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8 Attorney for Plaintiff
9 JOELLEN BURKE

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN JOAQUIN

12 JOELLEN BURKE,

13 Plaintiff,

14 v.

15 KAISER PERMANENTE, dba KAISER
16 PERMANENTE MEDICAL GROUP
17 INC., KENNETH LEE, and DOES 1
18 through 50, inclusive,

19 Defendants

No.

39-2013-00303681-CU-WT-STK

COMPLAINT FOR DAMAGES

1. EMPLOYMENT DISCRIMINATION BASED
ON MEDICAL CONDITION - State;
2. WRONGFUL TERMINATION IN
VIOLATION OF PUBLIC POLICY;
3. INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS;
4. NEGLIGENT SUPERVISION

Plaintiff, JOELLEN BURKE, alleges:

GENERAL ALLEGATIONS

1. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendants DOES 1 through 50, inclusive, are unknown to plaintiff, who therefore sues said Defendants by such fictitious names pursuant to Code of Civil Procedure §474. Plaintiff is informed and believes, and thereupon alleges, that each Defendant sued under such fictitious names is in some manner responsible for the wrongs and damages as alleged below, and in so acting was functioning as the agent, servant, and employee of the Defendants, and in doing

1 the actions mentioned below was acting within the course and scope of his or her authority as
2 such agent, servant and employee with the permission and consent of the Defendants. Plaintiff
3 will seek leave of this court to amend this complaint and any subsequent pleadings, to reveal said
4 Defendants true names and capacities, once the same have been ascertained.

5
6 2. Plaintiff is informed and believes, and thereupon alleges, that at all times
7 mentioned herein, Defendants, and each of them, were the agents, servants, and employees of
8 their Co- Defendants, and each of them, in doing the things hereinafter mentioned, were acting
9 within the course and scope of their authority as such agents, servants, and employees, and with
10 the permission of their Co-Defendants.

11 3. Plaintiff JOELLEN BURKE (hereafter BURKE) is a competent adult individual
12 who at all times relevant herein was a resident of the County of Stanislaus, in the State of
13 California.

14
15 4. Plaintiff is informed and believes, and thereupon alleges, that, at all times
16 mentioned herein, Defendant KAISER PERMANENTE, dba KAISER PERMANENTE
17 MEDICAL GROUP, INC., (hereafter KAISER), and DOES 1 through 5, is, and at all times
18 herein mentioned was, duly organized and existing under the laws of the State of California, and
19 authorized to transact business in California, registered as such with the California Secretary of
20 State, Entity Number 1015108.

21
22 5. Plaintiff is informed and believes, and thereupon alleges, that the individually
23 named Defendant, KENNETH LEE (hereafter LEE), is and was at all times mentioned herein, a
24 competent adult individual who resided in and/or committed the tortious acts complained of
25 herein in the County of San Joaquin, State of California.

26 6. Jurisdiction and venue are proper in this court pursuant to California Government
27 Code §12965(b) in that the unlawful employment practices alleged herein occurred in Stanislaus
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1 County, records relevant to said practices are maintained in San Joaquin County and/or San
2 Joaquin County is the place in which Plaintiff would have worked but for said practices. Venue
3 is further appropriate in this court in that the acts, practices, omissions and damages
4 predominately occurred in San Joaquin County. Plaintiff is informed and believes, and thereupon
5 alleges, that at all times herein mentioned, Defendant KAISER, and any successor or other
6 responsible entities to which the assets and liabilities of Defendant KAISER may accede, have
7 such continuous and systematic contacts, and have intentionally availed itself of the rights and
8 protections of the forum state, such that any and all entity Defendants named herein are subject to
9 the general and specific jurisdiction of the forum state.
10

11 7. Plaintiff is informed and believes and thereupon alleges that all entity Defendants,
12 at all times mentioned herein, employed more than five employees and were actively engaged or
13 involved in the interstate commerce of the United States.
14

15 8. Whenever in this complaint reference is made to "Defendants, and each of them,"
16 such allegation shall be deemed to mean the acts of Defendants or DOES acting individually,
17 jointly and/or severally.
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19 9. Plaintiff is informed and believes, and thereupon alleges, that at all times herein
20 mentioned, each of the Defendants was the agent, servant and employee, co-venturer and co-
21 conspirator of each of the remaining Defendants, and was at all times herein mentioned, acting
22 within the course, scope, purpose, consent, knowledge, ratification, and authorization of such
23 agency, employment, joint venture, and conspiracy.

