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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**
10

11 MYDRA MCGARR,
12

13 Plaintiff,

14 vs.

15 TENDERLOIN HOUSING CLINIC, INC.,
CHANEL SAMUEL, and DOES 1 to 25,
16 inclusive,

17 Defendants.
18
19

Case No. CGC 08-478204

**PLAINTIFF'S OPPOSITION TO
DEFENDANT TENDERLOIN
HOUSING CLINIC, INC.' S MOTION
FOR SUMMARY JUDGMENT;
POINTS AND AUTHORITIES;
DECLARATION OF WILLIAM E.
WEISS**

Hearing Date: 07/23/09

Time: 9:30 a.m.

Dept. 302

TRIAL DATE: AUGUST 24, 2009
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1 I. REQUEST FOR CONTINUANCE

2 On July 1, 2009 defendant Samuel plead guilty and accepted a sentence of four years
3 with a strike. Prior to the conviction and sentencing the parties could not depose Samuel because
4 she was incarcerated and was getting prosecuted. Her lawyer rightfully objected based on the 5th
5 Amendment. Now that she is convicted there is no barrier to taking defendant Samuel's
6 deposition. She is obviously an important witness so plaintiff requests a 60 day continuance of
7 this motion in order to locate her and obtain her deposition. Plaintiff will also seek a continuance
8 of the trial date of August 24, 2009.

9 II. SYNOPSIS

10 This case arises from a brutal assault and battery committed on the person of plaintiff,
11 Mydra McGarr, an employee of the defendant Tenderloin Housing Clinic, Inc. (hereafter
12 "THC"), by defendant Chanel Samuel who was not only a tenant of the THC but also an
13 employee. Plaintiff seeks to establish an exception to the worker's compensation exclusivity rule
14 by showing that the THC had notice of potential danger to the plaintiff and by not acting, ratified
15 the conduct of Samuel. Within a two or three day period in May 2008 plaintiff reported to THC's
16 management that Samuel was threatening her with violence and acting belligerent to her.
17 Further, Samuel's case manager, Laurie McElroy, actually witnessed Samuel threaten the
18 plaintiff with violence a day or two before the attack and did absolutely nothing about it and
19 failed to follow the THC's rules about threats of violence. Moreover, plaintiff's complaints were
20 downplayed or ignored. On the day of the attack, Samuel started stalking plaintiff around the
21 hotel as plaintiff was working as a janitor. Plaintiff also reported that to hotel manager, Jesus
22 Lopez who only joked about it and did nothing. Shortly thereafter plaintiff was on her way to the
23 hospital with severe facial and head injuries and a left arm fracture. ¹

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26
27 ¹ Multiple skull fractures (alveolar ridge fractures; dx with t-bone fracture and non displaced frontal sinus fracture;
28 closed fracture orbital floor-blow-out type; concussion with vertigo; severe headaches; open reduction internal
fixation of facial injuries; right eye visual disturbance plus ptosis; facial lacerations; traumatic hyphema retrobulbar
hemorrhage with vision loss; pain; swelling; severe emotional distress; severely comminuted and centrally depressed
fracture of the nasal orbital ethmoidal complex; fracture of the anterior and posterior tables of the frontal sinuses;
pneumocephalus; bilateral medial inferior orbital wall fractures with inferior blow out of the right resulting in

1 Illegal drug use is rampant at the Hartland Hotel and it was known to the manager of the
2 Hartland Hotel that Samuel smoked crystal meth. Further, defendant THC aided the criminal
3 defense of defendant Samuel by forcing witnesses to be prepared to say bad things about plaintiff
4 at the preliminary hearing to assist Samuel's lawyer argue self-defense. In fact, James Holland,
5 the Director of Property Management confided to plaintiff that the witnesses were forced to go
6 testify or get in trouble with the THC. Another witness told plaintiff that too when she visited
7 plaintiff in the hospital. The THC's counsel in this case supplied deposition transcripts and other
8 discovery responses to defendant Samuel's criminal defense counsel.
9

