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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GENE MORAN, Plaintiff and Appellant, v. MURTAUGH, MILLER, MEYER & NELSON, LLP, et al., Defendants and Respondents.	G033102 (Super. Ct. No. 03CC07389) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Arik Shafir and Evan Blair for Plaintiff and Appellant.

Butz, Dunn, DeSantis & Bingham, Kevin V. DeSantis, Steven C. Uribe and Kathleen A. Silhasek for Defendants and Respondents.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.B.2.

Gene Moran contends the trial court erred by requiring him, as a vexatious litigant, to post security before proceeding with claims against his former employer, Murtaugh, Miller, Meyer & Nelson, and several attorneys at the firm, Michael Nelson, Jim Murphy, David Davidson, and an administrator, Marjorie Doyle (collectively Murtaugh). Disagreeing with *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571 (*Devereaux*), we hold that to require security under Code of Civil Procedure section 391.1,[1] the trial court need not conclude as a matter of law that the plaintiff has no reasonable probability of prevailing on any of his or her claims. Nor is the court required to credit the allegations of the plaintiff's complaint as true, but instead may exercise its discretion in weighing the evidence presented at the security motion, without infringing the plaintiff's right to a jury trial.

As a matter of first impression, we also conclude that where an employer conducts an investigation on suspicion of employee wrongdoing or misconduct, pursuant to Civil Code section 1786.53 the employer must furnish to the employee copies of any public records uncovered by a background check within a reasonable time after the investigation concludes, rather than within a fixed period. Finally, in light of these holdings, we determine the trial court did not abuse its discretion in concluding it was not reasonably probable Moran would prevail on any of his claims against Murtaugh. We therefore affirm the trial court's dismissal of Moran's suit for failure to post security.

I

FACTUAL AND PROCEDURAL BACKGROUND

Murtaugh hired Moran for an at-will position as a paralegal on April 2, 2003. Because Moran would be privy to client confidences, he was required to sign a

[1] All further undesignated statutory references are to this code unless otherwise specified.

confidentiality statement. On April 3, 2003, after a discussion with Moran, firm associate David Davidson conducted a computerized legal database search that turned up three unpublished appellate opinions in which Moran was a party. The three cases, all civil suits, revealed that Moran had suffered several felony convictions, including grand theft, second degree burglary, and theft with a prior conviction. In one of the cases, Moran sued the City of Brea, its police department, a mall owner, a store owner, and several officials and individuals for allegedly violating his civil rights when he was arrested for commercial burglary at Brea Mall.

On April 8, 2003, Davidson anonymously placed printouts of the cases on the chairs of two Murtaugh partners, who forwarded them to the firm's managing partners, Michael Nelson and James Murphy. The next day, April 9, 2003, Nelson and Murphy met with Moran to discuss whether he had ever been convicted of a felony and, when he answered affirmatively, they requested and received his immediate resignation.

On Saturday, April 19, 2003, Moran sent a letter to Murtaugh by e-mail, fax, and certified mail, citing the Investigative Consumer Reporting Agencies Act (Civ., Code, § 1786 et seq.) and requesting "a copy of the sourced public record information that the adverse decision was based upon, and the date it was accessed." Moran stated in his letter, "I need to know what public record information relied upon was perceived as adverse to my continuing employment with the firm." According to Moran, on "the very next day," Murtaugh mailed him copies of the cases discovered by Davidson. The cover letter sent with the cases was dated Monday, April 21, 2003.

Moran eventually filed suit against Murtaugh, claiming violation of Civil Code section 1786.53, employment discrimination in violation of the Fair Employment and Housing Act (Gov. Code, § 12940), and negligent infliction of emotional distress.

Upon learning Moran had filed numerous unmeritorious lawsuits, Murtaugh sought an order identifying him as a vexatious litigant and requiring that he post security. (§ 391.1.) In an affidavit opposing the motion, Moran claimed Nelson and Murphy "obtain[ed] copies of pub[l]ic records that had information discussing criminal convictions" and further that, "I was never presented with any copy of these public records, and these agents of [Murtaugh] never asked me what the convictions were for."

