SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Hall of Justice 813 6th Street , Sacramento, CA 95814

Brigadier General Jeffrey W. Magram (Ret.) **Plaintiff/Petitioner(s)** **vs.** **Major General Matthew P .Beevers et al** **Defendant/Respondent(s)**	*FOR COURT USE ONLY*
	Dept: 53 **Judge:** Richard K. Sueyoshi
ORDER re: Ruling on Submitted Matter	CASE NUMBER: **24CV009096**

TENTATIVE RULING:

Defendants' demurrer to the First Amended Complaint ("1AC") of plaintiff Brigadier General Jeffrey Magram (Ret.) is ruled upon as follows.

***** If oral argument is requested, the parties must <u>at the time oral argument is requested</u> notify the clerk <u>and</u> opposing counsel of the specific issues and/or causes of action discussed below that will be addressed at the hearing. Counsel are also reminded that pursuant to local rules, only <u>limited</u> oral argument is permitted on law and motion matters. *****

The table of contents for the opposition included numerous incorrect page references.

<u>Factual Background</u>

This action arises out of plaintiff Magram's employment with defendant California Military Department ("CMD"), which spanned 14 years and ended in January 2023. This action was commenced on 1/24/2024 in Los Angeles County Superior Court and after venue was transferred to this Court, defendants filed a demurrer to the complaint. However, prior to the hearing on this demurrer, plaintiff filed the operative 1AC on 11/27/2024. The opening paragraph of the 1AC alleges as follows:

> This case is an action for Religious Discrimination, Harassment, and Wrongful Termination in violation of California Government Code §12940, and the California Fair Employment and Housing Act ("FEHA") arising out of Magram's 37-plus years of employment with the California Air Guard and United States Air Force, which includes

> 14-plus years as a full time officer on State Active Duty with the CMD. Beevers discriminated against Magram by harassing and wrongfully terminating Magram because of Magram's Jewish faith, Jewish heritage, and Magram's complaints about Beevers' anti-Semitic discrimination and harassment. Beevers' discrimination against Magram violated FEHA, California public policy and Article I, Section 7 of the California Constitution. The State of California, CMD, and Governor Newsom were aware of Beevers" anti-Semitism, Beevers" anti-Semitic campaign, and Beevers' retaliation against Magram. The State California, CMD and Governor Newsom facilitated and ratified Beevers' anti-Semitism and Beevers' anti-Semitic campaign against Magram.
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> (1AC, ¶1.)

The 1AC purports to assert eight (8) separate causes of action for discrimination and for harassment on the basis of religion; discrimination on the basis of disability/medical condition; retaliation for complaining of discrimination and harassment; failure to prevent discrimination, harassment, and retaliation; whistleblower retaliation; wrongful termination in violation of public policy; and violation of equal protection under Article I, Section 7 of the California Constitution.

Defendants CMD, Major General Matthew Beevers and Governor Newsom now demur to each cause of action in the 1AC on multiple grounds discussed below. Plaintiff Magram opposes, except with respect to the wrongful termination cause of action.

Legal Standards for Demurrer

A demurrer tests the legal sufficiency of the pleadings, raising issues of law, not fact, regarding the form or content of the opposing party's pleading. (Code of Civil Procedure §422.10, §589.) A demurrer may only challenge defects on the face of the complaint or from matters that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) However, the face of the complaint includes facts contained in exhibits attached to the complaint. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) A demurrer can be utilized where a complaint itself is incomplete or discloses some defense that would bar recovery. (*Guardian North Bay, Inc. v. Superior Court (Myers)* (2001) 94 Cal.App.4th 963, 971-972.)

In reviewing the sufficiency of a complaint against a general demurrer, courts treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. Matters which may be judicially noticed may also be considered. The complaint is to be given a reasonable interpretation, reading it as a whole and its parts in their context. (*Farmers v. Zerin* (1997) 53 CaI.App.4th 445, 451.) Consideration of extrinsic evidence or facts asserted in the memorandum supporting or opposing the demurrer is improper. (*Ion Equipment*

Corp. v. Nelson (1980) 110 Cal.App.3d 868, 881.)

A demurrer may be sustained only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal. App. 3d 764, 778.) "Plaintiff need only plead facts showing that he may be entitled to some relief…, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint." (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 696-697.) "[Courts] are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." (*Picton v. Anderson Union High School Dist*. (1996) 50 Cal.App.4th 726, 733.) Still, the plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action. (See, *e.g. Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031; *Sui v. Price* (2011) 196 Cal.App.4th 933, 938.) The allegations must be factual and specific, not vague or conclusionary. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43–44.)