10 III. STATEMENT OF FACTS

11 On May 30, 2008, the plaintiff, Mydra McGarr, was employed as a janitor at the Hartland
12 Hotel, an SRO hotel run by defendant THC. In late morning she went into the basement of the
13 hotel to return the rug shampooer and to prepare to cut a key for a tenant. As she started to head
14 out of the basement, defendant Chanel Samuel, also an employee of the THC and a tenant of the
15 Hartland Hotel came out of hiding and struck plaintiff on the head with a sewer pipe with great
16 force. Plaintiff turned and Samuel repeatedly struck plaintiff in the head with the pipe. Plaintiff
17 tried to defend herself with a vacuum cleaner but that was broken by the force of the blows.
18 McGraw could not wrestle the pipe away from Samuel because she was already weak from loss
19 of blood.
20

21 Plaintiff told Samuel that she was messing up her life and plaintiff's but Samuel said she
22 did not care. When plaintiff tried to get her cell phone out to call for help Samuel said: "Huh-uh
23 bitch, you dying today" striking plaintiff's left arm with the pipe and breaking it; and then
24
25

26 herniation of the fat and inferior displacement of the inferior rectus; right superior orbit fracture; fairly marked right
27 proptosis resulting in straightening of the optic nerve; moderate retrobulbar hemorrhage and stranding adjacent to
28 the extraocular muscles; bilateral anterior and medial maxillary sinus fractures; minimally displaced fractures of the
squamosal portion of the left temporal bone; left central and lateral incisors pushed back and loose other teeth dead
nerves; multiple abrasions; extensive complex lacerations to plaintiff's face and head; left nondisplaced fracture of
the ulna; seizures; post traumatic stress disorder. Other brain related issues are still being explored by medical
personnel. Currently Plaintiff is temporarily totally psychiatrically disabled.

1 Samuel crushed the phone under her foot. Plaintiff yelled for help and was hit a few more times.
2 McGarr Depo pp. 115:3-13; 116:1-25; 117:1-3 (*See* Ex. "A" to Decl. of William E. Weiss)

3 At that point the front desk clerk, James Kang, came down in response to the cries for
4 help and told Samuel to stop and that he was going to call the police. McGarr Depo p. 119:1-25.
5 (*See* Ex. "A" to Decl. of William E. Weiss) Chanel Samuel was arrested and taken away by the
6 San Francisco Police on May 30, 2008. She told James Kang, the desk clerk who witnessed the
7 beating of the plaintiff that she messed up and did not want to go to jail. Kang Depo pp. 40:1-17,
8 42:4-9 (*See* Ex. "E" to Decl. of William E. Weiss)

9
10 Around the 28th or 29th of May 2008 before the subject incident of May 30, 2008 case
11 manager Laurie McElroy heard defendant Samuel say to plaintiff: "I am going to beat your ass"
12 and "I am going to get mine". It sounded intense. McElroy thought it was two weeks before the
13 incident of May 30, 2008. Plaintiff testified that the incident that McElroy witnessed where
14 Samuel threatened to "beat her ass" (said directly to plaintiff) was one day prior to May 28 or 29,
15 2008, not two weeks prior. McElroy Depo p. 36:2-23 (*See* "G" to Decl. of William E. Weiss),
16 McGarr Depo p. 86:5-25 (*See* "A" to Decl. of William E. Weiss)

17
18 Plaintiff appeared upset after the threat and was holding her head in her hands. McElroy
19 Depo pp. 37:17-25; 38:1-25 (*See* Ex. "G" to Decl. of William E. Weiss)

20
21 McElroy did not fill out any sort of paperwork on the threat of violence but thinks she
22 may have told her supervisor Jeff Buckley about it. According to assistant manager, Steve
23 Williams, the case manager should set a meeting called a "hork" to deal with a tenant's violation
24 of the rules-regarding violence for example-with the general manager and "proper" supervisors
25 McElroy Depo pp. 39:13-15; 61:13-17; Williams Depo pp. 24:3-6; 66:12-25; 67:1-25 (*See* Ex.
26 "V" to Decl. of William E. Weiss)