Nelson's affidavit described events differently: "Murphy and I discussed the situation and decided to meet with Moran to ask if he was the 'Gene Moran' identified in the decisions." According to Nelson, "Murphy and I met at length with Moran" and he "admitted to the prior felony convictions." Then, "Mr. Murphy and I explained to Moran that because of the nature of the cases that the firm handles, and the nature of Moran's past crimes, we did not feel that it was appropriate to employ a convicted felon as a paralegal. Moran was afforded the opportunity to resign, which he elected."

The trial court held an evidentiary hearing on Murtaugh's motion for security, concluded Moran was a vexatious litigant with no reasonable probability of prevailing on his claims, and required him to post security. When he failed to do so, the court dismissed his suit (§ 391.4), and he now appeals.

II

DISCUSSION

A. Standard of Review

Moran concedes he falls within the statutory definition of a vexatious litigant (§ 391, subd. (b)(1)),[2] but contends the trial court erred in requiring him to furnish

[2] Section 391, subdivision (b)(1) defines a "vexatious litigant" as a person who, "[i]n the immediately preceding seven-year period has commenced, prosecuted, or

security based on its finding there was no reasonable probability he would prevail on any of his claims. Under section 391.1, a defendant's motion for security "must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."[3] Reviewing courts have long recognized that the statute vests the trial court with discretion to weigh the complaint's allegations against evidence proffered in the defendant's affidavits supporting the security motion. (*Muller v. Tanner* (1969) 2 Cal.App.3d 445, 464-465 ["'Where the evidence is conflicting the implied finding of the trial court, if based on sufficient evidence, is binding on the appellate court'"]; see *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521, 526 (*Taliaferro*) [noting § 391.1 derives from Corporations Code section 834 (now § 800), which vests discretion in the trial court to determine whether security should be required for a shareholder's derivative suit because there is "no reasonable probability" the suit will benefit the corporation or its shareholders].)

But *Devereaux*, *supra*, 32 Cal.App.4th 1571, on which Moran relies, interpreted section 391.1 differently. There, the court held that, "to satisfy its burden of showing that the plaintiff has no reasonable probability of prevailing, the defendant must show that the plaintiff's recovery is foreclosed as a matter of law or that there are

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maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing."

[3] Section 391.1 provides in full: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based on the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant."

insufficient facts to support recovery by the plaintiff on its legal theories, even if all the plaintiff's facts are credited." (*Id.* at pp. 1582-1583.) This standard — akin to that for sustaining a demurrer — alters the statutory formula to require that the defendant must establish the plaintiff's allegations do not present a cognizable claim. In other words, as with a demurrer, if the security motion successfully "'sets up the failure of the facts alleged to establish a cause of action,'" then the ensuing judgment "'may be deemed a judgment on the merits . . . .'" (*Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591, 1597.) Section 391.2, however, expressly states: "No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof."

Devereaux's notion the court must accept plaintiff's facts as true is inconsistent with the evidentiary hearing the Legislature envisioned by enacting section 391.2. (See *Taliaferro*, *supra*, 2 Cal.App.3d at p. 465.) Under section 391.2, "the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion." If the standard articulated in *Devereaux* were correct, there would be no need for such an *evidentiary* hearing, just as there is none on a demurrer, where the plaintiff's alleged facts are accepted as true.

Section 391.3 makes clear that the trial court need not credit the allegations of the plaintiff's complaint. Instead, the court is entitled to exercise its discretion in evaluating the evidence presented by the moving defendant and by the plaintiff. The statute provides: "*If* after hearing the evidence upon the motion, *the court determines* that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount

and within such time as the court shall fix." (§ 391.3, italics added.) We agree with courts construing identical language that "[t]he use of the terms 'if' and 'determine' denotes that a court is vested with discretion . . . ." (*Ek v. Boggs* (Hawaii 2003) 75 P.3d 1180, 1185.)

