age discrimination can be made against Methodist Hospital. In any event, plaintiff failed to exhaust her administrative remedies under FEHA, thereby barring her claim even if FEHA were to apply.

2. The statutory presumption is that employment relationships are at-will. As plaintiff admits, Methodist Hospital affirmatively confirmed the at-will nature of her employment. Plaintiff

presented no cognizable evidence of anything other than an at-will employment. The isolated facts plaintiff points to—e.g., length of employment and written standards for progressive discipline—are insufficient as a matter of law to negate expressly at-will employment.

3. In any event, defendants had more than adequate cause to terminate plaintiff's employment. Plaintiff suffered a non-work injury and was unable to perform her job. Her employer afforded her six months of medical leave, two months more than provided for in its policies, before terminating her. Plaintiff admitted that even years after she commenced this litigation she still could not perform her job. Plaintiff herself acknowledged that she could be terminated if she did not return when her leave of absence expired. An employee's admitted inability to perform her job is the ultimate good cause for termination.

For these reasons, the trial court's grant of summary judgment should be affirmed.

STATEMENT OF FACTS

1. The Religious Nature Of Methodist Hospital of Southern California.

The Methodist Hospital of Southern California ("Methodist Hospital") was incorporated in 1912 as a non-profit religious organization (1: JA 49, 99-100)[1/] by the trustees of the Women's Home Missionary Society of the Methodist Episcopal Church of the Southern California Conference (5: JA 1025). Its articles of incorporation expressly state its religious purpose: "[A]ll of the properties, monies and assets of this corporation are irrevocably dedicated to charitable and religious purposes." (1: JA 50, 92 [emphasis added].) Its bylaws require that a majority of its board members be members of the United Methodist Church; in addition, at least one other board member must be a Methodist minister and, by virtue of her office, the president of the United Methodist Women, California-Pacific Conference, is also automatically a board member. (1: JA 49-50, 59.) The directors are elected annually by the Women's Society of Christian Service of the Southern California-Arizona Conference of the Methodist Church. (1: JA 80.) A standing board Religion and Health Committee is responsible for the development and maintenance of a strong Chaplaincy Program, including Doctor-Clergy liaison activity. (1: JA 66.)

Methodist Hospital abides by the requirements of the Health and Welfare Ministry of the United Methodist Church and is accredited by the Certification Council of the United Methodist Church. (1: JA 50.) A Methodist chaplain ministers to the needs of Methodist Hospital's patients and Methodist Hospital broadcasts a daily sermon for the benefit of patients, staff and visitors. (1:

[1/] We refer to the Joint Appendix as "JA" preceded by the volume number and followed by the page number. We refer to the Reporter's Transcript of Proceedings as "RT" followed by date and, where applicable, page number.

JA 50.) In the event of dissolution, Methodist Hospital's assets revert to the United Methodist Women. (1: JA 49-50, 97.)

2. Plaintiff's At-Will Employment With Methodist Hospital.

In January 1985, Methodist Hospital hired plaintiff as a nurse. (4: JA 762.) When hired, plaintiff received and read a copy of the employee handbook which defined the terms and conditions of her employment. (3: JA 454, 566.) The handbook expressly stated that plaintiff was an at-will employee who could be terminated for any reason or no reason. (3: JA 461, 565.) No one from Methodist Hospital ever told plaintiff that she could be terminated only for certain reasons. (3: JA 458-459, 463; 4: JA 671.)

3. The Uncertainty Of Plaintiff's Continued Employment With Methodist Hospital.

Consistently throughout her employment, plaintiff received written criticism of her work performance. Annual performance appraisals and sporadic disciplinary reports stated that she needed to improve her charting, to be to work on time, and to wear her uniform to work. (3: JA 459, 464-466, 467-469, 470-472, 568-587.) In the last month in which she actually worked at Methodist Hospital, plaintiff received a disciplinary report for excessive overtime and inappropriate charting (3: JA 588), and written notice that she failed to meet job standards (3: JA 475-476, 589).

4. Plaintiff's Non-Work Injury And Her Repeated Requests For Medical Leaves Of Absence.

In early May 1990, plaintiff was involved in a car accident unrelated to her employment. (3: JA 482-483, 650.) She saw Dr. Richard Vanis for her injuries arising out of the car accident. (3: JA 482.) Subsequently, on June 20, 1990, plaintiff was removing a patient from his bed when he moved off the bed and plaintiff fell into a recliner with him. (3: JA 484; 5: JA 1089-1091.) Plaintiff again saw Dr. Vanis, who confirmed that the problem was her prior "non-industrial" injury. (3: JA 485-486, 590.)

Plaintiff requested, and Methodist Hospital granted, a medical leave of absence beginning June 24, 1990 and lasting until July 16, 1990. (3: JA 492, 596.) Plaintiff thereafter requested, and Methodist Hospital again granted, three additional medical leaves of absence from August through October 1990. (3: JA 597-600.) In November 1990, plaintiff requested, and Methodist Hospital granted, yet another medical leave of absence, this time extending into December 1990. (3: JA 601-602.) In each leave of absence request, plaintiff stated that she understood if she failed to return to work within three days following the expiration of her leave of absence, her employment could be terminated. (3: JA 591-602.)

Plaintiff knew that a medical leave involved an injury that did not occur on the job, in contrast to a Workers' Compensation injury that occurs while at work. (3: JA 490.) With one exception, plaintiff specifically sought "medical" leaves of absence. (3: JA 492, 495, 497, 499, 501, 590, 596-599.) Plaintiff's mid-October request sought a Workers' Compensation leave. By her November 1990 request, however, plaintiff again sought a "medical" leave of absence. (3: JA 504, 507-508, 601-602.)

Throughout her leave of absence, plaintiff received state disability insurance benefits (which cover non-work related injuries), but never sought Workers' Compensation benefits. (3: JA 509, 511, 664-665.)

5. Methodist Hospital Terminates Plaintiff's Employment After Six Months Of Medical Leave, Two Months More Than Provided For In Its Written Policy, When She Is Still Unable To Return To Work.

Methodist Hospital's written leave policy allowed for four months of medical leave premised upon non-work related sickness or injury. (3: JA 605.) Plaintiff's final leave of absence expired on December 19, 1990. (3: JA 602.) On December 20, 1990, Dr. Vanis wrote Methodist Hospital informing that plaintiff could not return to work until January 21, 1991. (4: JA 691; 5: JA 1066.) Methodist Hospital thereupon terminated plaintiff's employment effective January 1, 1991, because plaintiff had been on medical leave since June 1990, two months longer than the maximum allowed under its policy. (3: JA 522, 616, 641; 5: JA 1013.) Indeed, as of April 1994, plaintiff was still unable to perform her duties as a nurse due to her injury. (3: JA 666.)

STATEMENT OF THE CASE

1. Plaintiff's Operative Complaint.

Plaintiff's third amended complaint alleged causes of action for breach of implied-in-fact employment contract, breach of the covenant of good faith and fair dealing, wrongful termination

in violation of public policy, and fraud and deceit. (2: JA 331-350.) Plaintiff expressly pleaded that her injury was not work related and that she had requested and been granted "medical" leaves of absence. (2: JA 337-338.) In addition to Methodist Hospital, plaintiff sued her supervisor Ellen Blackstock. (2: JA 333.)