27
28 After the incident McElroy heard people speaking openly about Samuel using meth and
that she smoked it in her room. McElroy Depo pp. 40:18-25; 41:1-8; 43:2-8 (*See* Ex. "G" to

1 Decl. of William E. Weiss) McElroy had noticed that Samuel was “twitchy” and seemed a little
2 tense to her and that she would move her body around in abrupt ways. McElroy Depo pp. 43:4-
3 25; 44:1-5 (*See* Ex. “G” to Decl. of William E. Weiss)

4 MCElroy also heard, after this incident, from tenants that Samuel had a really bad
5 temper, that she could be violent and could “really flash on.” McElroy Depo pp. 47:16-25; 48:1-
6 22 (*See* Ex. “G” to Decl. of William E. Weiss)

7 McElroy knew the THC had a policy about not tolerating violence and that the THC had
8 violence incident reports. McElroy Depo pp. 46:22-25; 47:1-3; 77:6-23 (*See* Ex. “G” to Decl. of
9 William E. Weiss)

10 Laurie McElroy, Samuel’s case manager, says she doesn’t recall if she had training on
11 what to do if she hears one employee threaten another even though she read the employee
12 manual and signed off on it. She has a copy of the manual in her office. McElroy Depo pp.78:5-
13 25; 70:1-16 (*See* Ex. “G” to Decl. of William E. Weiss)

14 McElroy never sent any paperwork higher up after hearing Samuel threaten Plaintiff with
15 violence because she wasn’t sure what to do and she never sought any guidance about what she
16 should do. McElroy Depo pp. 39:13-25; 40:1-2 (*See* Ex. “G” to Decl. of William E. Weiss)

17 The THC’s support services incident reporting policy says if a case manager witnesses a
18 threat of violence from a client (i.e., tenant) toward a staff member, among others, he or she
19 should make an incident report and if there are any questions about appropriateness of reporting
20 the case manager should discuss it with their Support Services manager immediately. (*See*
21 Support Services Incident Reporting Policy, Ex. “I” to Decl. of William E. Weiss)

22 The incident report should be completed within 24 hours of any incident and submitted
23 immediately to the Support Services manager. (*See* Support Services Incident Reporting Policy,
24 Ex. “I” to Decl. of William E. Weiss)

1 Information gathered about a threat of violence may be reported to other THC
2 departments if the incident was observed in a public space. (See Support Services Incident
3 Reporting Policy, Ex. "I" to Decl. of William E. Weiss)

4 The THC has a policy that any threats of violence made against staff or tenants should be
5 reported to police. Depo of James Holland p. 102:10-25 (See Ex. "C" to Decl. of William E.
6 Weiss)

7
8 If a case manager knows a threat of physical violence has been made the case
9 manager should immediately contact his or her supervisor. Depo of James Holland p. 102:17-
10 23(See Ex. "C" to Decl. of William E. Weiss) Under the THC's Tarasoff policy a threat of
11 violence against staff or a tenant should be reported to a supervisor if one is available and if not
12 to the support services director. Depo of James Holland pp. 102:24-25; 103:1-2 (See Ex. "G" to
13 Decl. of William E. Weiss)

14
15 If the support services director is not available to receive a report of threatened violence
16 the deputy director of the Client Services should be contacted. Depo of James Holland p. 103:3-
17 6 (See Ex. "G" to Decl. of William E. Weiss)

18 It was the THC's policy to design a plan to report threatened violence to the police.
19 Holland Depo pp.103:7-14 (See Ex. "G" to Decl. of William E. Weiss)

20 The THC has a policy called threat of violence in the workplace policy that seeks to
21 protect staff from harm as a matter of utmost importance. Holland Depo p. 105:18-21 (See Ex.
22 "G" to Decl. of William E. Weiss)