A demurrer admits the truth of all material facts properly pled and the sole issue raised by a general demurrer is whether the facts pled state a valid cause of action - not whether they are true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Finally, a demurrer may only be sustained where it disposes of an entire cause of action. (See, *e.g.*, *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.)

Request for Judicial Notice

Defendants' Request for Judicial Notice of plaintiff's 6/27/2023 government claim is granted but only for those purposes appropriate for judicial notice. (See, Evid. Code §451, subd. (a); §452, sub. (b)-(d); see also, *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768 [court may take judicial notice of the existence of court documents but not to the truth of the statements contained therein]; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 145-148; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569-70.)

Discussion

I. The *Feres* Doctrine. Defendants first contend that all eight (8) causes of action alleged in the 1AC are barred by the *Feres* Doctrine which originated in *Feres v. United States* (1950) 340 U.S. 135, where it was held that suits filed against federal and state military personnel for injuries 'arising out of or occurring in the course of activity incident to service' are barred as a matter of law. (Mov. MPA, p.14:22-3.) According to defendants, the *Feres* Doctrine originally prohibited service members from suing under the Federal Tort Claims Act but has since been expanded to

bar "a wide variety of statutory and constitutional claims" brought against the military so as to prevent the judiciary from intruding on military affairs and from second-guessing military decisions and discipline. (*Id*., at p.14:36-p.15:11.) Thus, defendants point to a number of subsequent court opinions which "regularly decline to hear lawsuits involving personnel actions integrally related to the military's unique structure" and which have applied the *Feres* Doctrine to California's own military forces. (*Id*., at p.15:12-30.) Among the authorities cited in the moving papers to support the application of the *Feres* Doctrine to the case at bar is *Estes v. Monroe* (2004) 120 Cal.App.4th 1347, where the Third District Court of Appeal expressly applied the *Feres* Doctrine to a paralyzed California National Guard officer's wrongful termination claim after the state failed to accommodate his disability. (*Id*., at p.15:24-30.)

Plaintiff contends that the *Feres* Doctrine does not apply to the present litigation for multiple reasons. First, the opposition insists the injuries alleged in this case were not "incident to service" insofar as defendants' "intentional religious and ethnic discrimination against Jewish soldiers and airmen is not in furtherance of any legitimate military purpose. (Opp., p.3:16-23.) Second, the *Feres* Doctrine has evolved with subsequent decisions articulating its policy justifications, with the Ninth Circuit adopting a four-part test for determining whether an injury is "incident to service," with no single factor being dispositive and an emphasis on the "totality of the circumstances," but plaintiff emphasizes that the case at bar, unlike most existing precedent, does not involve any personal injury stemming from merely negligent conduct. (*Id*., at p.3:24-p.6:5**.)** Finally, the opposition adds that the *Feres* Doctrine is "fatally flawed and should not continue to be the law, as it actually undermines military discipline by denying service members legal remedies otherwise recognized under the law. (*Id*., at p.6:6-p.8:22.)

While the parties have cited a number of judicial opinions pertaining to the application of the *Feres* Doctrine in a variety of factual circumstances, the Court focuses on *Estes v. Monroe, supra*, because it otherwise constitutes binding precedent in this jurisdiction. In *Estes*, a California National Guard officer was paralyzed after a car accident and requested a transfer as an accommodation for his disability but instead, he was terminated without any other attempt to accommodate his disability. (*Estes*, at 1351.) The guardsman filed suit against the CMD and a military officer in Sacramento Superior Court, alleging causes of action for intentional infliction of emotional distress, breach of contract and wrongful termination, with the latter asserting "his discharge was wrongful because it violated the public policy embodied in the FEHA by failing to offer him reasonable accommodation for his disability." (*Id.*, at 1351, 1355.) The trial court sustained the defendants' demurrer to the complaint on the ground "the case was not justiciable" and the Third District Court of Appeal affirmed but based on "a deferential analysis of the pertinent statutes as required by the *Feres* doctrine." (*Id.*, at 1350.)

The Court of Appeal began by providing a history of the *Feres* doctrine, noting the following:

> The rationale of *Feres* has been used to construe a wide variety of statutory and

> constitutional claims… But the Attorney General equates the *Feres* doctrine with a wholesale grant of intramilitary immunity to the Armed Services and a corollary principle that claims by military personnel are nonjusticiable. *Feres*, however, does not rest on principles of justiciability or immunity. We reject the Attorney General's broad characterization of the *Feres* doctrine and the analytic framework he proposes to evaluate the viability of plaintiff's tort claim. [¶] *Feres* has been expanded, distinguished, explained, rationalized, and criticized for over 50 years. … Despite the ongoing and acrimonious debate over the validity of the justifications proffered by the court a half century ago, *Feres* survives. (*Costo v. United States* (9th Cir. 2001) 248 F.3d 863.) Although we will not add our voices to the cacophony, we will apply *Feres*, as we must, to the statute before us.
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> (*Estes*, 120 Cal.App.4th 1352-1353.)