2. The Prior Abortive Writ Proceeding.

The trial court had sustained without leave to amend a demurrer to a prior complaint as to plaintiff's cause of action for wrongful termination in violation of public policy. (1: JA 182; 2: JA 296B.) Upon plaintiff's petition for writ of mandate as to that ruling, arguing that she had a non-statutory claim for age discrimination (1: JA 183-215), this Court issued an alternative writ (2: JA 259-260).[2/] Rather than allow this Court to consider the issue, however, the trial court complied with the alternative offered by this Court's writ, and reversed its own order. (2: JA 261.) Not surprisingly, this Court discharged the alternative writ and never considered the issue on the merits. (2: JA 273.)

3. Methodist Hospital's Motion For Summary Judgment.

Methodist Hospital moved for summary judgment and, in the alternative, for summary adjudication. (2: JA 411-436.) In support of its motion for summary judgment, Methodist Hospital relied on the following undisputed facts:

[2/] At the time, June 1993, the Supreme Court had not decided Jennings v. Marralle, supra, 8 Cal.4th 121, which holds that there is no non-statutory public policy which would support a cause of action for age discrimination in employment.

a. Methodist Hospital is a non-profit religious corporation (4: JA 868-869);

b. Plaintiff failed to exhaust her administrative remedies with the California Department of Fair Employment and Housing (4: JA 869);

c. Methodist Hospital informed plaintiff at the time it hired her that she was an at-will employee and she admits she was never told otherwise (4: JA 861-862); and

d. Methodist Hospital terminated plaintiff for good cause as its policy allows only a four-month medical leave of absence and plaintiff could not return to work after a six-month medical leave (4: JA 863-864).

The first two facts independently disposed of plaintiff's age discrimination claim and the last two facts disposed of her contract-based claims.

4. Plaintiff's Opposition.

Plaintiff initially opposed the motion for summary judgment as untimely by attempting to quash service of the motion. (4: JA 874-879.) The trial court resolved disputed factual assertions regarding timely delivery of the motion papers and found, as a matter of fact, service proper and the motion timely. (RT 9/1/94.)

Plaintiff proceeded to oppose the motion on the merits. She asserted: (a) Methodist Hospital was not exempt from FEHA or, alternatively, a public policy cause of action for age discrimination exists outside the FEHA; and (b) she had an implied-in-fact agreement with Methodist Hospital not to terminate her employment without cause. She relied on the following facts:

a. a minority of Methodist Hospital's board may be non-Methodists; only one board member must be a Methodist minister (6: JA 1371);

b. Methodist Hospital had employed her for five years (6: JA 1356-1357);

c. Methodist Hospital had a written policy of progressive discipline (6: JA 1357);

d. plaintiff's evaluations, on balance, were satisfactory (6: JA 1358); and

e. one of plaintiff's multiple leave of absence requests sought leave for a work-related injury (6: JA 1361-1362).

Plaintiff presented no evidence to dispute that she failed to exhaust her administrate remedies under FEHA. (See 6: JA 1287-1377.)

5. The Summary Judgment In Favor Of Defendants.

Upon hearing the motion, the trial court granted summary judgment to defendants (7: JA 1521; RT 9/23/94) and thereafter issued a formal written order to that effect (7: JA 1547-1565). The trial court held that the undisputed facts established:

a. Methodist Hospital is a non-profit religious corporation exempt from the age discrimination provisions in the Fair Employment and Housing Act (7: JA 1559);

b. Methodist Hospital did not have an implied-in-fact contract with plaintiff that she would be terminated only for good cause (7: JA 1548-1551); and

c. Even if such a contract existed, Methodist Hospital had good cause to terminate plaintiff as she did not perform her obligations under the contract and she is still unable to return to work (7: JA 1551-1557).

The trial court entered a final judgment in favor of Methodist Hospital on October 28, 1994. (7: JA 1566-1568.) Methodist Hospital served a notice of entry of judgment on November 1, 1994 (7: JA 1569-1574), and plaintiff timely appealed on December 21, 1994 (7: JA 1575-1577).

LEGAL DISCUSSION

I.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S CAUSE OF ACTION FOR AGE DISCRIMINATION.

The Fair Employment and Housing Act ("FEHA") prohibits certain employers from engaging in age discrimination in employment. (Gov. Code, §§ 12926, subd. (c), 12941.) In Jennings v. Marralle (1994) 8 Cal.4th 121, the Supreme Court held that FEHA is the exclusive remedy for claims of age discrimination in employment; there is no fundamental public policy expressed in statute or constitution outside of FEHA as would be necessary to justify a tort cause of action. If an employer is exempt from FEHA, no age discrimination claim may be made against it. Because Methodist Hospital is a non-profit religious corporation exempt from FEHA, plaintiff has and can have no claim for age discrimination in employment against defendants.

A. There Is No Cause Of Action For Age Discrimination Outside Of That Provided By The Legislature In FEHA.

A cause of action for wrongful termination in violation of public policy must be premised on the violation of a fundamental public policy embodied in statute or constitution. (Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1094-1095.) FEHA is the sole statutory or constitutional prohibition on age discrimination in employment. It does not suffice to create a public policy

against such discrimination as to employers to which it does not apply. Jennings v. Marralle, supra, 8 Cal.4th 121, is the pivotal and controlling authority. Remarkably, plaintiff fails to discuss this authority in her opening brief, mentioning the case only in passing. (AOB at p. 27.)

In Jennings, the plaintiff could not state a statutory cause of action for age discrimination in employment because her employer did not fall within FEHA's definition of an "employer" in that he employed less than five persons. (8 Cal.4th at pp. 135-136; see Gov. Code, § 12926, subd. (d).) Nonetheless, the plaintiff asserted (as plaintiff asserts here) that FEHA embodied a public policy against age discrimination in employment that should bind even those employers expressly exempted from FEHA. The Supreme Court disagreed.

It held that "[w]hether discrimination in employment on the basis of age violates a 'fundamental' public policy" was irrelevant "since the 'public policy' on which plaintiff relies [prohibiting age discrimination by an employer] is not applicable to defendant. He is not an 'employer' subject to the age discrimination provisions of the FEHA." (Jennings v. Marralle, supra, 8 Cal.4th at p. 130.)

As to employers not falling within the scope of FEHA's limited definition, there is no public policy against, and therefore no statutory or tort cause of action for, age discrimination:

> "[T]he inclusion of age in the policy statement of FEHA alone is not sufficient to establish a 'fundamental' public policy for the violation of which an employer may be held liable in a common law tort action. The Legislature's decision to exclude small employers from the FEHA and the omission of any other legislation barring discrimination on the basis of age precludes finding a fundamental policy that extends to age discrimination by small employers." (Jennings v. Marralle, supra, 8 Cal.4th at p. 135; see also Strauss v. A. L. Randall Co. (1983) 144 Cal.App.3d 514, cited

with approval in Jennings, supra, 8 Cal.4th at p. 133 [there is no common law claim for age discrimination; FEHA provides the exclusive remedy for such claims].)

The same rationale applies to other employers exempt from FEHA: "It would be unreasonable to expect employers who are expressly exempted from the FEHA ban on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability." (Jennings v. Marralle, supra, 8 Cal.4th at pp. 135-136.)

B. FEHA Expressly Exempts Non-Profit Religious Corporations, Such As Methodist Hospital, From Claims Of Age Discrimination.

The defendant-employer in Jennings fell outside of FEHA's definition of a covered employer as he employed less than five persons. In the same statutory section, Government Code section 12926, subdivision (d)(1), FEHA also excludes non-profit religious corporations from the definition of a covered "employer." As we now demonstrate, there can be no doubt that Methodist Hospital falls within the exception to FEHA the Legislature intended for non-profit religious corporations.