23
24 It is the policy of the THC that all threats to employees should be taken seriously and
25 responded to immediately. Holland Depo p. 105:22-25 (See Ex. "G" to Decl. of William E.
26 Weiss)

27 It is the further policy of the THC that all efforts should be made to provide the employee
28 with a temporary work site to allow him/her to continue to work if there is a threat of violence

1 and if this is impossible then the direct supervisor will plan out a work situation for the employee
2 that is similar as possible. Holland Depo p.106:1-10 (*See Ex. "G" to Decl. of William E. Weiss*)

3 If a manager of a THC hotel learns that a tenant is smoking crystal meth in his or her
4 room the manager's role would be to do nothing as long as there are no behavioral problems.
5 Depo of Krista Gaeta pp. 27:21-25, 28:1-2 (*See Ex. "D" to Decl. of William E. Weiss*)

6 Violence would be considered a behavioral problem. Depo of Krista Gaeta p. 28:13-21
7 (*See Ex. "D" to Decl. of William E. Weiss*)

8 McElroy knew that the use of stimulants can make a person agitated and combative and
9 that Samuel appeared to be physically agitated. McElroy Depo pp.71:19-24; 72:1-12. (*See Ex.*
10 *"G" to Decl. of William E. Weiss*)

11 McElroy has seen Samuel working as a desk clerk before at the Hartland Hotel. McElroy
12 Depo p. 91:1-21. (*See Ex. "G" to Decl. of William E. Weiss*)

13 When plaintiff was working one day, the Hartland manager, Jesus Lopez, summoned her
14 to the room of defendant Samuel to identify a strange smell. He was there conducting a pest
15 inspection. McGarr Depo p. 43:15-25 (*See Ex. "A" to Decl. of William E. Weiss*)

16 Plaintiff identified the foul smell as the residue of smoked crystal meth and she told this
17 to Lopez. McGarr Depo p. 44:1-18 (*See Ex. "A" to Decl. of William E. Weiss*)

18 Before the two incidents when plaintiff was on schedule with Samuel cleaning out the
19 basement, she said hello to Samuel and Samuel replied "if you are thinking about suing the
20 company I don't want anything to do with you." Plaintiff could not comprehend what Samuel
21 was talking about and asked manager Lopez not to have them work together again. Lopez told
22 plaintiff he had had an altercation with Samuel as well. He also called Colleen Carrigan and
23 Carrigan had her removed from the building to work at another building. McGarr Depo pp. 80:9-
24 25; 81:1-16. Also see McGarr Depo pp. 54:23-25; 55:1-3, 56:11-23 (*See Ex. "A" to Decl. of*
25 *William E. Weiss*)

1 On May 29, 2008 plaintiff was behind the front desk relieving the desk clerk for her
2 break when defendant Samuel quickly walked behind the front desk and behind the plaintiff.

3 McGarr Depo p. 58:1-25 (*See Ex. "A" to Decl. of William E. Weiss*)

4 Samuel was not authorized to go behind the front desk because she was not on duty.

5 Lopez Depo p. 44:1-5 (*See Ex. "F" to Decl. of William E. Weiss*)

6 Plaintiff advised Samuel the area was unauthorized for her and if she needed water she
7 should ask from the front of the desk. In response Samuel walked out of the office door and left
8 the building. She then walked back in and slammed the office door saying, "This is for what you
9 did to me two months ago." Plaintiff wrote an incident report and called manager Jesus Lopez to
10 report the incident. McGarr Depo p. 58:7-25 (*See Ex. "A" to Decl. of William E. Weiss*)

11 Lopez did not talk to Samuel about the complaint of Samuel's unauthorized entry behind
12 the front desk and slamming the door and yelling at plaintiff. Lopez Depo pp. 44:1-5; 47:7-23
13 (*See Ex. "F" to Decl. of William E. Weiss*)