However, the Third District proceeded to clarify what *Feres* actually does and does not stand for, stating in pertinent part:

> Indeed, *Feres* involves statutory construction. "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." (*Feres, supra*, 340 U.S. at 138.) … [¶] … The [*Feres*] court concluded that there was no liability of a "private individual" even remotely analogous or any "like circumstances" in that no law had ever permitted a soldier to recover for negligence. Hence, the [*Feres*] court rejected the notion that Congress intended to extend the remedies of the Tort Claims Act to servicemen "where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." (*Feres*, *supra*, 340 U.S. at 146.)
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> The dispositive issue, therefore, in *Feres* was not whether the claim was justiciable but whether the Tort Claims Act provided members of the Armed Services a tort remedy for the negligence suffered "incident to service." [¶] It is true that several federal courts have characterized the threshold question in military disputes as one of justiciability. But in most of these cases, the federal district court had dismissed the action for lack of subject matter jurisdiction and the circuit court stated that the issue involved an array of policy considerations under the general rubric of "justiciability" rather than jurisdiction. [Citations omitted.] Where, as here, there is no challenge to the court's jurisdiction, *Feres* quite simply offers a template for construing a general statute as applied to active duty members of the military.

> Nor does the *Feres* doctrine create "intramilitary" immunity. In *United States v. Stanley* (1987) 483 U.S. 669 (*Stanley*), the majority noted that the Constitution did not contain a grant of immunity to military personnel and explained "[t]here is no more reason why court-created rules of immunity (as opposed to immunity specifically prescribed in the Constitution) should be held a priori to describe the limit of those concerns here than in any other field." (*Id*. at 685.) In *Feres, Chappell v. Wallace* (1983) 462 U.S. 296 (*Chappell*), and *Stanley*, the Supreme Court exercised deference and restraint with regard to military matters, but it did not thereby immunize the military from liability. Although, as the Attorney General suggests, some federal courts have referred to a "doctrine of intramilitary immunity" (see, *e.g., Hodge v. Dalton* (9th Cir. 1997) 107 F.3d 705, 710 (*Hodge*)), we will follow the Supreme Court's admonition in *Stanley* to subscribe to the more analytically sound premise of *Feres*.
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> (*Estes*, at 120 Cal.App.4th 1353-1355 (underline added for emphasis).)

The Court of Appeal then proceeded to analyze the guardsman's claim for wrongful termination in violation of the FEHA under the *Feres* Doctrine and after considering analogous federal anti-discrimination statutes and their application to the military, concluded the guardsman's claim was barred as a matter of law. (*Id*., at 1355-1360.)

In light of the foregoing, this Court is not persuaded that the *Feres* doctrine in and of itself constitutes a categorical bar to the present suit and thus, defendants' demurrer to all causes of action now alleged in the 1AC based solely on the *Feres* doctrine is overruled. In particular, *Estes* confirms that *Feres* merely establishes "a template for construing a general statute as applied to active duty members of the military" and the *Feres* doctrine does not create a form of "intramilitary" immunity notwithstanding various examples of judicial "deference and restraint with regard to military matters." (*Estes*, at 1354-1355.) Moreover, the Third District Court of Appeal clarified that the *Feres* Doctrine must be applied consistent with the limitations discussed by the U.S. Supreme Court in *Stanley* (*Id*., at 1355), something which appears to be in direct conflict with the broad interpretation suggested by the moving papers. Thus, while there can be no dispute that the termination of the paralyzed guardsman in *Estes* necessarily implicated the military's judgment regarding who is ready and able to serve, the conduct alleged in the present case (and presumed to be true for purposes of this demurrer) was primarily motivated by a particular individual's personal distaste for a specific religion despite the absence of a logical or demonstrable correlation to plaintiff's ability to fulfill his military duties. As such, the allegations in the case at bar do not appear to have any relevant connection with the military structure and decision-making process which the *Feres* Doctrine was meant to safeguard. (See, *e.g*., *Johnson v. United States* (9th Cir. 1983) 704 F.2d 1431, 1438.) Put another way, this Court cannot accept defendants' proposition that the antisemitic behavior attributed to defendant Beevers is fairly characterized as being "incident to service," probably the single most important component for determining whether the *Feres* Doctrine does or does not apply to a particular set of facts.