1. FEHA's Plain Meaning Dictates That Methodist Hospital Is Not A Covered "Employer."

FEHA expressly defines the employers it regulates to exclude "a religious association or corporation not organized for profit." (Gov. Code, § 12926, subd. (d)(1); see also Gov. Code, § 12940, subd. (h)(3)(B).) This language is plain on its face. If the entity is non-profit and governed, controlled, or run on the basis of a religious affiliation, it is exempt from FEHA. This is particularly true where the entity is engaged in an enterprise traditionally pursued by religious organizations. Through the ages, hospitals traditionally have been religious enterprises. (See Rosenberg, The Care of Strangers: The Rise of America's Hospital System (1987), p. 8 [the hospital was "[i]nitiated in the late eighteenth and early nineteenth centuries as a welfare institution framed and motivated by the responsibilities of Christian stewardship"]; id. at pp. 110-111 [emphasizing the religious motivation in establishing modern hospitals]; Compton's Living Encyclopedia (1995) (available on America Online) [Saint Vincent de Paul noted for founding hospital in the 1600s; "The Order of the Hospital of St. John of Jerusalem, founded in the 11th century and known of the Knights Hospitalers, was probably the first order to establish genuine medical and hospital services"].)

Thus, a charitable institution, such as a hospital, school, or nursing home, operated, controlled, or governed by a religious denomination is generally considered within the scope of the phrase "religious corporation." (See Arriaga v. Loma Linda University (1992) 10 Cal.App.4th 1556, 1560-1561 [university associated with the Seventh Day Adventist Church].) Even under federal Title VII, 42 U.S.C. § 2000e et seq., which contains an exemption much narrower than

FEHA's, such institutions have been considered religious corporations.[3/] (E.g., Little v. Wuerl (3d Cir. 1991) 929 F.2d 944, 949 [Catholic school]; E.E.O.C. v. Presbyterian Ministries (W.D. Wash. 1992) 788 F.Supp. 1154, 1156 [retirement home run by the Presbyterian Church]; Feldstein v. Christian Science Monitor (D. Mass. 1983) 555 F.Supp. 974, 978 [Christian Science newspaper]; see also Cal. Admin. Code, tit. 2, § 7286.5, subd. (a)(5) ["any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act" (emphasis added)].)

Where the meaning of the words of the statute are plain, that meaning must be applied. (Williams v. Superior Court (1993) 5 Cal.4th 337, 350; Adoption of Kelsey S. (1992) 1 Cal.4th 816, 826 [a court's primary task in construing a statute is to determine the Legislature's intent and "(t)he statutory language, of course, is the best indicator of legislative intent"]; Delaney v. Superior Court (1990) 50 Cal.3d 785, 800; Edgington v. San Diego County (1981) 118 Cal.App.3d 39, 46.) Here, the plain meaning of FEHA's statutory language exempts non-profit religious corporations, such as Methodist Hospital.

[3/] Title VII exempts only "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the corporation, association, educational institution, or society of its activities." (42 U.S.C. § 2000e-1, subd. (a) [emphasis added].)

2. FEHA's Legislative History Confirms That The Legislature Intended a Broad Exemption Of Non-Profit Religious Corporations.

The legislative history of FEHA confirms that the Legislature intended broadly to exclude all religiously affiliated non-profit organizations from the sweep of FEHA.[4/] The Legislature last amended the relevant definition of an "employer" in 1977. (Assem. Bill No. 1047 (1977-1978 Reg. Sess.) ["A.B. 1047"] amending former Lab. Code, § 1413, subd. (d) (now Gov. Code, § 12926, subd. (d)).) Prior to 1977, the definition of employer excluded all social clubs and fraternal, religious, charitable or educational associations or corporations. As initially proposed, A.B. 1047 sought to limit this exclusion to a "religious association or corporation when employing persons directly involved in carrying out the religious purposes of the religious association or corporation." (A.B. 1047, Mar. 22, 1977 [emphasis added].)

However, the Assembly immediately broadened this proposed language to encompass "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such religious entity of its activities." (A.B. 1047, as amended May 9, 1977.) This new language was intended to exempt religious organizations from discrimination claims based on religion for both religious and secular employment activities. (See Assem. Com. on Lab., Emp., & Cons. Aff. Rep. on A.B. No. 1047, as amended May 9, 1977.)

Even this broader exclusion remained controversially too narrow. The Senate and Assembly progressively amended the definition of employer, ultimately broadening the exemption for all

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[4/] Methodist Hospital requests that this Court take judicial notice of the relevant parts of this legislative history in its accompanying Request For Judicial Notice. (Evid. Code, § 452, subds. (b), (c); see O'Brien v. Dudenhoeffer (1993) 16 Cal.App.4th 327, 333.)

activities of all religious corporations, retaining only the language that an "[e]mployer does not include a religious association or corporation not organized for private profit." (A.B. 1047, as amended August 24, 1977.) The Legislature understood the final version of the bill to make religious associations and corporations wholly exempt from the provisions of FEHA, as they had been under the previous statutory definition. (See Legis. Analyst Rep. on A.B. 1047, as amended Aug. 24, 1977.) The effect of the amended definition, therefore, was solely to extend FEHA to wholly secular social, fraternal, charitable and educational associations (e.g., social clubs) (see Bohemian Club v. Fair Employment & Housing Comm. (1986) 187 Cal.App.3d 1, 9); religious corporations remained as exempt as they always had been.

These successive drafts of A.B. 1047, and the Legislature's rejection of limits based on religious function or type of discrimination, conclusively demonstrate the blanket nature of the exemption of religious corporations from FEHA. (O'Brien v. Dudenhoeffer, supra, 16 Cal.App.4th at p. 334 ["successive drafts of a bill may be helpful in construing a statute"].) Where, as here, the Legislature considers and expressly rejects certain statutory language, a court may not adopt an interpretation of the statute "in a fashion inconsistent with the statutory language deliberately chosen by a majority of the Legislature and approved by the Governor . . . ." (Wiley v. Southern Pacific Transportation Co. (1990) 220 Cal.App.3d 177, 192, fn. 8; see also Wells Fargo Bank v. Superior Court (1991) 53 Cal.3d 1082, 1099 [a court is not "empowered to insert what a legislative body has omitted from its enactments"]; City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 88-89, 92 [where Legislature expressly rejected requirements of affidavits on personal knowledge and "particular" description of documents in early drafts of discovery statute, Court would not infer such requirements]; Central Delta Water Agency v. State Water Resources Control Board (1993) 17 Cal.App.4th 621, 632 ["The rejection (by the Legislature) of a specific provision contained in an

act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out." (Citations omitted)].)

Significantly, the Legislature was aware of and rejected the provisions of the federal Title VII, which permit religious corporations to discriminate only on the basis of religion. (See Assem. Com. on Lab., Emp., & Cons. Aff. Rep. on A.B. No. 1047, as amended May 9, 1977.) Congress intended to limit Title VII's religious corporation exemption, consistently rejecting proposals to allow religious corporations to discriminate on grounds other than religion. (E.E.O.C. v. Pacific Press Pub. Assn. (9th Cir. 1982) 676 F.2d 1272, 1277.) By contrast, the California Legislature broadly "intended to allow nonprofit religious associations and corporations to discriminate on any basis." (Selected 1977 California Legislation (1978) 9 Pac. L.J. 281, 528.)

The legislative history, thus, evidences a clear intent that FEHA's religious corporation exemption be broadly interpreted.