14 Colleen Carrigan did talk to Samuel about it and told her that her conduct was
15 inappropriate and that she should not have been behind the desk if she was off duty. Samuel said
16 she understood. Carrigan Depo pp. 95:11-25; 96:5-25; 97:1-2 (*See Ex. "B" to Decl. of William*
17 *E. Weiss*)

18 Carrigan had heard about the incident personally from plaintiff at a safety meeting earlier
19 in the day and from the hotel manager, Jesus Lopez, via e-mail. Carrigan Depo pp. 86:3-25,
20 87:1-4, 90:7-18 (*See Ex. "B" to Decl. of William E. Weiss*)

21 In late afternoon, about 1-2 hours after the first incident, Samuel came back to the hotel
22 and started shouting at plaintiff that she hates her, she was going to get her for the incident
23 report, that plaintiff was the biggest hater ever, I can't stand you and let's talk to the manager
24 about you slamming the door in my face. Samuel then walked out the front door and then came
25 back in. Samuel called plaintiff a bitch and told plaintiff she was going to get her. She also had a
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1 look that plaintiff interpreted as Samuel was going to harm her. McGarr Depo pp. 59:3-25; 60:1-
2 6, 61:1-13 (*See Ex. "A" to Decl. of William E. Weiss*)

3 Plaintiff told Lopez that she was threatened by Samuel. At that point plaintiff felt in fear
4 for her life. She reported both incidents to hotel manager Jesus Lopez by telephone as well as
5 writing two incident reports. McGarr Depo pp. 70:5-24; 71:4-13; 72:1-25 (*See Ex. "A" to Decl.*
6 *of William E. Weiss*)

7
8 Plaintiff told Lopez after the second incident in phone call on May 29 how she thought
9 Samuel was threatening her, that maybe she was calling someone to come over and harm
10 plaintiff (plaintiff said Samuel was on a cell phone walking by her cursing at her at the same time
11 while plaintiff was talking to Lopez). McGarr Depo pp. 77:12-25; 72:3-13 (*See Ex. "A" to Decl.*
12 *of William E. Weiss*)

13
14 Samuel also relieved desk clerks frequently at the Hartland Hotel regardless of her
15 janitorial work at other buildings and plaintiff saw her behind the front desk. McGarr Depo pp.
16 90:18-25; 91:2-20 (*See Ex. "A" to Decl. of William E. Weiss*)

17 On May 30, 2008, the day of the attack, Maddy, the desk clerk, told plaintiff that Samuel
18 was trying her to leave the front desk early so Samuel could take over the front desk. Samuel was
19 noted by Maddy to be pacing back and forth and then she left to get her paycheck. After that she
20 started following plaintiff around the building. McGarr Depo pp. 93:12-25; 94: 1-20 (*See Ex.*
21 *"A" to Decl. of William E. Weiss*)

22
23 On May 30, 2008, the day of the attack, plaintiff started work at 8:00 a.m. From then
24 until about 11:20 a.m. Samuel followed plaintiff around the building as plaintiff worked, no
25 matter what floor she was on. She reported this to manager Lopez but he just cracked jokes about
26 it. Since Samuel was following plaintiff around every floor she worked on plaintiff tried to be
27 cautious of her. McGarr Depo pp. 89:13-25; 90:1-9; 92:14-25; 93:1-23 (*See Ex. "A" to Decl. of*
28 *William E. Weiss*)

1 After learning about the second incident on May 29, 2008, which involved insults and
2 threats to get the plaintiff, general manager Lopez did nothing. He did not have a reason for this
3 lapse. Lopez Depo p.47:18-23 (*See Ex. "F" to Decl. of William E. Weiss*)

4 Lopez e-mailed Colleen Carrigan, the lead Property Manager, about the incident of door
5 slamming and faxed her a form mentioning the second incident which involved threats and name
6 calling. He saw Samuel the morning in the main office and told her they need to talk and she said
7 OK. Lopez Depo pp.49:12-25; 50:1-25 (*See Ex. "F" to Decl. of William E. Weiss*)