Finally, even though *Estes* did ultimately reject the claim for wrongful termination in violation of the FEHA, the Court must still reject defendants' claim that the *Feres* Doctrine is a complete bar to all eight causes of action alleged in the 1AC. In *DiRaffael v. California Army National Guard* (2019) 35 Cal.App.5th 692, the Second District Court of Appeal held that the *Feres* Doctrine does not bar a suit seeking reinstatement to the California Army National Guard based on a facial constitutional challenge to the application of a federal military regulation. There, the defendants argued the *Feres* doctrine precluded judicial review of the plaintiff's separation from the National Guard insofar as the doctrine had been expanded to bar "a wide variety of statutory and constitutional claims" brought by servicemembers against the military, largely on the ground that "the judiciary ought not to intrude in military affairs" and second-guess military decisions. (*DiRaffael*, at 705 [citations omitted].) However, while federal courts have applied the *Feres* doctrine to bar suits by servicemembers seeking reinstatement, these courts have also recognized that the *Feres* doctrine does not bar facial constitutional challenges including those based on military regulations or statutes. (*Id*., at 705-706 [citations omitted].) Additionally, a California Court of Appeal considered a state constitutional challenge to enforcement of the federal "Don't Ask, Don't Tell" policy regarding the sexual orientation of servicemembers. (*Id*., at 706 [citation omitted].) In the end, the Second District cited another court's explanation:

> There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which *Feres* [and progeny] are premised."
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> (*Id*., at 706 [citation omitted].)

Based on *DiRaffael* which appears to remain good law, the *Feres* doctrine does not independently preclude plaintiff from making a constitutional challenge, such as under the equal protection clause referenced in the final cause of action (provided he can otherwise allege facts sufficient for this purpose).

For all these reasons, defendants' demurrer to all eight causes of action based solely on the *Feres* doctrine shall be overruled.

II. All FEHA Claims. According to the moving papers, each of plaintiff's causes of action premised on the FEHA are barred because the FEHA's statutory remedies "do not apply to state active-duty service members," (Mov. MPA, p.17:6-8.) Relying primarily on the above-cited *Estes v. Monroe* decision by the Third District Court of Appeal, defendants contend that FEHA remedies are not available to state active-duty service members "when the challenged personnel action is incident to or arises from military service" because of the military's need for

"unhesitating and decisive action" and the absence of any clear legislative intent to extend FEHA remedies to such service members, who are already subject to a comprehensive regulatory scheme. (*Id*., at p.17:19-p.18:18.)

In opposition, plaintiff insists *Estes* is "materially distinguishable" in that it involved a National Guard officer's discharge as a result of a significant physical disability following a car accident without any attempt to accommodate his disability, whereas the allegations in the case at bar are that plaintiff suffered discrimination due to his religion and ethnicity which does not impact military service. (Opp., p.8:23-p.9:10.)

As discussed above, *Estes* arose from a suit filed by a California National Guard officer who was paralyzed after a car accident and was later terminated without any attempt to accommodate his disability, as he had requested. (*Estes*, at 1351.) The guardsman filed sued for intentional infliction of emotional distress, breach of contract and wrongful termination. (*Id.*) His complaint did not "attempt to state a cause of action under the [FEHA]" but instead merely alleged "his discharge was wrongful because it violated the public policy embodied in the FEHA by failing to offer him reasonable accommodation for his disability." (*Id.*, at 1355.) The trial court sustained the defendants' demurrer to the complaint on the ground "the case was not justiciable" but the Third District Court of Appeal affirmed based only on "a deferential analysis of the pertinent statutes as required by the *Feres* doctrine." (*Id.*, at 1350.)

After discussing the *Feres* Doctrine and its history, the Third District acknowledged the FEHA provides a broad definition of "employer" and the absence of an express exemption for military personnel, something which the FEHA provides for religious and nonprofit organizations. (*Estes*, at 1358-1359.) Nevertheless, the Court of Appeal was concerned about "creat[ing] a remedy for soldiers, including National Guard members, that the Legislature did not intend to provide" and declined to do so in the absence of "clear evidence that the Legislature specifically intended to extend FEHA protection to National Guard members on state active duty, particularly when allowing such claims would be at odds with the federal decisions construing analogous antidiscrimination legislation." (*Id.*, at 1359-1360.) The Third District concluded with the following:

> We hold, therefore, that the Legislature did not express the requisite intent to extend the FEHA to cover claims by those on active duty when the challenged personnel actions are incident to service. Since the California National Guard terminated plaintiff based on his physical disability without providing reasonable accommodation, the decision was clearly "incident to service" and directly affected the peculiar and special relationship between soldiers and their superiors. … Hence, in the absence of express statutory language extending the FEHA to military personnel, we must reject plaintiff's claim as a matter of law.

