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PUBLIC ENTITY EXEMPT FROM FILING FEE REQUIREMENTS PER GOVERNMENT CODE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, NORTH DISTRICT

JON RAMBUS, ALEC CALZADA, LAUREN FLORES, and MEREDITH GROSS, a minor, by and through her Guardian ad Litem, MARILYN GROSS, Plaintiffs, vs. CITY OF PALMDALE, a governmental agency; SAMUEL COOKSEY, KRISTY NUA, CHRISTINA ALATORRE, JOE GOSS, JANE HAUSER and DOES 1 through 50, inclusive, Defendants.	Case No. MC022637 NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT FOR DAMAGES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (Assigned to the Honorable Brian C. Yep) Date: January 26, 2012 Time: 8:30 a.m. Dept: A10 Date Action Filed: June 9, 2011 Trial Date: None [Defendants' Request to Take Judicial Notice on Demurrer Filed Concurrently Herewith]

PLEASE TAKE NOTICE that on January 26, 2012, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department A10 of the above-entitled court, located at 42011 4th Street West, Lancaster, California, 93534, defendants City of Palmdale, Joe Goss and Kristy Nua, will and do hereby demur to the Complaint for Damages ("Complaint"), on the grounds that the Complaint, and each of its causes of action, fails to state facts sufficient to constitute a cause of action, as follows:

1. The first cause of action for intentional infliction of emotional distress is barred by the exclusive remedy doctrine of California's workers compensation law;

2. The first cause of action for intentional infliction of emotional distress fails to state facts sufficient to constitute a cause of action because, as a matter of law, the allegations do not amount to extreme, outrageous conduct, as to exceed all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized society;

3. The second cause of action for false imprisonment fails to state facts sufficient to constitute a cause of action;

4. The second cause of action for false imprisonment cannot be maintained against the defendants, because the plaintiffs failed to file a Government Tort Claim with the City fairly setting forth a claim for false imprisonment. Failure to file such a claim bars the cause of action.

This demurrer is and will be based upon this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities attached hereto, the Request to Take Judicial Notice on Demurrer filed concurrently herewith, all of the records, documents and pleadings on file herein, and upon such other evidence and oral argument as may be presented at the hearing.

WHEREFORE, defendants pray:

1. That their demurrer to the complaint be sustained without leave to amend;
2. That the complaint be ordered dismissed;
3. For costs of suit; and
4. For such other and further relief as the Court may deem just and proper.

Dated: November 23, 2011

COHEN & GOLDFRIED
A Professional Corporation
ROBERT M. GOLDFRIED

By: _____
Robert M. Goldfried
Attorneys for Defendants City of Palmdale,
Joe Goss and Kristy Nua

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Summary of Argument.

The four plaintiffs, lifeguards employed by the City of Palmdale ("City"), were participating in pre-service training in early-June 2010, prior to the start of the swimming pool season at the City's pools. They allege they suffered physical and emotional injuries during the training, and have sued the City and five then-employees of the City. Their complaint purports to set forth two causes of action, one for intentional infliction of emotional distress, and a second for false imprisonment.

As will be demonstrated, neither cause of action can be pursued against the defendants. The first, for intentional infliction of emotional distress, is barred by the exclusive remedy provisions of the California workers' compensation law, and, in any event, does not state sufficient facts to constitute a cause of action. The second, for false imprisonment, also fails to state sufficient facts to constitute a cause of action, and, in any event, is barred by the failure of the plaintiffs to file a Government Tort Claim that fairly reflects a claim of false imprisonment.

II. The First Cause of Action for Intentional Infliction of Emotional Distress is Preempted by the Exclusive Remedy Provisions of the California Workers Compensation Law.

California Labor Code § 3600 *et seq.* limits employer liability for injuries sustained by employees arising out of and in the course of employment. The Labor Code provides that workers' compensation shall be an employee's exclusive remedy against his or her employer, and against fellow employees, when the employee is injured "performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment." Labor Code §§ 3600 (a)(2), 3601(a), and 3602(a). The exclusive remedy applies when the injury is proximately caused by the employment, with or without negligence. Labor Code § 3600 (a)(3).

In *Livitsanos v. Superior Court*, 2 Cal.4th 744, 747, 7 Cal.Rptr. 808 (1992), an employee asserted claims of intentional and negligent infliction of emotional distress arising from termination of employment. The California Supreme Court held "claims for intentional and negligent infliction of emotional distress are preempted by the exclusivity provisions of the workers' compensation law . . . ." Liability under the workers' compensation law "is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment,

and because the injury arose out of and in the course of the employment." *Williams v. Intern'l Paper Co.*, 129 Cal.App.3d 810, 815, 181 Cal.Rptr. 342 (1982).