Devereaux borrowed its demurrer-type standard from Civil Code section 1714.10,[4] "which requires a judicial determination of reasonable probability of success prior to permitting the filing of an action against an attorney based on a claim of civil conspiracy with a client." (*Devereaux*, *supra*, 32 Cal.App.4th at p. 1582.)

In *Hung v. Wang* (1992) 8 Cal.App.4th 908 (*Hung*), the same court that later decided *Devereaux* confronted the claim that Civil Code section 1714.10 violates the state constitutional right to a jury trial. (See *Hung*, *supra*, 8 Cal.App.4th at pp. 926-927.) There, the plaintiff argued "the statute cuts off appellant's constitutional right to have a jury determine the merits of his factual contentions of conspiracy" (*id.* at p. 927) because it "calls upon the trial judge who hears the section 1714.10 petition to weigh the evidence on both sides and to allow the petitioner to file the proposed conspiracy lawsuit only if the court determines that the petitioner will probably prevail on that issue." (*Id* at

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[4] The pertinent portion of the statute reads: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination." (Civ. Code, § 1714.10, subd. (a).)

pp. 926-927.) The *Hung* court "agree[d] that if section 1714.10 did require trial judges to weigh and adjudicate a factual dispute in this manner, it would violate the jury clause of the California Constitution." (*Id.* at p. 927.) Even if the statute were susceptible to the reading the plaintiff gave it, however, the court recognized "any ambiguity that may exist on the issue must be resolved in favor of a construction that preserves the statute, rather than one that renders it unconstitutional." (*Ibid*.) *Hung* therefore reached the unassailable conclusion that, to avoid infringing the plaintiff's constitutional right to a jury trial, the trial court must accept the allegations of the plaintiff's complaint as true in a proceeding under Civil Code section 1714.10. (*Hung*, *supra*, 32 Cal.App.4th at p. 931.)

In *Devereaux*, "[n]oting that the legislative purpose of Civil Code section 1714.10 was to eliminate frivolous allegations of attorney-client conspiracy" and that "the legislative purpose behind section 391.1 is also to minimize the number of frivolous filings," the court "adopt[ed] the interpretation given to the phrase 'reasonable probability' in Civil Code section 1714.10 for purposes of section 391.1." (*Devereaux*, *supra*, 32 Cal.App.4th at p. 1582.) Hence, "to satisfy its burden of showing that the plaintiff has no reasonable probability of prevailing, the defendant must show that the plaintiff's recovery is foreclosed as a matter of law or that there are insufficient facts to support recovery by the plaintiff on its legal theories, even if all the plaintiff's facts are credited." (*Id.* at pp. 1582-1583.)

We agree with the court's conclusion in *Hung*, but a crucial distinction separates Civil Code section 1714.10 and section 391.1. Unlike Civil Code section 1714.10, section 391.1 only empowers the trial court to require security, not halt a lawsuit. The plaintiff's failure to persuade the court that his civil conspiracy complaint has legal merit operates as a complete defense to the action. (Civ. Code, § 1714.10,

subd. (b).) In contrast, the trial court's assessment under section 391.1 that there is no reasonable probability the plaintiff will succeed is subject to a contrary conclusion by a jury on the merits. (§ 391.2.) Thus, the plaintiff's right to a jury trial remains intact, and the rationale for the demurrer-type standard adopted by *Devereaux* disappears.

In sum, in light of the particular language utilized in sections 391.1, 391.2, and 391.3, and the fact that the trial court's security determination does not infringe the plaintiff's right to a jury trial, we must part company with *Devereaux*. As discussed, we hold the trial court need not credit the allegations of the plaintiff's complaint as true, but rather may exercise its discretion in evaluating the evidence presented on a motion to require security under section 391.1. Accordingly, the standard of review is abuse of discretion.