(*Id.*, at 1360 [underline added for emphasis].)

This Court finds defendants' reliance on *Estes* misplaced insofar as the above-cited holding is quite narrow and clearly based on specific facts of that case, which facts bear little resemblance to those of the case at bar. First, the plaintiff in *Estes* was paralyzed and this would undoubtedly impact his ability to fulfill his responsibilities as a guardsman, leaving little room for a court to conclude the decision to terminate his employment was "clearly 'incident to service'" and have a direct bearing on "the peculiar and special relationship between soldiers and their superiors." In stark contrast, the 1AC in the case at bar alleges *inter alia* that plaintiff was harassed, discriminated against and ultimately terminated not due to any physical impediment to performing his military work but rather primarily due to his Jewish religion/ancestry and/or complaining about mistreatment motivated by his religion/ancestry. Unlike the substantial physical injuries in *Estes*, there can be no genuine dispute that plaintiff's religion/ancestry and the surrounding facts as currently alleged in the complaint would have no logical or reasonable bearing on his ability to fulfill his military assignments and thus, this Court is not persuaded that a decision to terminate him on account of his religion/ancestry can be properly characterized as one which was "clearly 'incident to service'" and/or could have a meaningful impact on "the peculiar and special relationship between soldiers and their superiors," as was the case in *Estes*.

Second, while the 1AC does also include a claim for discrimination based on plaintiff's physical disability/medical condition, it likewise is dramatically different from the claim advanced in *Estes*. In the 1AC, plaintiff generally alleges that defendant Beevers attempted to interfere with and disrupt the former's effort to secure a disability retirement due to his being Jewish. (1AC, ¶¶19-20.) Since plaintiff's religion/faith has no reasonable correlation to his ability to fulfill his military duties, any action taken against him based on his religion/faith is not fairly construed as being "clearly 'incident to service'" and/or having a direct effect on "the peculiar and special relationship between soldiers and their superiors." Thus, this Court is not persuaded that *Estes* necessarily applies to the case at bar.

Third, the holding of *Estes* is arguably limited to only those claims by active-duty service members which seek to "challenge[] personnel actions" and as such, *Estes* would appear to pose no specific bar to claims for harassment insofar as California law is clear that harassment under the FEHA does not involve conduct which is constitutes genuine management or personnel decisions but is instead limited to conduct which is not essential to one's job and is "presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869-870.)

For these reasons, this Court is unable to conclude that all of plaintiff's FEHA-based causes of action are barred as a matter of law pursuant to the Third District Court of Appeal's decision in *Estes* and thus, the demurrer on this ground is overruled.

III. Whistleblower Retaliation. Defendants argue that plaintiff's fifth cause of action for whistleblower retaliation under Labor Code §1102.5 and Military & Veterans Code §56 is barred. More specifically, defendants maintain that for the reasons articulated in *Estes*, "[i]t would be non-sensical to conclude that FEHA's retaliation provisions do not apply to the CMD and its service members, but that the Labor Code whistleblower retaliation provisions do." (Mov. MPA, p.18:19-30.) Defendants also insist that plaintiff's reliance on Military & Veterans Code §56 likewise falls short since this statute does not provide a private right of action or authorize any judicial remedy. (*Id*., at p.18:30-p.19:5.)

Although inclined to agree Military & Veterans Code §56 does not authorize a private right of action which can be adjudicated here, the Court need not decide this issue since it has already concluded that *Estes* does not necessarily preclude plaintiff from prosecuting any of his FEHA-based claims. Therefore, coupled with the fact that defendants have proffered no other authority for the proposition that Labor Code §1102.5's provisions do not apply to the CMD and its service members, the demurrer to the fifth cause of action for whistleblower retaliation is overruled.

IV. Wrongful Termination Claim. According to defendants, plaintiff's seventh cause of action for wrongful termination in violation of public policy is a common law claim which cannot be asserted against a public entity like CMD in light of the express language of Government Code §815, stating that all public entities are immune from liability unless a statute provides otherwise. (Mov. MPA, p.19:6-p.20:27.)

The demurrer on this ground shall be sustained because the opposition expressly concedes plaintiff's "Tamney [*sic*] Claim" is barred. (Opp., p.10:2.)