In the within case, the plaintiffs allege injury arising out of and in the course of employment. The complaint alleges as follows: the four plaintiffs were lifeguards hired by the City after they passed the Palmdale Lifeguard Academy (Complaint, para. 13); they were required to participate in Pre-Service Training prior to being allowed to work as a lifeguard at one of the pool facilities owned or managed by the City (Complaint, paras. 13, 16); the City staff conducting the training had the plaintiffs participate in unnecessary and excessive exercise, which included excessive "cherry-pickers," swimming, running, and treading water for extended periods of time without breaks (Complaint, paras. 15, 17, 18, 19, 28); the lifeguards were provided with little or no rest, access to shade, or drinking water (Complaint, paras. 18, 22); the training was of a "military type," including calling the lifeguards "rookie" to harass and intimidate them (Complaint, paras. 18, 28); the excessive exercise was meant to demean, harass, intimidate and cause severe emotional distress to the plaintiffs (Complaint, para. 28); the conduct of the defendants was intentional, extreme and outrageous (Complaint, para. 29); the conduct of the defendants caused the lifeguards to suffer severe emotional distress (Complaint, para. 30).

Thus, the allegations clearly state that the conduct of the defendants took place within the course and scope of employment, as part of a training program, and the alleged injuries arose out of and in the course of that training. Even if conduct complained of is characterized as manifestly unfair, outrageous, harassing, or intended to cause emotional distress, as here, it is nevertheless covered by the workers' compensation exclusivity provisions. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal.3d 148, 160, 233 Cal.Rptr. 303 (1987). Indeed, the California Supreme Court recognized the deleterious effect a contrary holding would have on the workers' compensation system, when it said the following:

> "If characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of

causing injury. Such an exclusion would be contrary to the compensation bargain and unfair to the employer." 43 Cal. 3d at 161.

Plaintiffs' allegations, taken as a whole, amount to a claim that they were required to engage in a demanding physical workout. Many jobs require a worker to be physically fit. Physical fitness is an asset for employees like lifeguards, who may be called upon to engage in sudden physical exertion to save lives. The importance of this trait is underscored by a common requirement that people in such positions meet physical conditioning requirements and pass fitness tests. Thus, it is inconceivable that such physical fitness training, even if characterized as manifestly unfair, outrageous, harassing, or intended to cause emotional distress, could be held to be outside of the employment relationship. As such, the intentional infliction of emotional distress claim falls squarely within, and is barred by, the exclusive remedy doctrine of the workers' compensation law.

While the defendants have been unable to find any California case involving a claim for intentional infliction of emotional distress arising out of alleged excessive physical fitness training, the kinds of cases in which emotional distress claims are deemed to fall outside of workers' compensation exclusivity are very different in nature than the instant case. They include emotional distress caused by an employer's defamation and harassment, *Livitsanos, supra*, 2 Cal.4th at 756, emotional distress caused by an employer's unlawful discrimination, *Fretland v. County of Humboldt,* 69 Cal.App.4th 1478, 1492, 82 Cal.Rptr.2d 359, 368 (1999), emotional distress caused by an employee's reliance on an employer's fraudulent misrepresentations to induce him to become an employee, *Lenk v. Total-Western, Inc.*, 89 Cal.App.4th 959, 972, 108 Cal.Rptr.2d 34, 42 (2001), and emotional distress caused by a coworker's sexual harassment that an employer failed to remedy despite repeated complaints. *Hart v. National Mortg. & Land Co.,* 189 Cal.App.3d 1420, 1430, 235 Cal.Rptr. 68, 74 (1987). Thus, the exclusivity rule does not bar a suit for emotional distress damages attributed to sexual harassment, unlawful discrimination or other misconduct that exceeds the normal risks of the employment relationship in these ways.

But the within case is in no way similar to these cases. So long as the basic conditions of compensation are otherwise satisfied, and the employer's conduct neither contravenes fundamental public policy nor exceeds the risks inherent in the employment relationship, an employee's

emotional distress injuries are subsumed under the exclusive remedy provisions of workers' compensation. *Jones v. Dept.of Corrections and Rehab.*, 62 Cal.Rptr.3d 200, 152 Cal.App.4th 1367 (2007); *Gibbs v. American Airlines, Inc.*, 87 Cal.Rptr.2d 554, 74 Cal.App.4th 1 (1999).