B. No Abuse of Discretion

1. Civil Code Section 1786.53

Moran contends the trial court abused its discretion by concluding there was no reasonable probability he would prevail on his claim Murtaugh violated Civil Code section 1786.53, which governs the disclosure of background checks conducted by employers. Subdivision (a) of Civil Code section 1786.53 provides broadly that "[a]ny person who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on a consumer's character, general reputation, personnel characteristics, or mode of living, for employment purposes, which are matters of public record, and does not use the services of an investigative consumer reporting agency, shall provide that information to the consumer pursuant to subdivision (b)."

The purpose of Civil Code section 1786.53 is "to provide California consumers with additional protections against identity theft." (Historical and Statutory

Notes, 9A West's Ann. Civ. Code (2004 Supp.) foll. § 1785.10, p. 136 [letter from Assemblymember Roderick D. Wright describing intent of Stats. 2001, c. 354 (A.B. 655), which added § 1786.53].) The section aids the discovery of identity theft by requiring employers to provide employees and prospective employees (Civ. Code, § 1786.53, subd. (a)(1)) who are the subject of a background check with copies of "public records" in the report, that is, "records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment."[5] (Civ. Code, § 1786.53, subd. (a)(3).) Thus apprised of the report's contents, the person may prevent or correct an adverse employment action, such as denial of employment (see Civ. Code, § 1786.53, subd. (a)(1)), premised on information attributable to identity theft or that is otherwise erroneous.

Here, Murtaugh claims the disclosure requirement does not apply because its request for Moran's resignation was not premised on the civil cases Davidson discovered, but rather on Moran's admission he had at least one felony conviction as described in the cases. This argument fails. The Investigative Consumer Reporting Agencies Act (the Act), which includes Civil Code section 1786.53, was amended precisely to forestall such arguments by employers and others who obtain consumer credit reports or conduct background checks. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1068 (2001-2002 Reg. Sess.) as amended June 26, 2002, p. 9 [noting "weakness" in earlier version of Act in that it "allowed a user who takes an adverse

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[5] Murtaugh does not dispute the appellate decisions Davidson uncovered fell within the wide ambit of Civil Code section 1786.53 because they conveyed "information on a consumer's character, general reputation [or] personnel characteristics . . . , which are matters of public record" (Civ. Code, § 1786.53, subd. (a)), as reflected in the cases's discussions of his "arrest[s], . . . conviction[s]," and subsequent "civil judicial action[s.]" (Civ. Code, § 1786.53, subd. (a)(3).

action to avoid having to notify the consumer simply by denying that the action was based on information in the report"].) Now, for example, the information in "an investigative consumer report" must generally be disclosed whenever there is adverse employment action and "a report regarding the consumer was obtained from an investigative consumer reporting agency" (Civ. Code, § 1786.40, subd. (a)), thus fostering more opportunities for affected persons to inspect these reports and combat identity theft.[6]

The disclosure requirements are even broader for employers who conduct their own background checks. Disclosure in such instances is not predicated on adverse employment action. Rather, an employer who "does not use the services of an investigative consumer reporting agency" but through other sources or its own efforts "collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates" background check information (Civ. Code, § 1786.53, subd. (a)), or "receives" it in this manner (Civ. Code, § 1786.53, subd. (b)(1)), generally must provide a copy to the subject of the background check "within seven days after receipt of the information . . . ." (*Ibid*.)

Moran complains he did not receive copies of the documents Davidson discovered within the prescribed time frame. Davidson conducted his database search on Thursday, April 3, 2003. Nelson and Murphy reviewed the information and confronted

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[6] An "investigative consumer report" is "a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means. The term does not include a consumer report or other compilation of information that is limited to specific factual information relating to a consumer's credit record . . . ." (Civ. Code, § 1786.2, subd. (c).) And an "investigative consumer reporting agency," as relevant here, is "any person who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties . . . ." (Civ. Code, § 1786.2, subd. (d).)