3. The Undisputed Facts Reveal Methodist Hospital's Religious Character And Purpose.

As a non-profit corporation affiliated with a specific religious denomination, Methodist Hospital falls within the plain meaning of FEHA's exemption, particularly given the expansive reading the Legislature intended for the exemption. But, even if a strong nexus with a religious purpose were required under FEHA, Methodist Hospital established that nexus.

Although California courts have not had occasion to examine FEHA's religious corporation exclusion in detail, other courts have explored the more restrictive exemption in Title VII. Recently, Justice Gonzalez of the Texas Supreme Court surveyed the Title VII jurisprudence and

helpfully distilled eight factors governing whether an entity should be considered a religious corporation. (Speer v. Presbyterian Children's Home & Serv. Agency (1993) 847 S.W.2d 227, 235 [Gonzalez, J., concurring].) The entity need not meet all factors to be considered a religious corporation, as the inquiry is essentially a balancing test to determine whether the entity's primary purpose and character are religious. (Ibid.) Even under the more restrictive Title VII test, the factors identified by Justice Gonzalez uniformly confirm that Methodist Hospital is a religious corporation under FEHA:

a. Whether the entity is for-profit or non-profit. Methodist Hospital is a non-profit corporation, exempt from federal and state income taxes, as well as social security taxes. (1: JA 96-100.)

b. Whether an administrative agency has determined the entity's status. The Commission has previously found it had no jurisdiction over discrimination charges filed by former Methodist Hospital employees. (3: JA 644; see Feldstein v. Christian Science Monitor, supra, 555 F.Supp. at p. 978 [Equal Employment Opportunity Commission previously found it had no jurisdiction over the Monitor newspaper].) Because plaintiff failed to invoke, much less exhaust, her administrative remedies (see discussion at pages 25-26, infra), the Commission had no opportunity to make a similar finding in this case.

c. Whether the entity's articles of incorporation or other documents state a religious purpose. Article VII of the Methodist Hospital's articles of incorporation expressly states: "All of the properties, monies and assets of this corporation are irrevocably dedicated to charitable and religious purposes." (1: JA 50, 92 [emphasis added].)

d. Whether the entity represents itself to the church, public and government as a secular or sectarian body. Methodist Hospital's name, alone, is evidence of its representation to

the public as a religious organization. (See Speer v. Presbyterian Children's Home & Serv. Agency, supra, 847 S.W.2d at p. 236 [Gonzalez, J., concurring].) Methodist Hospital also represents itself to the United Methodist Church as a religious corporation, abiding by the requirements of the Health and Welfare Ministry of the United Methodist Church. (1: JA 50.) Moreover, it is accredited by the Certification Council of the United Methodist Church. (1: JA 50.)

e. Whether the church is involved in the management, day-to-day operations and financial affairs of the entity. Although the Methodist Church does not exercise day-to-day control over the operations of Methodist Hospital, it possess the power to exercise such control. (See Speer v. Presbyterian Children's Home & Serv. Agency, supra, 847 S.W.2d at p. 236 [Gonzalez, J., concurring].) Methodist Hospital's bylaws require that a majority of its board members be members of the United Methodist Church and that at least one board member be a Methodist minister; by virtue of her office, the president of the United Methodist Women, California-Pacific Conference, is also automatically a board member. (1: JA 49-50, 59.) The directors are elected annually by the Women's Society of Christian Service of the Southern California-Arizona Conference of the Methodist Church. (1: JA 80.)

f. Whether the church supports or is affiliated with the entity. As noted above, Methodist Hospital abides by the requirements of the Health and Welfare Ministry of the United Methodist Church and is accredited by the Certification Council of the United Methodist Church. (1: JA 50.) In the event of dissolution, Methodist Hospital's assets revert to the United Methodist Women. (1: JA 50, 77-78.)

g. Whether the entity adheres to or deviates from an original religious purpose. Over time, Methodist Hospital has increased its dedication to a religious purpose. The 1981

amendment to its articles of incorporation strengthened the language demonstrating its religious purpose. (1: JA 96-97.)

h. Whether the entity conducts religious activities, services or instruction. The Methodist faith is an integral part of the day-to-day activities of Methodist Hospital. A board of trustees' standing Religion and Health Committee is responsible for the development and maintenance of a strong Chaplaincy Program, including Doctor-Clergy liaison activity. (1: JA 66.) In addition, a Methodist chaplain ministers to the needs of Methodist Hospital's patients and Methodist Hospital broadcasts a daily sermon for the benefit of patients, staff and visitors. (1: JA 50.)

These fundamental links between Methodist Hospital and the United Methodist Church demonstrate that it is a religious corporation even under the more restrictive Title VII test. When one takes into consideration the California Legislature's evident intent that FEHA's religious corporation exemption be more expansive than Title VII's, Methodist Hospital undoubtedly qualifies for FEHA's exemption.

C. Plaintiff's Attempts To Create An Age Discrimination Claim Outside Of FEHA And To Narrow FEHA's Exemption Of Religious Corporations Are Unfounded.

Plaintiff seeks to avoid the statutory limitations on age discrimination claims by relying on: (1) the Supreme Court's easily distinguishable decision in Rojo v. Kliger (1990) 52 Cal.3d 65, recognizing a common law tort claim for gender discrimination; (2) inapposite federal cases applying different statutory language to distinct factual circumstances; and (3) a decade-old administrative

ruling at odds with FEHA's statutory history that relies on administrative reinterpretation of FEHA that was never implemented. (AOB at pp. 21-30.) Plaintiff's efforts are unavailing on each ground.

1. Plaintiff's heavy reliance on Rojo v. Kliger, supra, 52 Cal.3d 65 (AOB at pp. 28-29), is entirely misplaced. In Rojo, the Court held that FEHA is not the exclusive remedy for discrimination claims where there is some independent common law or statutory basis for such claims. Rojo confirms that such an independent claim requires a fundamental policy founded in constitution or statute (other than FEHA). (52 Cal.3d at pp. 79-80.) Since Article I, section 8, of the California Constitution articulates a fundamental public policy against sex discrimination,[5/] Rojo held that an employee may state a cause of action for wrongful discharge in violation of public policy independent of FEHA based on sex discrimination. (Rojo v. Kliger, supra, 52 Cal.3d at pp. 89-91.) As the Constitution does not mention age as a protected class, the Court in Rojo expressly left open the question of whether an employee may state a common law cause of action for age discrimination. (Id. at p. 82, fn. 10.) The Court in Jennings answered that question with a resounding "no," expressly distinguishing Rojo. (Jennings v. Marralle, supra, 8 Cal.4th at p. 133.)

2. Plaintiff's challenge to Methodist Hospital's status as a religious organization mistakenly relies on federal cases addressing wholly different issues than that presented here. (AOB at pp. 22-23.) Significantly, the federal cases plaintiff cites interpret statutes with language much more limited and histories very different from FEHA's non-profit religious corporation exemption. In E.E.O.C. v. Townly Engineering & Manufacturing Co. (D. Ariz. 1987) 675 F.Supp. 566, aff'd. in part and rev'd. in part, (9th Cir. 1988) 859 F.2d 610, cert. den., (1989) 489 U.S. 1077 (see AOB at p. 22), the court found that Title VII did not apply to a for-profit corporation. The district court

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[5/] Article I, section 8, of the California Constitution provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

found clear that "any reasonable construction of the [religious corporation] exemption would not include a for-profit corporation whose only religious characteristic is the beliefs of its stockholders" (675 F.Supp. at p. 568), and the Ninth Circuit agreed that the beliefs of its stockholders were insufficient to bring a for-profit venture within Title VII's religious corporation exemption. (859 F.2d at p. 619.) FEHA's exclusion is expressly limited to non-profit entities and there is no dispute that Methodist Hospital is a non-profit corporation. Townly, thus, is irrelevant.