Nor do the limited statutory exceptions to the workers' compensation exclusivity rule apply here. An employee is not limited to workers' compensation if (1) his injury is proximately caused by a willful physical assault by the employer, (2) the injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, or (3) the injury is proximately caused by a defective product manufactured by the employer. Labor Code § 3602 (b). No allegations in the complaint fall within any of these exceptions.

There is an additional reason why the intentional infliction of emotional distress claim is precluded by the exclusive remedy of workers compensation. The allegations of the complaint amount to claims of workplace safety and health violations. Indeed, the City was cited by the California Division of Occupational Safety and Health ("OSHA") for violations of a number of safety and health regulations in connection with the pre-service training at which the plaintiffs were injured, including the following: on June 7-10, 2010, employees were provided with pre-service training and subjected to exercise drills including cherry pickers, lunges, and running exercises; the length, intensity, and repetitive nature of the physical exercises had not been evaluated by the City to identify hazards introduced; as a result of this strenuous physical demand, employees suffered severe overexertion, and kidney failure, among other things. (OSHA Citation 2-1)[1]. This is the very same thing that the plaintiffs complain about. (Complaint, paras. 13, 15, 17, 18, and 30).

OSHA also cited the City for other conduct claimed by the plaintiffs to support their claim for intentional infliction of emotional distress, such as restricting access to drinking water (OSHA Citation 3-1)(Complaint, paras. 18 and 22), not encouraging rest breaks, and not permitting access to shade at all times (OSHA Citation 4-1)(Complaint, paras. 18, 19, 22 and 23). However, it is well-established that workplace safety and health violations are exclusively covered by the workers' compensation law. *Spratley v. Winchell Donut House, Inc.*, 188 Cal.App.3d 1408, 1412–1414, 234

[1] All of the OSHA citations referred to are attached as Exhibits 1-3 to the Defendants' Request to Take Judicial Notice on Demurrer, filed concurrently herewith.

Cal.Rptr. 121, 124–125 (1987). As stated in *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 723, fn. 7, 30 Cal.Rptr.2d 18 (1994), "[i]t is an expected part of the compensation bargain that industrial injury will result from an employer's violation of health and safety, environmental and similar regulations."

A prime example of this kind of case occurred in *Vuillemainroy v. American Rock & Asphalt, Inc.*, 70 Cal.App.4th 1280, 83 Cal.Rptr.2d 269 (1999). In that case, the family of an employee killed in a workplace accident brought a civil claim against the employer for various causes of action, including involuntary manslaughter, alleging that in failing to maintain trucks and haul roads in a safe condition, the employer violated various safety regulations, thereby causing the death of the employee when the brakes failed on a heavily loaded truck as he drove down a steep haul road. Relying upon *Fermino,* 7 Cal.4th 701, *supra*, the court held that such a claim was preempted by the exclusive remedy of workers' compensation, because the safety violations alleged fell squarely within the bounds of the workers' compensation law. *Vuillemainroy, supra,* 70 Cal.App.4th at 1285-86. *See also, Stalnaker v. Boeing Co.,* 186 Cal.App.3d 1291, 231 Cal.Rptr. 323 (1986), in which the court applied the exclusivity rule to a case in which the employer knowingly sent an employee onto a gunnery range containing hidden live ordnance.

Accordingly, the intentional infliction of emotional distress claim alleged in the first cause of action is precluded by the exclusive remedy provisions of the workers' compensation laws, because the conduct alleged was not outside of the employment relationship, and because the claim arises out of alleged violations by the City of workplace safety and health regulations.

III. In Any Event, The First Cause of Action Fails to State Facts Sufficient to State a Cause of Action for Intentional Infliction of Emotional Distress, Because, as a Matter of Law, the Allegations Do Not Amount to Extreme, Outrageous Conduct, as to Exceed All Possible Bounds of Decency, So as to Be Regarded as Atrocious and Utterly Intolerable in a Civilized Society.

Even if the plaintiffs' intentional infliction of emotional distress claim is not precluded by the workers compensation laws, the acts of which they complain do not amount to intentional infliction of emotional distress, as a matter of law. To constitute a claim for intentional infliction of

emotional distress, there must be facts alleged from which it can be found that the defendants engaged in extreme, outrageous conduct, as to exceed all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized society. *Christensen v. Superior Court*, 54 Cal.3d 868, 903, 2 Cal.Rptr.2d 79 (1999). It is not mere insults, annoyances, or petty oppressions. All persons must necessarily be expected and required to be hardened to occasional acts that are inconsiderate and unkind. On the other hand, extreme and outrageous conduct is conduct which would cause an average member of the community to immediately react in outrage. *Fletcher v. Western Nat'l. Life Ins. Co.*, 10 Cal.App.3d 376, 397, 89 Cal.Rptr. 78, 90 (1970).