Moran on Wednesday, April 9. Murtaugh provided Moran with copies of the public records eight business days later, on Monday, April 21. Whether measured from the time Davidson uncovered the cases or from the date Nelson and Murphy asked him to resign, Moran complains he did not receive copies of the information "within seven days after" Murtaugh's "receipt of the information," relying on section 1786.53, subdivision (b)(1).[7]

But subdivisions (b)(3) and (b)(4) of the same section suspend the seven day requirement when the employer is investigating "suspicion of wrongdoing or misconduct" by the employee.[8] Here, Davidson ferreted out background information suggesting Moran had previously engaged in theft and other serious wrongdoing and, given the nature of the firm's practice handling client confidences and assets, Murtaugh was entitled to investigate. Notably, the statutory language does not specify that the wrongdoing or misconduct must be contemporaneous rather than occurring before the employee was hired. We see no reason to impose such a requirement since antecedent

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[7] Subdivision (b)(1) reads: "Any person described in subdivision (a), or any person who receives information pursuant to subdivision (a), shall provide a copy of the related public record to the consumer within seven days after receipt of the information, regardless of whether the information is received in written or oral form." (Civ. Code, § 1786.53, subd. (b)(1).)

[8] Subdivision (b)(3) provides: "If any person obtains a public record pursuant to this section for the purpose of conducting an investigation for suspicion of wrongdoing or misconduct by the subject of the investigation, the person may withhold the information until the completion of the investigation. Upon completion, the person shall provide a copy of the public record pursuant to paragraph (1) [i.e., to the "consumer" who has been the subject of the background check], unless the consumer waived his or her rights pursuant to paragraph (2). Subdivision (b)(4) states: "If any person takes any adverse action as a result of receiving information pursuant to subdivision (a), the person shall provide to the consumer a copy of the public record, regardless of whether the consumer waived his or her rights pursuant to paragraph (2)." Paragraph 2 instructs employers to provide applicants and employees the opportunity to waive, in writing, "his or her right to receive a copy of any public record obtained pursuant to this section." (§ 1786.53, subd. (b)(2).)

conduct may affect an employee's suitability for his or her position. Nor does the statute require an elaborate investigation to defer disclosure. According to the circumstances, the employer may choose to interview fellow employees, conduct surveillance, contact prior employers, or make other inquiries.

Nothing in the statute, however, precludes a simpler investigative tactic: the employer may choose to withhold the background check results temporarily to confront the employee with the information therein and measure character, veracity, and other factors according to his or her response. Here, Davidson passed on the information about Moran to the Murtaugh partners, no doubt to prompt action of some kind, and partners Nelson and Murphy prudently exercised due diligence by investigating the matter in the most direct and expedient manner possible—confronting Moran.

Civil Code section 1786.53, subdivision (b)(3) contemplates that the employer will provide the employee with a copy of the background check "[u]pon completion" of the investigation, but does not specify a particular window of time for compliance. The only statutorily prescribed period for disclosure is subdivision (b)(1)'s requirement that "a copy of the related public record" be provided "to the consumer *within seven days after receipt of the information*, regardless of whether the information is received in a written or oral form." (§ 1786.53, subd. (b)(1), italics added.) True, subdivision (b)(3) does state that after an investigation the requisite copy of the public record shall be furnished "pursuant to paragraph (1) . . . ." (§ 1786.53, subd. (b)(3).) But we reject the notion this is a reference to subdivision (b)(1)'s seven day time frame because, as here, the investigation authorized by subdivision (b)(3) may conclude at a time rendering it impossible to satisfy subdivision (b)(1)'s "within seven days *after receipt of the information*" requirement. (Italics added.) "It is not to be supposed that the

Legislature intended to require [an] impossible or idle act . . . ." (*Knight v. City of Los Angeles* (1945) 26 Cal.2d 764, 769-770.)