In any event, Townly construes a statute, Title VII, containing a much more limited religious corporation exemption that Congress expressly intended to be narrowly construed. (E.E.O.C. v. Townly Engineering & Manufacturing Co., supra, 859 F.2d at pp. 617-619.) As discussed above, the California Legislature directly rejected such a more limited religious corporation exemption and opted for a much broader exemption and construction. Federal Title VII jurisprudence cannot justify a narrowing of the religious corporation exemption that the California Legislature specifically rejected.

Saint Elizabeth Community Hospital v. N.L.R.B. (9th Cir. 1983) 708 F.2d 1436, 1440-1441 (see AOB at p. 23), is similarly inapplicable. That case held there was no unconstitutional entanglement between church and state when Congress subjected church-operated hospitals to the jurisdiction of the National Labor Relations Board. Unlike FEHA, Congress expressly amended the National Labor Relations Act to cover all non-profit hospitals, specifically refusing to exempt religiously-run hospitals. (708 F.2d at p. 1440; see 29 U.S.C. § 152.) The issue in this case is not whether the Legislature could extend FEHA to religious corporations—the issue addressed in Saint Elizabeth—but whether to honor the Legislature's conscious decision not to do so.

3. Finally, plaintiff erroneously relies on Department of Fair Employment and Housing Commission v. Hoag Memorial Hospital Presbyterian ("Hoag") (1985) FEHC Dec. No.

85-10. (AOB at pp. 23-26.) That decade-old administrative decision was wrong when decided, is contrary to the plain language and evident Legislative intent of FEHA, and has not even been followed or implemented by the Fair Employment and Housing Commission. In Hoag, the Commission determined that to be exempt from FEHA, a non-profit organization had to demonstrate it was engaged in religious activities for a religious purpose and that any discrimination must be based on religion. (Hoag, supra, FEHC Dec. No. 85-10 at p. 6.) FEHA's history is directly contrary; those are the precise requirements the Legislature refused to enact.

It is well-settled that "the court may not insert into a statute qualifying provisions not intended by the Legislature . . . ." (City of Berkeley v. Cukierman (1993) 14 Cal.App.4th 1331, 1339.) Neither can the Commission. "'[A]dministrative construction of a statute, while entitled to great weight, cannot prevail when a contrary legislative purpose is apparent.'" (Central Delta Water Agency v. State Water Resources Control Board, supra, 17 Cal.App.4th at p. 631, quoting Pacific Legal Foundation v. Unemployment Insurance Appeals Board (1981) 29 Cal.3d 101, 117; see also Robinson v. Fair Employment & Housing Commission (1992) 2 Cal.4th 226, 235, fn. 6 ["Even though the court will give great weight to an administrative agency's interpretation of its own regulations and the statutes under which it operates, these are questions of law which the court must ultimately resolve"].) In attempting to impose requirements in Hoag that the Legislature had expressly rejected, the Commission undeniably overstepped its authority.

Indeed, the Commission in Hoag understood that it was attempting to change the non-profit religious corporation exemption as the Legislature had enacted it. The Commission recognized the religious corporation exemption "to mean that a nonprofit organization is entirely exempt from the Act if it can demonstrate that it is in fact religious in nature." (Hoag, supra, FEHC Dec. No. 85-10 at p. 5.) At the time, as now, the Commission's regulations provided "any non-profit religious

organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act." (Cal. Admin. Code, tit. 2, § 7286.5, subd. (a)(5).) Hoag states that "because this presumption is part of a regulation which we now believe does not state the proper standard for the Act's religious exemption, the regulation, and thus the presumption, is in the process of being repealed." (Hoag, supra, FEHC Dec. No. 85-10 at p. 6.) Ten years later, however, the regulation remains intact and identically worded. The only rational inference is that the Commission realized that it could not implement Hoag without violating the Legislature's evident intent and that its pre-existing regulation correctly states the law. Under that pre-existing regulation, the Commission had concluded that it had no jurisdiction over discrimination claims against Methodist Hospital. (3: JA 644.) The Commission would undoubtedly so hold today.

Where, as here, the language and history of a statute are clear, the legislative intent must be followed. Neither cases interpreting narrower statutes nor administrative attempts to limit its terms can trump the plain meaning of Government Code section 12926, subdivision (d)(1): all religiously affiliated non-profit organizations, including Methodist Hospital, are exempt from the provisions of FEHA.

D. Plaintiff Is Barred From Bringing A Cause Of Action For Age Discrimination Because She Failed To Exhaust Her Administrative Remedies.

Assuming arguendo that Methodist Hospital is covered by FEHA, plaintiff still has no cause of action here. She failed to exhaust administrative remedies, the necessary prerequisite to any claim under FEHA. Just as the definition of "employer" and the exceptions to that definition are

an integral part of the public policy embodied by FEHA (Jennings v. Marralle, supra, 8 Cal.4th at p. 130), the administrative procedures required by FEHA are integral to its public policy.

It is undisputed that plaintiff did not file a charge of discrimination with the California Department of Fair Employment and Housing ("DFEH"). (4: JA 745.) An administrative complaint alleging a claim of discrimination in employment must be filed within one year. (Gov. Code, § 12960.) DFEH then has 150 days either to issue an accusation or a right-to-sue letter. (Gov. Code, § 12965, subd. (b).) Receipt of a right-to-sue letter is a necessary prerequisite to judicial action: "exhaustion of the FEHA administrative remedy is a precondition to bringing a civil suit on a statutory cause of action." (Rojo v. Kliger, supra, 52 Cal.3d at p. 83 [emphasis in original]; Robinson v. Department of Fair Employment and Housing (1987) 192 Cal.App.3d 1414, 1416; see also Burdette v. Mepco/Electra, Inc. (S.D. Cal. 1987) 673 F.Supp. 1012, 1015 [holding that compliance with the administrative procedures set forth in FEHA is a prerequisite for a civil suit for age discrimination under California law].)

Acknowledging that she did not comply with FEHA's administrative procedures, plaintiff argues that her cause of action is brought on a violation of public policy theory rather than under FEHA. As discussed in section A above, however, FEHA is the exclusive avenue for claim of age discrimination. (Jennings v. Marralle, supra, 8 Cal.4th at pp. 134-135.) Because plaintiff's only possible cause of action for age discrimination is under FEHA, her failure to exhaust her administrative remedies bars any recovery, under whatever theory, for such discrimination.

E. Plaintiff Had No Cause Of Action Against Her Supervisor Defendant Blackstock.

The trial court also properly granted summary judgment in favor of Ellen Blackstock, plaintiff's supervisor.

First, as with Methodist Hospital, plaintiff failed to exhaust her administrative remedies against Blackstock. As discussed above, exhaustion of such administrative remedy is the necessary prerequisite to any cause of action for age discrimination given the wholly statutory nature of that claim.

Second, in any event, Blackstock individually is not subject to FEHA in these circumstances. Certain FEHA provisions, e.g., prohibiting sexual harassment or retaliation for complaining about discrimination, apply to "any employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person." (Gov. Code, § 12940, subds. (f), (h)(1).) Under this statutory language, an employee may bring an action for sexual harassment or retaliation directly against an individual supervisor, because a "person" includes an individual. (Gov. Code, § 12925, subd. (d); see Matthews v. Superior Court (1995) 34 Cal.App.4th 598, 603-605; Page v. Superior Court (1995) 31 Cal.App.4th 1206, 1211-1213.)