That the City put the plaintiffs through a very tough fitness workout cannot, by the wildest stretch of imagination, be held to be conduct that exceeded all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized society. Indeed, it is beyond dispute that demanding physical fitness workouts, even those which involve excessive exercise, occur commonly, such as for high school and college sports teams. See Exhibits 4 and 5 to the Defendant's Request to Take Judicial Notice on Demurrer. No doubt the same is true for physical fitness training of firefighters, new policemen, and other emergency rescue personnel. Even if the workout experienced by the plaintiffs involved excessive exercise, the allegations of the complaint do not support a claim that the alleged excessive exercise should be deemed to be any more atrocious or intolerable than the workouts engaged in by many other segments of society, where physical fitness is necessary in order to perform one's job.

The following cases illustrate circumstances in which a defendant's conduct has been found sufficiently outrageous, but they all involve conduct of a considerably different magnitude than in the within case: a television reporter interviewed three young children on camera, with no adult present, concerning the murder of two playmates who lived next door, about which the children were then unaware, *KOVR-TV v. Superior Court*, 31 Cal.App.4th 1023, 1030, 37 Cal.Rptr.2d 431 (1995); allegations of 8-month sexual relationship initiated by physician with minor, including mutual oral copulation and use of alcohol and controlled substances, showed sufficiently outrageous conduct to send case to jury, *Angie M. v. Superior Court*, 37 Cal.App.4th 1217, 1226, 44 Cal.Rptr.2d 197 (1995); defendant's website entries targeting an employee of an animal testing

lab for illegal activity and threatening her safety, *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, 129 C.A.4th 1260, 29 Cal.Rptr.3d 521 (2005).

In the employment context, even seemingly "outrageous" conduct in connection with the ultimate employment action an employer can take, termination of employment, has been held to not constitute intentional infliction of emotional distress. For instance, in *Crain v. Burroughs*, 560 F.Supp 849, 853 (C.D. Cal. 1983), the court held that termination without good cause, based on a mistaken judgment or failure to investigate further, even without warning or an opportunity to explain, and plaintiff's resulting humiliation, was not sufficiently extreme and outrageous to state a claim for intentional infliction of emotional distress. In *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1123-1130, 257 Cal.Rptr. 665 (1989), the employee's immediate supervisor stated repeatedly, a dozen or more times, in her presence and in the presence of others, that anyone over 40 was senile, and that plaintiff was senile and a liar. While these comments were frequent and made by a supervisor, and the court characterized them as "objectively offensive and in breach of common standards of civility," they were held to not be so egregiously outside the realm of civilized conduct as to give rise to actionable infliction of emotional distress. *See also*, *King v. AC & R Advertising*, 65 F.3d 764, 769-770 (9th Cir. 1995)(intentional infliction of emotional distress does not include efforts to change an employee's status and compensation, lack of interest in his history and role with the company, firing him after he rejected a proposal, and supervisors making age-related comments, because poor judgment and poor manners are not so extreme as to exceed all bounds usually tolerated in a civilized society, even if offensive and perhaps discriminatory).

In an attempt to bootstrap their unmeritorious claim, plaintiffs allege that they were called "rookie" (Complaint, para. 28). The term "rookie" bears no negative connotation, and is frequently applied to baseball players and police officers, among others.[2] Plaintiffs also allege, in a purely conclusory fashion, without any facts or examples to back up their allegations, that they were "ridiculed"(Complaint, paras. 15, 21), "mocked" (Complaint, para. 17), and "taunted" (Complaint,

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[2] *See, Newcombe v. Adolph Coors Co.*, 157 F.3d 686, 689 (1998)(Don Newcombe won the Rookie of the Year Award); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1034, fn. 6 (1990)("Officers hired laterally from other police departments enter as 'step C' employees as compared to rookie police officers who enter at 'step A.'")

para. 20). None of these hyperbolic claims elevate the conduct at the pre-service training to the level necessary to support a claim for intentional infliction of emotional distress. It is well-established that "there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances." *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1128, 257 Cal.Rptr. 665 (1989)(internal citations omitted). *See also*, *Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1991)(a supervisor screaming and yelling at an employee, threatening to throw her out of the department, while making threatening gestures, does not amount to intentional infliction of emotional distress, because rudeness and insensitivity do not amount to outrageous conduct).