24 10. On or about May 28, 2000, Plaintiff was hired by Defendant KAISER as a
25 Pharmacy Clerk/Cashier, at its Stockton, California facility.

26 11. At all times pertinent herein, Plaintiff was a member of an approved collective
27 bargaining unit, SEIU United Healthcare Workers -West and Kaiser Permanente, and as such, the
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1 terms and conditions of Plaintiff's employment were subject to a Collective Bargaining
2 Agreement, (hereafter CBA) which, among other things, prohibited termination at will and which
3 required good and just cause for termination, and which also required progressive and
4 proportional discipline such that minor disciplinary infractions, including tardiness, would not
5 result in termination, but rather coaching and other progressively severe but proportional
6 measures.

7
8 12. Plaintiff is informed and believes, and thereupon alleges, that tardies of less than
9 ten (10) minutes were common in her department, did not constitute grounds for discipline under
10 the CBA, and were often overlooked or ignored with respect to other employees. Plaintiff is
11 further informed and believes, and thereupon alleges, that Defendant KAISER, prohibited
12 employees from clocking in earlier than their scheduled start times to avoid paying overtime and
13 required employees to clock in upon arrival.

14
15 13. On or about August 3, 2011, Plaintiff became ill with the flu and, supported by a
16 valid doctor's note, took sick leave until August 5, 2011.

17 14. On or about September 19, 2011, through no fault of her own, Plaintiff was rear-
18 ended by another motor vehicle at high speed while commuting to work and sustained serious
19 bodily injuries. Plaintiff immediately advised Defendant KAISER of the accident and her
20 inability to work and timely supplied a valid doctor's note excusing her from work due to a
21 serious medical condition. After initially denying her request, Defendant KAISER subsequently
22 approved FMLA leave for Plaintiff from September 19, 2011 to September 23, 2011.

23
24 15. On or about October 17, 2011, Plaintiff is informed and believes, and thereupon
25 alleges, that Defendant LEE, called Plaintiff into the office and advised Plaintiff that, due to her
26 recent absences, she would be terminated unless she agreed to resign from her full-time, benefited
27 position and except a demotion to a non-benefitted, on-call position.
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1 16. On or about November 2, 2011, after Plaintiff declined to accept the demotion,
2 Defendant terminated Plaintiff due to "attendance."

3 17. Thereafter, Plaintiff is informed and believes, and thereupon alleges that
4 Defendant KAISER contested Plaintiff's claim for unemployment benefits by asserting her
5 attendance constituted serious misconduct; after a due process hearing before the unemployment
6 agency, it was adjudicated that Plaintiff was not guilty of serious or willful misconduct.

7 18. Thereafter, Plaintiff is informed and believes, and thereupon alleges, that the
8 Union grieved Defendant's termination decision, but that this grievance either remains
9 unresolved, has been abandoned, or has not been submitted to or decided by arbitration, such that
10 Plaintiff's termination remains intact.

11 19. Plaintiff is informed and believes, and thereupon alleges, that Defendant KAISER
12 discriminated, retaliated and harassed Plaintiff for her serious medical conditions and for taking
13 legally protected sick leave in violation of the Fair Employment and Housing Act, The California
14 Family Rights Act, and California Common Law, by terminating Plaintiff nine (9) days after her
15 return to work.

16 20. Plaintiff is informed and believes, and thereupon alleges, that Defendant KAISER
17 purported reason for termination, i.e., attendance, was in fact a pretext to conceal its true motive
18 of discrimination, retaliation and harassment of Plaintiff for exercising her legally protected leave
19 rights. Plaintiff is informed and believes, and thereupon alleges, that prior to her two sick leaves
20 immediately preceding her termination, Defendant KAISER had no plan, nor made no attempt, to
21 terminate Plaintiff and, moreover, could not have legitimately done so pursuant to the CBA.