V. Harassment Claim. The moving papers insist that plaintiff's second cause of action for harassment under the FEHA fails against defendant Beevers because Military & Veterans Code §392 immunizes "members of the militia for acts done in the performance of their duties" especially when Paragraph 5 of the 1AC specifically alleges defendant Beevers' actions were performed in his "official capacity." (Mov. MPA, p.20:28-34.) In short, defendants argue that §392 effectively precludes liability against defendant Beevers on a harassment theory for making "necessary personnel management" decisions like initiating administrative investigations, taking corrective or disciplinary action, assigning work and terminating individuals. (*Id*., at p.20:34-p.21:8.)

The opposition counters that Military & Veterans Code §392 does not afford immunity for defendant Beevers' anti-Semitic behavior because it was outside the scope of his military duties

and does not constitute "necessary personnel management" decisions in furtherance of any legitimate military purpose. (Opp., p.10:18-p.12:7.)

The demurrer to the second cause of action for harassment shall be overruled. First, contrary to defendants' characterization, Paragraph 5 of the 1AC does not actually assert that any or all of defendant Beevers' actions were performed in his "official capacity." Instead, this paragraph merely states "Defendant Beevers was, at all relevant times alleged herein, a supervisory employee of defendant CMD and California, and is subject to suit under the provisions of FEHA, Government Code Section 12940(I)."

Second, while it may be true that "necessary personnel decisions" (*e.g.*, hiring and firing, promotion or demotion, project assignments, performance evaluations, *etc*.) do not come within the meaning of harassment under the FEHA (see, *e.g., Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869-870), the second cause of action is not fairly construed as being premised exclusively on such "necessary personnel decisions" made by defendant Beevers. In particular, Paragraph 10 of the 1AC expressly alleges that defendant Beevers had "over the past few years…displayed a pattern of antisemitism and bigotry that created a hostile and toxic work" by making "multiple bigoted and disparaging statements to Magram and to other officers about Jewish military personnel," thereafter providing some examples of the remarks attributed to defendant Beevers. The allegations of this paragraph were effectively 'incorporated by reference' into the harassment cause of action. Since it is well-established that harassment actionable under the FEHA consists of conduct which is not necessary to one's job performance and is "presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives" (*Id.,* at 869 [citing *Reno v. Baird* (1998) 18 Cal.4th 640, 646]), the Court is not persuaded that Military & Veterans Code §392 constitutes a complete bar to a claim against defendant Beevers for harassment especially when California law indicates even a single incident of harassment may be sufficient to establish liability. (See, *e.g*., *Carranza v. City of Los Angeles* (2025) 111 Cal.App.5th 388, 402-403 [citing *inter alia* Gov. Code §12923].)

Finally, while the second cause of action appears to include allegations which are not relevant to a claim for harassment under the FEHA and instead pertain to the separate and distinct claims of discrimination and/or harassment (both of which require some "adverse employment action" that materially affects the terms, conditions, or privileges of one's employment (see, *e.g*., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035-1036; 1 CACI 2500, 2505, 2509), this alone does not render the harassment cause of action subject to demurrer. After all, a demurrer may only be sustained where it disposes of an entire cause of action. (See, *e.g.*, *Fremont Indemnity Co., supra,* 148 Cal.App.4th at 119.)

For these reasons, the demurrer to the second cause of action based on Military & Veterans Code §392 is overruled.

VI. Equal Protection Claim. According to defendants, plaintiff's final cause of action for violation of the California Constitution's equal protection clause in Article I, Section 7 is subject to demurrer on several independent grounds including (1) personal injury damages are not available for a violation of this provision pursuant to *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 525 ; (2) this cause of action was not alleged in the original complaint and was improperly added to the 1AC; (3) plaintiff failed to timely present a government claim prior to bringing this cause of action; and (4) this plaintiff's final cause of action is fatally uncertain and fails to plead sufficient facts. (Mov. MPA, p.21:9-p.24:5.)

The opposition contends this equal protection claim survives demurrer because (1) plaintiff seeks only equitable remedies based on defendants' discrimination against a class of employees based on their religion and/or ethnicity, thereby rendering *Gates* inapplicable and obviating the need to present a government claim; (2) even if a government claim were required, this cause of action is premised on the same facts set forth in the government claim which plaintiff presented on 6/27/2023; (3) this cause of action was properly included in the 1AC because it "relates back" to the original complaint insofar as it arises from the same set of facts and relates to the same injuries stemming from the same instrumentality; and (4) this cause of action pleads sufficient facts and is not uncertain. (Opp., p.12:8-p.15:26.)

In *Gates v. Superior Court*, the Second District Court of Appeal determined that the plaintiffs there could not sue for personal injury damages under Article I, Section 7 of the California Constitution for a violation of their equal protection rights. (*Gates, supra,* 32 Cal.4th at 516.) The High Court explained its conclusion that there is no right to compensation under this constitutional provision was founded upon on existing California precedent (*Id*., at 524-525) and was subsequently cited with approval by the California Supreme Court in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328-329.