The persons subject to FEHA's regulation of age discrimination are more limited, however. FEHA limits its prohibition of age discrimination to acts by "employers." (Gov. Code, § 12941, subd. (a).) The omission of other entities and individuals described in Government Code section 12940 from section 12941, subdivision (a), strongly implies a more limited scope of potentially liable parties than for other kinds of discrimination. "When a statute contains a particular provision, the omission of that provision from similar statutes on the same or a related subject reveals a different intent." (City of Dublin v. County of Alameda (1993) 14 Cal.App.4th 264, 280; see also

City of Huntington Beach v. Board of Administration (1992) 4 Cal.4th 462, 468 ["all parts of a statute should be read together and construed in a manner that gives effect to each"].) Blackstock, therefore, can be liable for age discrimination only if she is an "employer."

Admittedly, an "employer" may include "any person acting as an agent of an employer." (Gov. Code, § 12926, subd. (d)(1).) The same statutory section, however, excludes certain entities (i.e., small businesses, religious corporations) from the definition of "employer." Thus, an individual who acts as an agent of an "employer" may not be considered to be an "employer" when he or she acts on behalf of an exempt entity.

Any other result would make no sense. It is inconceivable that the Legislature would have intended to exempt the corporate employer, yet attach liability on the individual acting on the exempt employer's behalf. (See Jennings v. Marralle, supra, 8 Cal.4th at pp. 135-136 ["It would be unreasonable to expect employers who are expressly exempted from the FEHA ban on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability"].) Thus, Blackstock, as the agent of a religious corporation exempt from FEHA, must be exempt in her individual capacity as well.

Accordingly, the trial court properly granted summary judgment in favor of Blackstock.

II.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CAUSES OF ACTION FOR BREACH OF IMPLIED CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiff asserted a contractual claim for breach of a supposed implied contract not to terminate her employment except for cause. As we now explain, the trial court correctly granted summary judgment as to this cause of action as well because the undisputed evidence negates any possibility of an implied contract. Moreover, the undisputed evidence establishes in any event that plaintiff was terminated for good cause.

A. There Was No Contract To Terminate Only For Good Cause.

1. Both Statutory Presumption And Unrefuted Evidence Establish That From The Time Of Her Hire Plaintiff Was An At-Will Employee.

Both the law and the undisputed evidence establish that plaintiff was an at-will employee who Methodist Hospital was free to terminate at any time. As a matter of statute, "an employment, having no specified term, may be terminated at the will of either party." (Lab. Code, § 2922.) This statute "establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or grounds for termination." (Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 677.)

In this case, however, there is much more than the bare statutory presumption. It is undisputed that, when plaintiff was hired, she read and understood Methodist Hospital's employee handbook. That handbook irrefutably informed her both that "the employment relationship is completely voluntary" and that "[t]he relationship may be terminated for any reason, or for no reason at all, by either the employee or the hospital." (3: JA 565.) Equally undisputed is that Methodist Hospital's at-will policy remained in effect throughout the term of plaintiff's employment. (3: JA 626-628.) Plaintiff admitted that no one at Methodist Hospital ever told her that she wold be terminated only for certain reasons. (3: JA 458; 4: JA 671-672, 675-676.)

The undisputed express contract between Methodist Hospital and plaintiff, therefore, allowed termination without regard to cause.

2. Plaintiff Presented No Cognizable Evidence Of An Implied Agreement For Termination Only For Cause.

Once the party moving for summary judgment has shown that "one or more elements of the cause of action, even if not separately pleaded, cannot be established" (Code Civ. Proc., § 437c, subd. (o)(2)), the burden shifts to the non-moving party to establish a triable issue of fact. To meet that burden,

> "The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or defense thereto." (Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 583.)

The purpose of this provision, in conformance with federal law, is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." (Id. at p. 588 [citation omitted].) Plaintiff does not come close to satisfying this burden with regard to the issue of the existence of an employment contract to terminate only for cause.

Having admitted that there was no express agreement for termination only for cause (3: JA 458, 4: JA 671-672, 675-676), plaintiff seeks to imply such an agreement. Case law recognizes certain plausible sources of evidence of such an agreement: (1) the employer's written policies; (2) longevity of service; (3) implied assurances of continued employment; and (4) industry practices. (Foley v. Interactive Data Corp., supra, 47 Cal.3d at p. 680; Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal.App.4th 620, 629.) Plaintiff failed to present any evidence sufficient to raise a triable issue of fact under any of these categories.

a. Nothing In Methodist Hospital's Personnel Policies Provide For At-Will Employment

Methodist Hospital's employee handbook unequivocally reaffirms the statutory at-will presumption. Nonetheless, plaintiff contends (AOB at pp. 31-32) that other provisions of Methodist Hospital's personnel policies establish an implied contract. She is wrong.

As a threshold matter, one cannot create by implication what is expressly denied. (See Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 374 ["as a general matter, implied terms should never be read to vary express terms" (citations omitted)].)

In any event, Methodist Hospital's policies do not support the implication plaintiff seeks. First, she argues (AOB at p. 34) that disciplinary guidelines and a list of unacceptable modes of conduct demonstrate that her employment should continue until she violates one of those policies. (5: JA 972-973.) Davis v. Consolidated Freightways (1994) 29 Cal.App.4th 354, 367, directly rejects her claim. There, the plaintiff described his employer's similar system of "progressive discipline" and argued that such a policy contradicted the at-will provision also in the personnel policies. Affirming a summary judgment in favor of the employer, the court held that the pronouncement or use of disciplinary techniques short of termination are irrelevant to the existence or non-existence of an at-will policy. If the rule were otherwise, "an employer would be forced purposely to terminate employees for any and every infraction—or none at all—in order to maintain the presumption of at-will employment. The law does not require such caprice to avoid creating an implied in fact contract." (Ibid.)

Second, plaintiff argues her change in status from a "temporary" to a "full-time" employee created an implied contract of long term employment. (See AOB at p. 34; 5: JA 970.) Again, directly on-point authority is to the contrary. Camp v. Jeffer, Mangels, Butler & Marmaro, supra, 35 Cal.App.4th at p. 630, expressly holds that an employee's at-will status is not altered by a switch from "temporary" to "permanent" status. (See also Foley v. Interactive Data Corp., supra, 47 Cal.3d at p. 678 [a contract for "permanent" employment is a contract for an indefinite period terminable at will by either party].)

Third, plaintiff argues (AOB at pp. 31-32) that Methodist Hospital's policy of permitting a leave of absence for a work-related disability to extend through the duration of the disability creates an implied contract not to terminate when an employee is on any disability leave. (5: JA 969.)

Plaintiff conveniently ignores that Methodist Hospital had a distinct, different policy governing non-work related disability, i.e., "medical leave." (3: JA 605.)

The existence of a policy for work-related disability leave is irrelevant to the matter at hand because plaintiff was not on leave for a work-related disability. Plaintiff alleges in her third amended complaint that she went on a non-work related medical leave of absence beginning in June 1990; that in July 1990 plaintiff's doctor confirmed that her injury was non-industrial; and that she sought and obtained her leaves of absence on a non-work related medical basis. (2: JA 338-339.) As we discuss in section C, below, she cannot now assert that she should have been on a different type of leave, i.e., workers' compensation leave, than she requested from Methodist Hospital. As plaintiff was on a medical leave for a non-work related injury, Methodist Hospital's policies for work related injuries are irrelevant.