In the within case, the conduct claimed by plaintiff to have been outrageous, does not amount to the kind of conduct that supports a claim of intentional infliction of emotional distress, as a matter of law.

IV. The Allegations of the Second Cause of Action Do Not State Facts Sufficient to Constitute a Cause of Action for False Imprisonment, As a Matter of Law.

The second cause of action purports to set forth a claim of false imprisonment. The elements of a tort claim for false imprisonment include the following: the plaintiff was intentionally deprived of his or her freedom of movement, by use of physical barriers, force, threats of force, menace, fraud, deceit or unreasonable duress; the restraint, detention, or confinement compelled the plaintiff to stay or go somewhere for some appreciable time; the plaintiff did not consent; the plaintiff was actually harmed; and the defendant's conduct was a substantial factor in causing the harm. CACI 1400, *Fermino, supra,* 7 Cal.4th 701.

Most of the cases involving tort claims of false imprisonment involve actions by law enforcement, including arrest, with or without a warrant, or restraint by threats of arrest and prosecution, *e.g., Dragna v. White,* 45 Cal.2d 469, 472, 289 P.2d 428 (1955). Tort claims of false imprisonment that do not involve conduct by law enforcement occur far less often. They include cases where merchants detain individuals whom they have probable cause to believe are about to injure their property, *e.g., Collyer v. S.H. Kress & Co.,* 5 Cal.2d 175, 180–181, 54 P.2d 20 (1936), and a small number of miscellaneous fact patterns that defy categorization, *e.g., Wilson v. Houston*

Funeral Home, 42 Cal.App.4th 1124, 1135, 50 Cal.Rptr.2d 169 (1996)(plaintiffs whose loved one died alleged they entered a limousine believing they were being driven to the cemetery for the burial services, but instead were driven against their will and over their protests by a mortuary employee to a bank, where they were compelled to remain against their will, were told that they were not going to be able to leave the bank, and there would be no burial until they withdrew $5,000 to pay the mortuary. The court held that to leave the bank would have been to abandon the remains of their loved one to an uncertain fate at the hands of the mortuary employee, resulting in duress).

In the employment context, cases in which the tort of false imprisonment is claimed are few, involving acts of assault, including sexual assault, *e.g., Meyer v. Graphic Arts International Union*, 88 Cal.App.3d 176, 151 Cal.Rptr. 597 (1979), *Iverson v. Atlas Pacific Engineering*, 143 Cal.App.3d 219, 191 Cal.Rptr. 696 (1983), or involving an attempt by an employer to investigate employee theft or other misconduct, including interrogation and unreasonable detention of the employee by the employer.

For instance, in *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 716, 30 Cal.Rptr.2d 18 (1994), a sales clerk sued her employer for false imprisonment and other torts, based upon the following allegations: the employee was taken to a windowless interrogation room at work, where managers and security personnel accused her of stealing the proceeds of a $4.95 sale; they threatened to have her arrested and charged with the crime, and hurled profanities at her while demanding that she confess; they denied her repeated requests to leave the room and telephone her mother; she was physically compelled to remain in the room for more than one hour; at one point when she rose out of her chair and walked toward the door of the interrogation room in an attempt to leave, one of the security guards slid in front of the door, threw up a hand and gestured her to stop; she was told that witnesses to the incident were waiting in the next room; she was kept in the room for more than an hour, and was released only when she became hysterical, at which point she was told that there were no witnesses in the next room, and that her interrogators believed she was innocent. *Fermino, supra*, 7 Cal.4th at 706-07.

These egregious allegations are what prompted the California Supreme Court in *Fermino* to describe false imprisonment as an "unreasonable and indeed criminal confinement," that involves

"forcibly and criminally" depriving an employee of liberty, by means of "violence and coercion." *Fermino, supra,* 7 Cal.4th at 721, 723.[3]

In the within case there are no factual allegations that are in any way similar or comparable to the allegations in *Fermino, supra.* The false imprisonment claim is based solely on allegations that the plaintiffs were "compelled" to remain at the pool area where training was taking place, and to participate in the training until its completion, because of the fear of losing their job (Complaint, paras. 20, 35), and the defendants maximized the threat of job loss by starting a rumor that the City was still planning on laying off some lifeguards who did not meet expectations during the training (Complaint, para. 24). Thus, **in a nutshell, the plaintiffs are alleging that they were afraid that if they left the training early, they might lose their job, so they chose to stay.** That kind of an allegation simply does not rise to the level of the allegations in *Fermino, Meyer and Iverson, supra,* and does not satisfy the elements of a cause of action for false imprisonment, as a matter of law.