8 Lopez e-mailed Carrigan about the first incident and she said she would handle it. He
9 saw Carrigan the morning of the 30th, before the attack, and told her that he wanted to give
10 Samuel a written violation and schedule a conference with her. Colleen told him she would talk
11 to Samuel as her supervisor. Carrigan did not say when she would do this. Lopez Depo pp.
12 52:22-25; 53:1-25; 54:1-16, 60:1-5 (*See Ex. "F" to Decl. of William E. Weiss*)

13 Lopez did not tell Samuel that a written violation could threaten her tenancy. Lopez
14 Depo p. 61:14-16 (*See Ex. "F" to Decl. of William E. Weiss*)

15 Carrigan learned about the second incident of May 29, 2008 from Jesus Lopez. And saw
16 writings about the second incident the morning of May 30, 2008 before the attack. Carrigan
17 Depo pp. 88:1-15; 90:1-25; 91:1 (*See Ex. "B" to Decl. of William E. Weiss*)

18 Carrigan planned to follow up with the parties involved and schedule a tenant conference.
19 No conference was scheduled for the 30th. Carrigan Depo pp. 93:2-18; 102:9-12 (*See Ex. "B" to*
20 *Decl. of William E. Weiss*)

21 The morning of May 30, 2008 Samuel came to Carrigan to get her paycheck because
22 Carrigan was her supervisor. Carrigan did not talk to Samuel the morning of the 30th about either
23 incident on the 29th. Carrigan testified that it did not occur to her to be important to discuss the
24 second incident report with Samuel at that time nor did she talk about setting a meeting to
25 discuss it.

1 Instead Carrigan asked her how she was doing and discussed Samuel's interest in
2 becoming an assistant manager. Finally, Carrigan told Samuel to check back in with her on
3 Monday once she was back to work. Carrigan Depo pp.107:1-25, 109:22-25; 110:1-9 (*See Ex.*
4 "B" to Decl. of William E. Weiss)

5 Carrigan testified that it did not occur to her whether it was safe for McGarr to come to
6 work on the 30th. Carrigan Depo p. 108:3-15 (*See Ex.* "B" to Decl. of William E. Weiss)

7 Carrigan told desk clerk James Kang before his Deposition to make sure he realized it
8 was "none of their fault" and was he sure what had happened. Kang further testified that she did
9 not necessarily say it was not the THC's fault but reassured him it wasn't his fault. Kang Depo
10 pp. 66:22-25, 67:1-12 (*See Ex.* "E" to Decl. of William E. Weiss)

11 Colleen Carrigan has known Chanel Samuel since 2006 when Samuel was previously
12 employed at the THC as a desk clerk. Carrigan Depo p. 82:5-24 (*See Ex.* "B" to Decl. of William
13 E. Weiss)

14 Samuel never paid rent while living at the Hartland and no one ever attempted to collect
15 rent from her. Krista Gaeta, the director of Housing Services at the THC, said there was a
16 breakdown in the procedure and it should have been brought to her attention. Carrigan Depo pp.
17 154:6-25; 155:1-16; (*See Ex.* "B" to Decl. of William E. Weiss) Gaeta Depo pp. 25:2-25, 26:2-
18 21 (*See Ex.* "D" to Decl. of William E. Weiss)

19 Jesus Lopez, the Hartland Hotel manager, said he thought Samuel did pay rent but never
20 saw her name on the rent rolls. Lopez Depo pp. 38:3-13; 149:3-5; 150:8-23 (*See Ex.* "F" to Decl.
21 of William E. Weiss)

22 McElroy has seen Samuel work as a relief desk clerk at the Hartland and has seen her
23 working in the basement in a work jumpsuit and without a jumpsuit. McElroy Depo pp. 91:5-21;
24 92:2-23 (*See Ex.* "G" to Decl. of William E. Weiss)