In sum, Methodist Hospital's personnel policies are entirely consistent with the at-will nature of plaintiff's employment.

b. The Length of Plaintiff's Service Does Not Rebut the Presumption of At-Will Employment

Methodist Hospital employed plaintiff for almost five years. (5: JA 1016.) During that time, she received annual salary increases from 2 percent to 4.5 percent. (3: JA 567-587.) Plaintiff asserts that her modest tenure and salary increases created an implied contract not to terminate but for cause. (AOB at pp. 34-35.) Again Davis v. Consolidated Freightways, supra, is directly on point and directly contrary. There, the plaintiff had worked for his employer for nine years and had received regular promotions and salary increases. (29 Cal.App.4th at p. 368.) Quoting Miller v.

Pepsi-Cola Bottling Co. (1989) 210 Cal.App.3d 1554, 1559, a case involving an 11-year employee, Davis held:

> "Promotion and salary increases are natural consequences of an employee who remains with an employer for a substantial length of time. These factors should not change the status of an 'at-will' employee to one dischargeable only for 'just cause.'" (Davis v. Consolidated Freightways, supra, 29 Cal.App.4th at p. 368.)

Accordingly, plaintiff's five-year tenure and moderate salary increases, without more, do not rebut the presumption and other undisputed evidence of her status as an at-will employee.

c. Plaintiff Received No Implied Assurances of Continued Employment

Relying on Walker v. Blue Cross of California (1992) 4 Cal.App.4th 985, plaintiff asserts that her performance evaluations constituted implied promises of continued employment. (AOB at pp. 34-35.) In Walker, the plaintiff was employed by Blue Cross for over 19 years. During that time, she received eight promotions and even more salary increases. (Id. at pp. 990-991.) Throughout her tenure, the plaintiff received satisfactory or above standard performance evaluations. In her last two evaluations, she received a 3.0 and a 2.95 on a "1" to "5" scale where it was extremely unusual for an employee to receive above a "3." (Id. at p. 991.) There was no evidence that the plaintiff in Walker had been criticized about any aspect of her performance or that her evaluations had ever indicated she fell below any performance standards. (Id. at p. 993.)

Here, the evaluations of plaintiff paint a very different picture. Plaintiff received annual written evaluations every January. She repeatedly was criticized for her ability to set priorities and organize her work, her charting, punctuality, attendance, and failure to wear her uniform. (3: JA 567-587.) Often, she fell below minimum performance standards in one or more areas. On June 7, 1990, plaintiff received a disciplinary report relating to her excessive overtime and inappropriate charting (3: JA 588); subsequently, on June 21, 1990—just days before her request for medical leave—she received written notice that she had failed to meet job standards. (3: JA 475-476, 589.)

If anything, the contrast to Walker highlights that plaintiff's evaluations did not imply a promise of continued employment. That over her five-year tenure, plaintiff managed to keep her job despite her marginal performance does not equate with an implied promise that she would only be terminated for just cause. Davis, discussed above, is the relevant analogy.

d. Plaintiff Presented No Evidence Regarding the Standards in the Industry

Like the plaintiff in Davis, plaintiff produced no evidence that "just cause" termination was the standard in her industry. (See Davis v. Consolidated Freightways, supra, 29 Cal.App.4th at p. 368.) She cannot rely on this avenue to rebut the presumption and evidence of her at-will employment.

In sum, plaintiff submitted no evidence that raises even an inference of an implied agreement to terminate only for just cause. Plaintiff failed to present any triable issue of fact rebutting the statutory presumption and undisputed evidence of at-will employment. In the absence of such an implied agreement there can be no breach of contract. Likewise, it is axiomatic that Methodist

Hospital did not breach the implied covenant of good faith and fair dealing in terminating plaintiff's employ if no implied-in-fact contract existed requiring good cause. (Camp v. Jeffer, Mangels, Butler & Marmaro, supra, 35 Cal.App.4th at p. 631; see also Waller v. Truck Insurance Exchange (1995) 11 Cal.4th 1, 35-37 [implied covenant not breached if no contractual right exists].)[6/]

B. In Any Event, The Undisputed Evidence Is That Methodist Hospital Terminated Plaintiff For Good Cause.

Even assuming an implied contract to terminate only for good cause, summary judgment was proper because Methodist Hospital terminated plaintiff for good cause. "The proper inquiry to determine good cause will consider whether the discharge was within the bounds of the employer's discretion or instead was trivial, capricious, unrelated to business needs or pretextual." (Joanou v. Coca-Cola Co. (9th Cir. 1994) 26 F.3d 96, 99-100 [applying California law].) Because plaintiff's medical leave of absence exceeded that allowed by Methodist Hospital, good cause existed for plaintiff's termination.

Plaintiff's final leave of absence expired on December 19, 1990. (3: JA 602.) The leave of absence requests plaintiff signed stated that she understood if she failed to return to work within three days following the expiration of her leave of absence, she may be terminated. (3: JA 591-602.) On December 20, 1990, plaintiff's doctor wrote that she could not return to work until January 21, 1991. (4: JA 691; 5: JA 1066.) Methodist Hospital terminated plaintiff's employment

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6/ On appeal, plaintiff does not challenge the trial court's grant of summary judgment and summary adjudication of her cause of action for fraud and deceit; accordingly, she has waived any issue as to that cause of action. (North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 28-29; 1119 Delaware v. Continental Land Title Co. (1993) 16 Cal.App.4th 992, 1004.)

effective January 1, 1991, because she had been on leave for six months, two months more than afforded by Methodist Hospital's policy. (3: JA 522, 616, 641; 5: JA 1013.) Indeed, three years later, as of April 1994, plaintiff was still unable to return to work due to her injury. (3: JA 666.)

Plaintiff's reliance on Walker v. Blue Cross of California, supra, 4 Cal.App.4th at pp. 994-995, is again misplaced. There, the court found that retroactive application of the employer's new, shortened leave policy, coupled with the employer's failure to consider additional requests for leave when it had indicated earlier it would consider extensions with proper medical authorization, demonstrated a triable issue of fact as to the existence of good cause. By contrast here, Methodist Hospital did not apply a new policy; it applied its existing four-month medical leave of absence policy. (3: JA 605.) Plaintiff's final leave of absence expired on December 19, 1990. (3: JA 602.) Methodist Hospital expressly informed plaintiff, and she understood, that her employment could be terminated if she could not return to work after her leave of absence expired. (3: JA 591-602.) Plaintiff's doctor wrote that plaintiff could not return to work until January 21, 1991 (5: JA 1066), and plaintiff did not request an additional leave of absence based on extenuating circumstances. (3: JA 524.)

Knights v. Hewlett Packard (1991) 230 Cal.App.3d 775, 780-781, is more to the point. There, the plaintiff was terminated after several leave of absence requests totaling over five months and did not respond to the employer's final notice indicating that he would be terminated if the employer did not hear from him by a specific date. Affirming a summary judgment, Knights held that the plaintiff's conduct was unacceptable and good cause existed for his termination. (Ibid.)

Similarly, here, six months of medical leave with plaintiff still unable or unwilling to return to work was enough. Methodist Hospital had good cause to terminate plaintiff's employment.[7/]

C. Plaintiff's Claim Of A Work-Related Injury Is A Red Herring. Even If Plaintiff Could Disavow Her Own Pleading, Workers' Compensation Affords The Exclusive Remedy For Claims Of Employment Termination Stemming From A Work Related Injury.