Defendants have found no California case involving a claim of false imprisonment in the workplace like the instant case, where employees claimed that they were falsely imprisoned because they were afraid that if they left the workplace prior to completing some task, such as training, they would suffer some detriment, such as losing their job.[4] Indeed, the claim is absurd on its face. To say that such a claim amounts to false imprisonment would mean that any employee who desired to leave work in the middle of the day, but who decided not to do so for fear of adverse consequences, could sue the employer for false imprisonment. Does a judge who would like to attend a child's school event in the middle of the day, but who stays at the courthouse to complete his calendar, have a claim for false imprisonment because the judge is concerned that if he leaves early he might be reprimanded, or worse, for doing so? And what of a fireman or policeman who is undergoing a training course, who would like to leave in the middle of the training program one day, but who

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[3] *See also, Parrott v. Bank of America Nat'l Trust & Sav. Ass'n.*, 97 Cal.App.2d 14, 23–24, 217 P.2d 89, 95 (1950)(employee erroneously suspected of theft detained for 3 hours and threatened with criminal prosecution if she did not confess to theft that occurred several days earlier), and *Moffat v. Buffums' Inc.*, 21 Cal.App.2d 371, 375, 69 P.2d 424, 426 (1937)(employee detained for 5 hours while employer attempted to coerce confession).

[4] Defendants were also unable to find any California case imposing liability on a public entity for the tort of false imprisonment, where, as here, the allegedly wrongful conduct did not involve actions of law enforcement, but rather involved the public entity acting as an employer.

chooses not to do so because he is afraid that if he doesn't complete the training program, he might be judged to not be sufficiently qualified, and he might lose his job? Does that fireman or policeman have a legitimate claim for false imprisonment? How about a machinist, or a worker on an assembly line, who wants to go to a baseball game during his shift, but who opts to stay at work to complete the shift because he fears being fired if he leaves early? Does he have a claim of false imprisonment? Examples of the absurdity of such claims are legion. But that is exactly what the plaintiffs in the within case are contending is the law.

Deciding not to leave the workplace because one is afraid of being fired if one were to do so has been held in New York to not constitute false imprisonment. In *Malanga v Sears, Roebuck & Co.*,109 A.D.2d 1054, 1055, 487 N.Y.S.2d 194 (N.Y.A.D.,1985), the plaintiff was a part-time employee who was questioned by her employer during her regular business hours in familiar surroundings about some wrongdoing. She filed a complaint alleging false imprisonment. The court held that her fear that she would be arrested **or fired** if she left the premises before the questioning was completed did not constitute the detaining force necessary to establish the tort of false imprisonment under New York law, which is similar to California law. *See also, Arrington v. Liz Claiborne, Inc.*, 260 A.D.2d 267, 688 N.Y.S.2d 544, 546 (N.Y.A.D.,1999) ("Plaintiffs' fears that they would be arrested or **fired** did not constitute detaining force necessary to establish the tort of false imprisonment." (Emphasis added)).

For the very same reason, the false imprisonment allegations in the within case do not satisfy the elements of a false imprisonment cause of action. There are no allegations that the plaintiffs were intentionally deprived of their freedom of movement by the use of physical barriers, force, threats of force, menace, fraud, or deceit. Plaintiffs do not allege that their "detention" was the result of unreasonable duress. Nor could they do so, since, if it is unreasonable to communicate to an employee that if the employee leaves a training session prematurely the employee may not keep his job, then chaos in the workplace would result. Employers would be reluctant to discipline employees who left early, for fear that the employers would be sued for false imprisonment by virtue of the use of "unreasonable duress." How could it possibly be "unreasonable," under any normal understanding of that word, for an employer to tell employees that if they leave a training

program early and don't complete it, or if they walk out of work in the middle of their shift, they might be fired?[5]

For all of these reasons, the allegations of the complaint simply do not constitute a claim of false imprisonment against any of the defendants, as a matter of law.

V. The Government Tort Claims Filed by the Plaintiffs as a Prerequisite to Filing Suit Do Not Include Allegations of Facts Sufficient to Support a Cause of Action for False Imprisonment. As Such, the Second Cause of Action for False Imprisonment is Barred.