We therefore construe the "pursuant to paragraph (1)" language in Civil Code section 1786.53, subdivision (b)(3) as not referring to subdivision (b)(1)'s seven day period "after receipt of the information," but rather as describing to whom the information must be given as provided in subdivision (b)(1), i.e., "to the consumer," and requiring disclosure as in subdivision (b)(1), "regardless of whether the information is received in written or oral form." This construction harmonizes subdivision (b)(3) with its companion investigation provision, subdivision (b)(4), which specifies that disclosure shall be made "to the consumer" but does not specify a seven-day window or other time period. (See 2B Singer, Sutherland Statutes and Statutory Construction (6th ed. 2000) § 53:01, p. 324 [noting judicial "duty to construe statutes harmoniously where that can reasonably be done"].)

Illustrating the Legislature's preference for disclosure, subdivisions (b)(2) and (b)(3) together dictate that the background check information reviewed by the employer must be disclosed even if the investigation ends in a result favorable to the employee, unless the employee has "waive[d] his or her right to receive a copy of any public record obtained pursuant to this section." (Civ. Code, §1786.53, subd. (b)(2) and (3).) There is no requirement that the employee must request the information, for he or she may not even be aware a background check has been conducted. And subdivision (b)(4) provides that if the employee has executed a waiver, he or she is nonetheless entitled to a copy of the public record if the investigation results in adverse action. (Civ. Code, § 1786.53, subd. (b)(4).) In the absence of a statutorily prescribed period, we hold that an employer must furnish copies of any public record uncovered in a

background check within a reasonable time after an investigation concludes, according to the circumstances of each case.

Here, where Nelson and Murphy confirmed with Moran the relevant facts of the background check (i.e., that he was a felon) and provided him with copies of the documents within eight business days of confronting him, we conclude as a matter of law this was a reasonable amount of time. No purpose would be served by subjecting Murtaugh to the minimum $10,000 penalty for violations of the Act. (See Civ. Code, § 1786.50, subd. (a)(1).) Indeed, to hold Murtaugh liable would contravene the Act's purpose, since Nelson and Murphy's due diligence inquiry served to verify that the background check information was accurate and not the result of identity theft or otherwise erroneous. The trial court could thus conclude, without abusing its discretion, that there was no reasonable probability Moran would prevail on his Civil Code section 1786.53 claim, and hence require him to post security.

2. Other Claims

Moran contends the trial court also erred in concluding he had no reasonable probability of prevailing on his disparate impact discrimination claim under FEHA. (Gov. Code, § 12940.) "Prohibited discrimination may . . . be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354, fn. 20.)

Moran is Caucasian. It is true that courts in a few cases have recognized a nonminority's standing to pursue claims of discrimination against *fellow minority employees*. (See *Waters v. Heublein, Inc.* (9th Cir. 1976) 547 F.2d 466, 467, 469

(*Waters*) [reasoning that the plaintiff is an "aggrieved person" affected by the discrimination].) It is nevertheless also true that for the disparate impact claim to succeed, the plaintiff must: "'(1) identify the specific employment practice[] being challenged; (2) show disparate impact; and (3) *prove causation*.'" (*Beale v. GTE California* (C.D. Cal. 1996) 999 F.Supp. 1312, 1323, italics added.) "To prove causation, the plaintiff must 'offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused *the [plaintiffs' terminations] because of their membership in a protected group*.'" (*Ibid.*, original brackets, italics added.)

Here, Moran is a felon and not in any protected class. (See Gov. Code, § 12940, subd. (a) [prohibiting discrimination on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation"].) And, unlike the scenario in *Waters*, his complaint does not allege he brought suit to redress the discriminatory impact of an employment practice on minority employees or applicants at his workplace. Murtaugh contends it had no practice or policy of terminating employees with a felony record and that Moran was the only person to ever leave the firm in such circumstances. In any event, given the defect in Moran's complaint, the trial court could reasonably conclude he had no reasonable probability of prevailing on his FEHA claim. The trial court also could conclude Moran had no reasonable probability of success on his action for negligent infliction of emotional distress since it was based on his claims under Civil Code section 1786.53 and FEHA. Hence, the court was within its discretion in requiring Moran to post security.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal. (Cal. Rules of Court, rule 27.)

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.