1 According to McElroy only staff were allowed in the basement but doesn't know if they
2 are off duty if it is all right to go into the basement. McElroy Depo pp. 32:2-24, 33:1-12 (*See Ex.*
3 "G" to Decl. of William E. Weiss)

4 Illegal drug use is not allowed on the premises of a THC hotel and is a basis for eviction
5 although no one was ever evicted from the Hartland for drug related conduct. People are only
6 evicted for non-payment of rent. Gaeta Depo p. 31:6-22 (*See Ex. "D"* to Decl. of William E.
7 Weiss); Steve Williams Depo pp. 60:23-25; 61:1-25 (*See Ex. "V"* to Decl. of William E. Weiss)

8 Because the THC is a recipient of federal and state funds the THC is obligated to comply
9 with the state and federal Drug Free Workplace Act. Holland Depo p. 19:8-15 (*See Ex. "C"* to
10 Decl. of William E. Weiss)

11 The THC required tenants in 2008 to sign a lease addendum that forbids the use of drug
12 related activity by a tenant or guest of a tenant in the tenant's dwelling unit. Holland Depo p.
13 21:3-18 (*See Ex. "C"* to Decl. of William E. Weiss)

14 The lease addendum also forbids drug related activity at or near the hotel. Holland Depo
15 p. 20:3-19 (*See Ex. "C"* to Decl. of William E. Weiss)

16 James Holland is familiar with the lease addendums in his role as Director of Property
17 Management. Holland Depo p. 19:16-21 (*See Ex. "C"* to Decl. of William E. Weiss)

18 The THC's policy concerning drug and alcohol use forbids the use of illegal drugs by
19 staff because it affects the workplace. Gaeta Depo pp. 34:17-25, 35:4-5 (*See Ex. "D"* to Decl. of
20 William E. Weiss) The THC forbids use of illegal substances on or off the job because it
21 adversely affects an employee's work performance, efficiency, safety and health. Gaeta Depo p.
22 35:8-24 (*See Ex. "D"* to Decl. of William E. Weiss)

23 Further, the THC considers use of illegal substances as a danger to the welfare and safety
24 of all employees but no one has been evicted from the Hartland Hotel for drug use on the
25 premises. Gaeta Depo pp. 35:17-24; 18:13-19 (*See Ex. "D"* to Decl. of William E. Weiss)

1 Any employee who violates the THC's rules about illegal substance use is subject to
2 termination Gaeta Depo p. 37:2-10 (*See* Ex. "D" to Decl. of William E. Weiss)

3 The THC does not keep statistics on violence that occurs at any of its premises. Gaeta
4 Depo p. 42:20-22 (*See* Ex. "D" to Decl. of William E. Weiss)

5 At the preliminary hearing on the criminal case against Chanel Samuel a number of THC
6 employees went down to testify for the defense. They received their subpoenas from the THC
7 personnel office along with a letter of instruction as to where and when they would be needed.
8 Carrigan Depo p. 115:1-19 (*See* Ex. "B" to Decl. of William E. Weiss)

9 The defense tried to blame plaintiff for the attack and asked at least one witness, Jesus
10 Lopez, about negative aspects of plaintiff's personality. (*See* Transcript of the testimony of Jesus
11 Lopez from preliminary hearing dated August 26, 2008. Ex. "H" to Decl. of William E. Weiss)

12 Sometime after the preliminary hearing, James Holland, the Director of Property
13 Management told plaintiff at a BART station not to take it personally, referring to the employees
14 were forced to go down to the criminal court and testify against her. McGarr Depo pp. 155:18-
15 25; 156:1-25; 157:1-16 (*See* Ex. "A" to Decl. of William E. Weiss)

16 The defense lawyer in this case worked with the criminal defense lawyer to defend
17 Chanel Samuel, supplying deposition transcripts to him with plans to supply additional
18 investigation and documents. (*See* Motion to continue trial in *People v Samuel*, Declaration of
19 Chris Hite. Ex. "K" to Decl. of William E. Weiss)

20 IV. STANDARDS FOR A SUMMARY JUDGMENT

21 A trial court properly grants a motion for summary judgment only if the moving party has
22 demonstrated both that there is no triable issue of material fact and that it is entitled to judgment
23 as a matter of law. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The moving
24 party bears the burden of showing the court that the plaintiff "has not established, and cannot
25 reasonably expect to establish, a prima facie case" *Miller v. Department of Corrections*

1 (2005) 36 Cal. 4th 446, 460, quoting *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763,
2 768.