The California Tort Claims Act (California Government Code § 900 *et. seq.*) provides that certain actions against a public entity seeking money or damages must be preceded by presentation to the public entity of a proper administrative claim within a specified period of time. This claim requirement covers intentional torts. California Government Code § 905; *Tietz v. Los Angeles Unified School Dist.*, 238 Cal.App.2d 905, 911, 48 Cal.Rptr. 245 (1965). The plaintiffs' claims are intentional torts, and both seek money or damages. Thus, presentation of an adequate government tort claim is a mandatory prerequisite to maintaining each cause of action. Absent a sufficient government tort claim, a lawsuit is barred, and a demurrer is an appropriate way to raise this issue. *State v. Superior Court (Bodie)*, 32 Cal.4th 1234, 1239, 13 Cal.Rptr.3d 534 (2004).

The facts underlying each cause of action pleaded in the complaint must substantially correspond to those set forth in the government tort claim as the basis of the plaintiffs' injuries. *Nelson v. State of California*, 139 Cal.App.3d 72, 79-81, 188 Cal.Rptr. 479 (1982). A plaintiff relying on more than one theory of recovery against a public entity must make certain that the facts underlying each cause of action are reflected in the government tort claim. A civil complaint that alleges a factual basis for recovery not fairly reflected in the government tort claim is subject to demurrer, and cannot stand. *Fall River Joint Unified School Dist. v. Superior Court*, 206 Cal.App.3d 431, 434, 253 Cal.Rptr. 587 (1988).

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[5] In *Moffat v. Buffums' Inc.*, 21 Cal.App.2d 371, 69 P.2d 424 (1937), plaintiff employee was suspected of stealing money from her employer. She was detained for approximately five hours, while agents of the corporation attempted to coerce her into confessing. Defendant claimed the merchant's privilege, but the court disagreed, finding the detention unreasonable, as it was not done to stop a theft in progress or "for the purpose of investigation, but, on the contrary, ... for the purpose of securing a confession to the theft of money at a prior time. The alleged offense had been completed and the manner of detention was unreasonable." (*Id.* at pg. 375, 69 P.2d 424).

Thus, complaints in the following circumstances were held insufficient, because the factual basis for recovery set forth in the civil complaint was not fairly reflected in the government tort claim: the complaint alleged a cause of action for negligent release of water from state dams that was not reflected in the plaintiff's government tort claim, which only set forth facts to show negligent dissemination of erroneous flood forecast data, *Connelly v. State*, 3 Cal.App.3d 744, 753, 84 Cal.Rptr. 257 (1970); the government tort claim was premised on the theory that the Department of Motor Vehicles negligently permitted an uninsured driver to take a licensing test, but the civil complaint alleged that the testing officer failed to use due care in directing the operation of the vehicle, *Donohue v. State of California*, 178 Cal.App.3d 795, 803-804, 224 Cal.Rptr. 57 (1986); in a medical malpractice action the government tort claim alleged negligence in diagnosis and treatment, but the civil complaint added an allegation charging that the defendants wrongfully failed to seek assistance from medical professionals possessing needed expertise, *Nelson, supra,* 139 Cal.App.3d at 72, 79-81.

Paragraph 9 of the City's government tort claim form asks the claimant to "describe the circumstances of the incident/accident," and to "be specific as to what happened." In response to this directive, each government tort claim filed by the plaintiffs contains an attachment, in which the plaintiffs purport to describe the circumstances of the incident.[6] Those descriptions are identical for each of the plaintiffs, as follows:

> "Claimant was a trainee for a lifeguard position with the City of Palmdale. The training program's supervisors and trainers, **with the intent to cause serious emotional harm**, forced all trainees to submit to **unreasonable, inappropriate, abusive and dangerous training exercises**, under color of authority, and without provocation, while depriving them of adequate water and rest, **creating a hostile working environment** outside of their proper roles as employers, supervisors and trainers, resulting in injuries and damages not reasonably encompassed within the compensation bargained for. The conduct of the supervisors and trainers was

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[6] Each of the individual government tort claims are attached as Exhibits 6-9 of the Defendants' Request to Take Judicial Notice on Demurrer.

beyond widely accepted community norms of acceptable employer conduct and contrary to fundamental policies designed to protect Claimant from the type of harm, humiliation and public obloquy as was suffered in this incident." (Emphasis added).

The second cause of action of the complaint alleges false imprisonment. The allegations upon which that cause of action is based are the following: the defendants **compelled** the plaintiffs **to remain at the pool area** where the training was taking place, and the plaintiffs were **unable to leave** the pool area until completion of training (Complaint, para. 35); the plaintiffs were **compelled to stay** and participate in the training because of the **fear of losing their job** (Complaint, para. 20); the defendants maximized the **threat of job loss by starting a rumor** that the City was still planning on **laying off some lifeguards who did not meet expectations during the training** (Complaint, para. 24).