Although the opposition insists the above-cited authorities are inapplicable to plaintiff's final cause of action since it is based on defendants' discrimination against an entire class of employees based on their religion and/or ethnicity and actually seeks only equitable relief, this is not an accurate characterization of the actual allegations in the 1AC. The eighth cause of action specifically asserts in Paragraphs 106 and 107 that "Defendants…intentionally discriminated against Magram on the basis of his Jewish faith, Jewish heritage, and [his] complaints about Beevers' anti-Semitic discrimination and harassment…and/or creating a hostile work environment…on the basis of Magram's Jewish faith and heritage…" and such conduct "was not justified by any compelling government interest," while Paragraph 108 then alleges the following:

108. As a result of Defendant's unlawful discrimination, Magram has suffered and

> continues to suffer substantial harm, including but not limited to lost wages, lost benefits, damage to reputation, and emotional distress.

Based on these express allegations, this Court rejects the opposition's contention that this cause of action seeks only equitable relief on behalf of a class of employees based on their religion and/or ethnicity and instead, by its own terms, actually seeks compensatory damages for personal injuries allegedly suffered by plaintiff as a result of the claimed discrimination. However, plaintiff's claim for monetary damages stemming from not only the wages and benefits he allegedly lost but also other personal injuries attributed to the discrimination in violation of the equal protection clause is as a matter of law barred by the above-cited decisions in *Gates* and *Katzberg*.

While it may be true that the 1AC's concluding Prayer for Relief does include a request for injunctive relief (1AC, p.23:19-p.24:11; p.24:14-15), none of this injunctive relief is directly or expressly tied to plaintiff's equal protection claim. Indeed, the various forms of injunctive relief specified in the Prayer for Relief have no explicit or apparent correlation to the equal protection cause of action but regardless, plaintiff himself would not appear to be entitled to any injunctive relief based on the equal protection clause since he is no longer employed by defendant CMD, does not appear to seek reinstatement, and as such, is not likely to experience any discrimination in violation of the equal protection clause. Similarly, although the Prayer for Relief does also seek a declaration that plaintiff's rights to equal protection were violated (Id., at p.24:12-13), such relief is not included with the final cause of action itself and the sole relief actually specified in body of the final cause of action pertains to economic and general damages plaintiff attributes to the alleged violation of the equal protection clause. Accordingly, based on the language of *Gates* and *Katzberg*, the demurrer to the eighth cause of action is sustained.

The Court also finds the eighth cause of action to be vulnerable to demurrer based on its failure plead sufficient facts. According to the California Supreme Court, "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*People v. Morales* (2016) 63 Cal.4th 399, 408 [*italics* in original]; see also, *In re C.B.* (2018) 6 Cal.5th 118, 134.) However, the 1AC's final cause of action does not by its own terms identify any particular classification adopted by the state which purports to affect two or more similarly situated groups in an unequal manner but instead focuses solely on the alleged treatment of plaintiff himself on account of his religion or faith. As noted above, the eighth cause of action expressly states that "Defendants…intentionally discriminated against Magram on the basis of his Jewish faith, Jewish heritage, and [his] complaints about Beevers' anti-Semitic discrimination and harassment…and/or creating a hostile work environment…on the basis of Magram's Jewish faith and heritage…" (1AC, ¶106.) Contrary to the opposition's characterization, this cause of action does not contend that defendants adopted a policy or practice which treated all employees of

Jewish faith and/or heritage differently than any other class of employees but rather is focused solely on defendants' alleged discrimination against plaintiff himself, with no mention of any similarly situated individuals being treated differently. Consequently, in light of the above-cited Supreme Court precedent, defendants' demurrer based on the failure plead facts sufficient to establish a violation of the equal protection clause is sustained as well.

In light of the foregoing, the Court need not address any of the remaining arguments advanced by the parties relative to the equal protection cause of action.

Disposition

For the reasons explained above, defendants' demurrer to the 1AC is OVERRULED except as to the seventh cause of action for wrongful termination and the eighth cause of action for violation of the equal protection clause, the demurrer to which is SUSTAINED.