22 21. Accordingly, Plaintiff contacted the California Department of Fair Employment
23 and Housing regarding Defendants, and each of them, and timely filed charges and requested that
24 a right to sue letter be issued. In accordance with plaintiff's request, the Department of Fair
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1 Employment and Housing has issued plaintiff the right to sue, a true and correct copy of which is
2 attached hereto, and incorporated herein by reference as Exhibit "A". Accordingly, plaintiff has
3 exhausted her administrative remedies as required by law.

4
5 **FIRST CAUSE OF ACTION**
6 **Employment Discrimination Based on**
7 **Medical Condition - State**

8 22. Plaintiff repeats and re-alleges by reference each allegation contained in
9 paragraphs 1 through 21 of the General Allegations, and incorporates the same herein as though
10 fully set forth.

11 23. Defendants, and each of them, through its agents or supervisors, including
12 Defendant LEE and DOES, engaged in a pattern or practice of unlawful medical discrimination
13 by subjecting plaintiff to unwelcome medical condition discrimination, retaliation and
14 harassment, including a hostile work environment, in violation of California Government Code
15 §2940 et seq., culminating in Plaintiff's wrongful termination.

16 24. Defendant LEE is sued individually for harassment and retaliation only and not for
17 discrimination.

18 25. The above-described unwelcome medical condition discrimination, retaliation and
19 harassment created an intimidating, oppressive, hostile and offensive work environment which
20 interfered with Plaintiff's emotional and physical well-being. Defendants, and each of them,
21 engaged in the above-described actions with the intent of harassing Plaintiff. Defendants, and
22 each of them, would not have acted in such a manner but for Plaintiff's serious medical condition.
23 Such discrimination, retaliation and harassment was in violation of the Government Code
24 §12940, et seq., The California Family Rights Act and the public policies embodied therein, and
25 has resulted in damage and injury to Plaintiff as alleged herein.
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1 26. As a direct, foreseeable, and proximate result of the hostile workplace and
2 medical condition discrimination, retaliation and harassment alleged herein, Plaintiff has lost
3 income, employment, and career opportunities, and has suffered other economic loss, in such
4 amounts according to proof.

5 27. As a direct, foreseeable, and proximate result of the medical condition
6 discrimination, retaliation, harassment and hostile workplace alleged herein, Plaintiff has
7 suffered and continues to suffer humiliation, emotional distress, and mental and physical pain and
8 anguish, all to her damage in a sum in excess of the jurisdictional limits of this court over and
9 above \$25,000.00.

10 28. Plaintiff has incurred and continues to incur legal expenses and attorney fees.
11 Plaintiff is presently unaware of the precise amount of these expenses and fees, and prays leave of
12 court to amend this complaint when the amounts are more fully known.

13 29. As a result of the hostile and offensive work environment perpetrated by
14 Defendants, and each of them, and maintained by Defendants, and each of them, including
15 Defendants' failure to protect Plaintiff from further harassment, Plaintiff has suffered severe
16 emotional distress. Nevertheless, as described in paragraphs 1 through 21, Defendants retaliated
17 against and terminated Plaintiff's employment because of her leaves and medical condition
18 in violation of Cal. Gov't. Code § 12940, et seq.

19 30. Defendants, and each of them, also violated California Government Code §12940,
20 et seq., by failing to adequately supervise, control, discipline, and/or otherwise penalize the
21 conduct, acts, and failures to act of the other Defendants as described in paragraphs 1 through 21.

22 31. Defendants, and each of them, failed to comply with their statutory duty to take
23 all reasonable and necessary steps to eliminate discrimination and harassment from the
24 workplace and to prevent it from occurring in the future. Cal. Govt. §12940, et seq.

1 32. Plaintiff is informed and believes, and based thereon alleges, that in addition to
2 the practices enumerated above, Defendants, and each of them, have engaged in other
3 discriminatory practices against her and other employees which are not fully known. Plaintiff
4 prays leave of court to amend this complaint when said practices become known.