Nowhere in the plaintiffs' descriptions of the specific circumstances of the incident in their government tort claims is there language which can fairly be read to describe false imprisonment, or which is in any way similar to or suggestive of the complaint's false imprisonment allegations. One can search each plaintiff's entire government tort claim with a fine tooth comb, and not discover any allegations remotely similar to the false imprisonment allegations in the civil complaint. That is because no such allegations were made in the government tort claims.

Indeed, from the language of paragraph 9 of the tort claims, it appears that all the plaintiffs were trying to do was to put the City on notice that the plaintiffs were going to be making a claim that the City engaged in intentional infliction of emotional distress, because "with the intent to cause serious emotional harm, [defendants] forced all trainees to submit to unreasonable, inappropriate, abusive and dangerous training exercises, under color of authority, and without provocation, while depriving them of adequate water and rest, creating a hostile working environment," which constituted conduct "**beyond widely accepted community norms.**" As set forth in section III of this memorandum, above, this is classic intentional infliction of emotional distress language. But the language doesn't even hint at any claim that the plaintiffs were unable to leave, and were compelled to remain for fear of losing their jobs.

The allegations set forth by the plaintiffs in their government tort claims simply cannot

fairly be read to encompass a claim as different and unique as one for false imprisonment. As the California Supreme Court said in *Fermino*, *supra*, 7 Cal.4th at 722-23, "**unlike the tort of intentional infliction of emotional distress** . . . the tort of false imprisonment involves **criminal conduct against the employee's person, not permissible conduct that only becomes intentionally tortious in light of the employer's supposed malicious state of mind**. . . . [I]n order to plead false imprisonment in a civil action, a plaintiff/employee would have to **allege rather specific, and fairly uncommon, acts of involuntary and criminal confinement**." (Emphasis added). Since the facts alleged in the plaintiffs' government tort claims do not set forth facts underlying or suggestive of a cause of action for false imprisonment, the cause of action alleging false imprisonment in the civil complaint is subject to demurrer, and cannot stand. *Fall River Joint Unified School Dist. v. Superior Court*, *supra,* 206 Cal.App.3d at 434.

If the cause of action is barred against the City for failure to satisfy the government tort claims requirements, it is also barred against the individual defendants. California Government Code § 950.2; *Mazzola v. Feinstein*, 154 Cal.App.3d 305, 310, 201 Cal.Rptr. 148 (1984).

VI. Conclusion.

By reason of the foregoing, the complaint, and each of its causes of action, cannot proceed. The first, for intentional infliction of emotional distress, is barred by the exclusive remedy doctrine of the California workers' compensation law, and, in any event, does not state sufficient facts to constitute a cause of action. The second, for false imprisonment, also fails to state sufficient facts to constitute a cause of action, and, in any event, is barred by the failure of the plaintiffs to file a government tort claim that fairly reflects a claim of false imprisonment. Therefore, it is respectfully submitted that this Court should sustain the defendants' demurrer without leave to amend.

Dated: November 23, 2011.

COHEN & GOLDFRIED
A Professional Corporation
ROBERT M. GOLDFRIED

By: _____
Robert M. Goldfried
Attorneys for Defendants City of Palmdale,
Joe Goss and Kristy Nua

(PROOF OF SERVICE -- 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a resident of the aforesaid county, I am over the age of eighteen years and not a party to the within action; my business address is 9595 Wilshire Blvd., Suite 201, Beverly Hills, CA 90212.

On November 23, 2011, I served the within NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT FOR DAMAGES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

R. Rex Parris, Esq.
Law Office of R. Rex Parris
42220 10th Street West, Suite 109
Lancaster, CA 93534

✓ (BY MAIL) The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 23, 2011, at Beverly Hills, California.

___ (BY FACSIMILE) I sent such document by way of facsimile to the offices of the addressee as indicated above.

Executed on _____, at Beverly Hills, California.

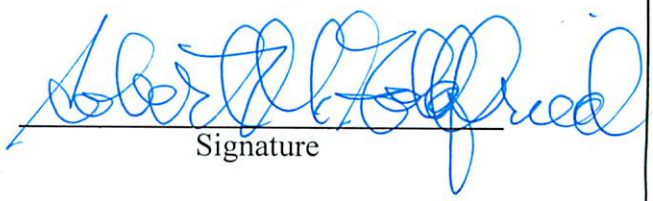
___ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at Beverly Hills, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

___ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Robert M. Goldfried
Type or Print Name



Signature