Where this demurrer has been sustained, leave to amend is GRANTED as this is the first challenge to plaintiff's pleading on which the Court has had opportunity to rule. An amended complaint may be filed and served no later than 10/9/2025. **Although not required by Court rule or statute, a copy of this order when the amended complaint is presented for filing.**

Defendants to respond within 30 days if the amended complaint is personally served, 35 days if served by mail.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

The Court, having taken the matter under submission on 09/25/2025, now rules as follows:

SUBMITTED MATTER RULING:

The Court has considered the oral arguments of the parties. Defendants requested an appearance and argued that the Court's tentative ruling is incorrect insofar as it overrules Defendants' demurrer to Plaintiff's causes of action (other than the seventh and eighth causes of action for which the tentative ruling sustained the demurrer). Defendants' principal argument is that in *Estes v. Monroe* (2004) 120 Cal.App.4th 1347, the Third District Court of Appeal broadly held that the *Feres* Doctrine precludes any and all claims based upon FEHA (or Labor Code section

1102.5) arising from any personnel action taken against active duty military personnel. More specifically, Defendants argued that every military personnel action against active duty personnel is by definition, "incident to service," such that the relevant inquiry on Defendants' demurrer as to the *Feres* Doctrine's application is limited to the question of whether Plaintiff's cause of action arises from a military personnel action and that no examination of factual allegations surrounding the personnel action at issue is proper or allowed. Defendants added that the Third District Court of Appeal held that termination of military personnel is, as a matter of law, "incident to service."

The Court has reviewed this matter further and for the reasons stated in its tentative ruling, the Court is unable to agree with Defendants that the Third District Court of Appeals' holding in *Estes* is as broad as Defendants argue. The Court of Appeal did not, as Defendants suggest, pronounce a blanket rule that every termination of military personnel on active duty is as a matter of law, "incident to service," such that the *Feres* Doctrine bars any cause of action arising therefrom under FEHA or otherwise. While the Court of Appeal discussed the *Feres* Doctrine's history in relation to federal statutes, and discussed the intent of the Legislature under FEHA, the Court of Appeals' ultimate holding in *Estes* was more narrow as this Court described in its tentative ruling. Rather than simply holding that the plaintiff's wrongful termination claim arose from a military personnel decision and thus, it is "incident to service," the Court of Appeal held, "[s]ince the California National Guard terminated plaintiff based upon his physical disability without providing reasonable accommodation, the decision was clearly 'incident to service' and directly affected the peculiar and special relationship between soldiers and their superiors." (*Estes, supra,* 120 Cal.App.4th at 1360 [emphasis added].) Contrary to Defendants' argument, instead of suggesting that it was irrelevant whether the termination was "based upon his physical disability without providing reasonable accommodation," the Court of Appeal specifically referenced such factual context to support its finding that the challenged termination was, in fact, "incident to service." This specific holding leaves open the question of whether a termination based upon different facts may or may not be "incident to service." While Defendants argued that this portion of the decision in *Estes* was merely "additional" and unnecessary to its prior blanket ruling that no military personnel actions against active duty personnel under any factual circumstances may be challenged under FEHA, this Court cannot agree that the Court of Appeal's statement is superfluous (or that it is erroneous to construe the statement as indicating that the factual circumstances of the personnel action are relevant to the analysis) especially where the statement is characterized as constituting the Court of Appeal's actual holding. While this statement by the Court of Appeal is enough to imply the relevance of the basis for termination to the analysis of whether a personnel action is "incident to service," the court later and consistently stated, "[t]he relevant inquiry under *Feres* and its progeny is simply whether the challenged personnel action is incident to military service." (*Id.* at 1362 [emphasis added].) Again, this is not a statement that every personnel action by the military against active duty personnel is, per se, "incident to military service," or that every termination of active duty military personnel is "incident to service." This Court finds that these statements do not support Defendants' contention that the relevant inquiry under *Feres* is simply whether the challenged action is a military personnel action against active duty personnel.

(Continued on next page.)

For the reasons stated in the Court's tentative ruling in addition to the comments above, the Court AFFIRMS its tentative ruling with the modification that where the demurrer was otherwise sustained, leave to amend is granted for Plaintiff to file an amended complaint no later than **November 26, 2025**. Defendants may respond according to the Code of Civil Procedure.

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc. §1019.5; CRC Rule 3.1312.)

Certificate of Mailing is attached.

Δατεδ: 10/31/2025

Richard K. Sueyoshi, Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Gordon D. Schaber Superior Court 720 9th Street, Sacramento, CA 95814	
PLAINTIFF/PETITIONER: Brigadier General Jeffrey W. Magram (Ret.)	
DEFENDANT/RESPONDENT: Major General Matthew P .Beevers et al	
CERTIFICATE OF MAILING	CASE NUMBER: 24CV009096

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Order re: Ruling on Submitted Matter upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Sacramento, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Joseph William Singleton
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Dated: 10/31/2025

By: */s/ P. Lopez*
P. Lopez, Deputy Clerk