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6 33. Plaintiff is informed and believes, and thereupon alleges, that the outrageous
7 conduct of Defendants described above, and each of them, was done with fraud, oppression and
8 malice; with a conscious disregard for her rights; and with the intent, design and purpose of
9 injuring her. Plaintiff is further informed and believes that Defendants, and each of them,
10 through its officers, managing agents and/or its supervisors, authorized, condoned and/or ratified
11 the unlawful conduct of Defendants. By reason thereof, Plaintiff is entitled to punitive or
12 exemplary damages from all Defendants in a sum according to proof at trial.

13 SECOND CAUSE OF ACTION

14 Wrongful Termination in Violation of Public Policy 15 (Entity Defendants Only)

16 34. The allegations set forth in paragraphs 1 through 21 of the General Allegations
17 are re-alleged and incorporated herein by reference.

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19 35. Plaintiff is informed and believes, and based thereon alleges, that she was
20 terminated from her employment solely as a consequence of her serious medical condition,
21 requesting accommodation and leave based thereon, and reporting the harassment to which she
22 had been subjected.

23 36. It is the public policy of the State of California as expressed in California
24 Government Code §12920, et seq., and in the common law as expressed in the California
25 Supreme Court's decision in Rojo v. Kliger, (1990) 52 Cal. 3d 65, that individuals shall not be
26 discriminated against or harassed in their employment on the basis of their medical condition or
27 disability, or by being subjected to a hostile work environment, or based upon the fact that they
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1 have requested medical leave or an accommodation of a serious medical condition.

2 37. As a direct and proximate result of Defendant KAISER's termination of
3 Plaintiff in violation of said public policy, Plaintiff has suffered and will continue to suffer pain
4 and suffering, and extreme and severe mental anguish and emotional distress. Plaintiff has
5 suffered and will continue to suffer a loss of earnings and other employment benefits and job
6 opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be
7 proven at trial.

8
9 38. Plaintiff is informed and believes, and thereupon alleges, that the outrageous
10 conduct of Defendants described above was done with malice, fraud and oppression; with
11 conscious disregard for her rights; with the intent, design and purpose of injuring Plaintiff.
12 Defendants, through its officers, managing agents and/or supervisors authorized, condoned and/or
13 ratified the unlawful conduct of all of the other Defendants named in this action. By
14 reason thereof, Plaintiff is entitled to punitive or exemplary damages from all Defendants in a
15 sum according to proof at trial.

16
17 39. Defendant KAISER's conduct as described herein was malicious and
18 oppressive, and done with a conscious disregard of Plaintiff's rights. The acts of Defendants
19 were performed with the knowledge of an employer's economic power over its employees.
20 Defendants, and each of them, through its officers, managing agents and/or supervisors,
21 authorized, condoned and ratified the unlawful conduct of the Defendants in this action.
22 Consequently, Plaintiff is entitled to punitive damages from all Defendants.

23 THIRD CAUSE OF ACTION

24 Intentional Infliction of Emotional Distress 25 (All Defendants)

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27 40. Plaintiff repeats and re-alleges by reference each and every allegation contained in
28 paragraphs 1 through 21 and incorporates the same herein as though fully set forth.

1 41. In failing to protect Plaintiff from the continuing discrimination, hostile work
2 environment, and other offensive conduct of Defendants, described herein, and, further, in
3 terminating and retaliating against Plaintiff for reporting discrimination, harassment and the
4 hostile work environment, Defendants, and each of them, abused their special position as
5 Plaintiff's superiors, which vested them with substantial power to control her work environment
6 and to damage her interests and well being.

7
8 42. Through the outrageous conduct described above, Defendants, and each of them,
9 acted with the intent to cause, or with reckless disregard for the probability of causing Plaintiff to
10 suffer severe emotional distress.

11 43. As a direct, proximate and foreseeable result of Defendants' actions, Plaintiff has
12 suffered and will continue to suffer pain and suffering, extreme and severe mental anguish, and
13 emotional distress; she has incurred and will continue to incur medical expenses for treatment by
14 psychiatrists, psychologists, physicians, and /or other health professionals, and for other
15 incidental expenses; and she has suffered and will continue to suffer a loss of earnings and other
16 employment benefits and job opportunities. Plaintiff is thereby entitled to general and
17 compensatory damages in amounts to be proved at trial.