Implicitly recognizing Methodist Hospital's good cause to terminate her employment when she was unable to return to work after a generous medical leave, plaintiff attempts to establish a triable issue by arguing that her injury was work-related. (AOB at pp. 35-36.) She cannot shift her theory mid-stream, however. Having chosen to plead and rely on the theory that her injury was non-work related (see p. 33, supra), she is bound by the same. (Troche v. Daley (1990) 217 Cal.App.3d 403, 409 ["In summary judgment motions, the law allows reliance on the pleadings of

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7/ On appeal, plaintiff presents no argument that the stated ground for her termination was a pretext. In any event, she has no such claim. Below, she argued that Methodist Hospital's good cause for terminating her was a pretext for age discrimination. Her evidence, at most, was simply that Methodist Hospital had a progressively younger work force. (6: JA 1372-1373.) This evidence is insufficient to establish any inference that the reason for plaintiff's termination was a pretext. (See Selby v. Pepsico, Inc. (N.D. Cal. 1991) 784 F.Supp 750, 756, aff'd. (9th Cir. 1993) 994 F.2d 703 ["[t]he fact that subsequent hires were younger than the terminated employees merely reflects a younger available work force, and is not evidence of discriminatory intent"]; cf. Ewing v. Gill Industries, Inc. (1992) 3 Cal.App.4th 601, 614-616 [in response to the defendant's asserted business reason for plaintiff's termination, plaintiff submitted evidence he could have provided services at a lower cost than the defendant was paying, the decision to terminate him had already been made when he was given assurances of continued employment, younger employees assumed most of his job responsibilities and several managers made age-related comments to plaintiff]; Stephens v. Coldwell Banker Commercial Group (1988) 199 Cal.App.3d 1394, 1400-1402 [plaintiff produced evidence that he was replaced with an employee 26 years younger, he received outstanding performance evaluations, his supervisor made several inquiries about his retirement plans and his supervisor stated his intent to get rid of "long term non-producers"].)

one's adversary"; summary judgment for defendant granted based on allegation in plaintiff's complaint establishing date of knowledge of alleged negligence triggering the statute of limitations].)[8/]

In addition, the undisputed evidence established that her injury was non-work related. Plaintiff repeatedly requested medical leaves, understanding that such leaves were not for work related injuries. (3: JA 597-602). When afforded the opportunity to do so, she failed to change her leave status from medical to Workers' Compensation. (5: JA 1047.) She received state disability benefits for her injury (3: JA 509-511, 664-665), which are only available for non-work injuries. (Unemp. Ins. Code, § 2601 et seq.)

In any event, plaintiff is not entitled to recovery for any violation of Methodist Hospital's leave policy for work-related injuries. If her injury were work-related, Workers' Compensation would be her sole remedy. (Lab. Code, §§ 132a, 3602; Angell v. Peterson Tractor, Inc. (1994) 21 Cal.App.4th 981, 988, 997; Usher v. American Airlines, Inc. (1993) 20 Cal.App.4th 1520, 1524-1528; Denney v. Universal City Studios, Inc. (1992) 10 Cal.App.4th 1226, 1235.) Labor Code section 132a's exclusive remedy for discrimination against injured workers does not "allow a separate action whenever an employee alleges that a work injury also resulted in a breach of contract. . . . Appellant cannot avoid the exclusive remedy provision (Lab. Code, § 132a) by labeling this cause of action breach of a contract. . . . The contract cause of action is also barred

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[8/] See also Pinewood Investors v. City of Oxnard (1982) 133 Cal.App.3d 1030, 1035-1036 (defendant's estoppel argument rejected because it admitted in answer that plaintiff paid certain fees under protest); Walker v. Dorn (1966) 240 Cal.App.2d 118, 120 ("A judicial admission in a pleading (either by affirmative allegation or by failure to deny an allegation) is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of the matter which has the effect of removing it from the issues").

by the Workers' Compensation Act." (Usher v. American Airlines, Inc., supra, 20 Cal.App.4th at p. 1528.)

Thus, even if plaintiff at this late stage can disavow her own pleadings, the exclusive remedy of Workers' Compensation preempts any claim that Methodist Hospital violated any policy governing leave for work-related injury.

III.

SERVICE OF THE SUMMARY JUDGMENT MOTION WAS PROPER; IN ANY EVENT, PLAINTIFF WAIVED ANY DEFECT.

Plaintiff concludes with a spurious argument regarding service of the summary judgment motion. On Friday, August 26, 1994, 28 days prior to hearing on the summary judgment motion, Methodist Hospital served plaintiff's counsel with the summary judgment moving papers. (4: JA 897.) Plaintiff contends that the papers were not delivered to her counsel's office until after 5:00 p.m., making service untimely. (See Code Civ. Proc., § 1011 [if no one is at attorney's office, personal service may be effected by leaving papers between 9:00 a.m. and 5:00 p.m. in a conspicuous place at attorney's office].)

The trial court resolved competing factual declarations by finding that the papers were delivered to counsel's office prior to 5:00 p.m. (RT 9/1/94, p. 7.) Substantial evidence supports this finding, including a messenger's declaration that he left the papers at plaintiff's counsel's office by 4:50 p.m. (4: JA 890-903; cf. 4: JA 882-883 [plaintiff's counsel's paralegal declared only that the papers were not served at 4:50 p.m., he did not state whether he remained in the office until 5:00 p.m. in order to accept timely service].)

In addition, the court further found that plaintiff's counsel suffered no prejudice. Plaintiff's counsel conceded that she had left her office at 1:30 p.m. on the Friday in question and that she would have reviewed the summary judgment papers the following Saturday morning whether they were served before or after 5:00 p.m. on Friday. (RT 9/1/94, pp. 4-6.) Statutory provisions regarding service of process are liberally construed. (Dill v. Berquist Construction Co. (1994) 24 Cal.App.4th 1426, 1436.) "'In the last analysis the question of service should be resolved by considering each situation from a practical standpoint . . . .'" (Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal.App.4th 1387, 1392, quoting Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal.3d 773, 778 [citations omitted].) Thus, even if (contrary to the trial court's factual findings) service did not occur until slightly after 5:00 p.m., the trial court properly found timely service considering the practical standpoint that counsel, by her own admission, would have first reviewed the papers Saturday morning regardless of the precise time of service. (RT 9/1/94, pp. 5-6.) Accordingly, the trial court did not abuse its discretion in finding the motion timely.

In any event, plaintiff waived any defect in notice by opposing the motion for summary judgment on the merits, both in writing and at the hearing. As Division Seven of this Court held in Alliance Bank v. Murray (1984) 161 Cal.App.3d 1, 7-8:

> "We find that appellant's appearance at the . . . hearing and his opposition to the motion on its merits constitutes a waiver of the defective notice of motion. As the court stated in Tate v. Superior Court (1975) 45 Cal.App.3d 925, 930: 'It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. (Citations.) This rule applies even when no notice was given at all. (Citations.) Accordingly, a party who appears and contests a motion in the

court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective.' (Citations.)"

In light of the trial court's factual findings of timely service, the admission of plaintiff's counsel that the precise time of service made no difference to her review of the motion, and plaintiff's opposition to the motion on the merits, plaintiff can establish no prejudicial error. Plaintiff's overly-technical challenge to the service of the motion for summary judgment is frivolous.

CONCLUSION

For all the reasons set forth above, Methodist Hospital respectfully requests that this Court affirm the trial court's grant of summary judgment.

Dated: November 15, 1995

Respectfully submitted,

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