18
19 44. Defendants' conduct as described herein was malicious and oppressive, and done
20 with a conscious disregard of Plaintiff's rights. The acts of Defendants, and each of them, were
21 performed with the knowledge of an employer's economic power over its employees.

22
23 Defendants, and each of them, through its officers, managing agents and supervisors, authorized,
24 condoned and ratified the unlawful conduct of the Defendants in this action. Consequently,
25 Plaintiff is entitled to punitive damages from all Defendants.

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FOURTH CAUSE OF ACTION

**Negligent Supervision
KAISER & LEE**

45. Plaintiff repeats and re-alleges by reference each and every allegation contained in paragraphs 1 through 21 and incorporates the same herein as though fully set forth.

46. At all times material herein, Defendants knew, or reasonably should have known, that the conduct, acts, and failures to act of all other Defendants and/or supervisors, agents and employees as described herein above, violated Plaintiff's rights under constitutional, statutory, regulatory and/or common law.

47. At all times material herein, Defendants, and each of them, knew or reasonably should have known, that the incidents, conduct, acts, and failures to act described herein above, would and did proximately result in emotional distress to Plaintiff including, but not limited to, loss of sleep, anxiety, tension, depression, and humiliation.

48. At all times material herein, Defendants, and each of them, knew, or in the exercise of reasonable care should have known, that unless Defendants, and each of them, intervened to protect Plaintiff, and to adequately supervise, prohibit, control, regulate, discipline, and/or otherwise penalize the conduct, acts, and failures to act, of all other Defendants and/or supervisors, agents or employees as alleged herein above, said conduct, acts, and failures to act would continue, thereby subjecting Plaintiff to personal injury and emotional distress.

49. Defendants, and each of them, knew, or in the exercise of reasonable care should have known, that unless Defendants, and each of them, intervened to protect Plaintiff, and to adequately supervise, prohibit, control, regulate, discipline and/or otherwise penalize the conduct, acts, and failures to act of the Defendants and others as described herein, Defendants failure to so protect, supervise, and intervene would have the effect of encouraging, ratifying, condoning, exacerbating, increasing and worsening said conduct, acts, and failures to act.

1 50. At all times material herein, Defendants, and each of them, had the power, ability,
2 authority, and duty to so intervene, supervise, prohibit, control, regulate, discipline, and/or
3 penalize the conduct of all other Defendants and/or supervisors, agents or employees as described
4 herein above.

5 51. Despite said knowledge, power, and duty, Defendants, and each of them,
6 negligently failed to act so as to prevent, supervise, prohibit, control, regulate, discipline and/or
7 penalize such conduct, acts, and failures to act or to otherwise protect Plaintiff.
8

9 52. As a direct and proximate result of the failure of Defendants to protect Plaintiff,
10 and to adequately supervise, prohibit, control, regulate, discipline and/or otherwise penalize the
11 conduct, acts and failures to act of all other Defendants and/or supervisors, agents or employees
12 as alleged herein above, said conduct, acts, and failure to act were perceived by them as, and in
13 fact had the effect of, ratifying, encouraging, condoning, exacerbating, increasing and/or
14 worsening said conducts, acts, and failures to act.
15

16 53. At all times material herein, the failure of Defendants, and each of them, to
17 protect Plaintiff and to adequately supervise, prohibit, control, regulate, discipline and/or
18 otherwise penalize the conduct, acts and failures to act of all other Defendants and/or supervisors,
19 agents, or employees violated Plaintiff's rights under constitutional, statutory, regulatory and/or
20 common law.
21

22 54. As a direct and proximate result of Defendants' actions, Plaintiff has suffered and
23 will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional
24 distress; she has incurred and will continue to incur medical expenses for treatment by
25 psychiatrists, psychologists, physicians, and /or other health professionals, and for other
26 incidental expenses; she has suffered and will continue to suffer a loss of earnings and other
27 employment benefits and job opportunities. Plaintiff is thereby entitled to general and
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