3 The burden does not shift to a responding party until the moving party has been able to
4 show that a cause of action is without merit because either an element of the claim cannot be
5 established or there is a complete defense. *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th
6 763, 768, citing *Scheidung v. Dinwiddie Construction Co.* (1999) 69 Cal. App. 4th 64, 70.

7
8 In considering a defendant's motion for summary judgment, the court must liberally
9 construe the plaintiff's evidentiary submissions and strictly scrutinize the defendant's own
10 evidence in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor. *Wiener v.*
11 *Southcoast Childcare Centers, Inc.* (2004) 32 Cal. 4th 1138, 1142.

12 A trial court may not grant a motion for summary judgment based on evidence that is
13 contradicted by other evidence or inferences. If the evidence raises a triable issue of material
14 fact, the court must conclude its consideration and deny the defendant's motion. *Aguilar v.*
15 *Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 856.

16
17 Ordinarily, questions of credibility cannot be resolved on summary judgment. *Miller v.*
18 *Department of Corrections* (2005) 36 Cal. 4th 446, 476. The trial court's function on a summary
19 judgment motion is limited to issue finding, not issue determination. *City of Santa Cruz v.*
20 *Pacific Gas & Electric Co.* (2000) 82 Cal. App. 4th 1167, 1188. Summary judgment may not be
21 granted by the court based on inferences reasonably deducible from the evidence, if contradicted
22 by other inferences or evidence, which raise a triable issue as to any material fact. Cal. Code Civ.
23 Proc. § 437c(c).

24
25 Defendant has not met its burden required for its motion. It has ignored significant
26 testimony of its own employees and argues in a conclusory way that it did nothing wrong. For
27 example, it cites *Fretland v. County of Humboldt* 63 CA4th 897 (1998) on pages 9, 10 and 12 of
28 its brief for the proposition that Labor Code § 3601(b) prohibits imposing civil liability on an

1 employer for one employee's assault and battery of another and that liability pursuant to labor
2 code § 3602 requires positive misconduct of the employer and not vicarious liability.

3 This case was overruled/superseded by *Fretland v County of Humboldt* 69 CA4th 1478
4 (1999) on other grounds but affirms that an employer may be liable if it ratifies the conduct of its
5 employee either by adopting it expressly or adopting it by implication based on conduct of the
6 purported principal from which an intention to consent to adopt the act may be fairly inferred,
7 including conduct which is 'inconsistent with any reasonable intention on his part, other than that
8 he intended approving and adopting it.' [Citations.]" (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67,
9 73." Id. 1491

11 It left out facts that militate against it and failed to explain them away. For example, it
12 argues that the incident reports plaintiff filled out don't say she felt threatened yet plaintiff
13 testified in Deposition that she told hotel manager Jesus Lopez that she felt threatened three
14 different times. (See Ex. "A" to Decl. of William E. Weiss)

16 There is no authority to say fear of violence must be reported in writing only.

17 After plaintiff told Lopez about feeling threatened she reported on the day of the attack
18 that Samuel was stalking her at work. He laughed it off and joked about it. (See Ex. "A" to Decl.
19 of William E. Weiss)

21 It ignores the fact that case manager Laurie McElroy personally witnessed Samuel
22 threaten plaintiff with violence and totally failed to follow defendant THC's rules for dealing
23 with threats of violence and claimed ignorance of them. (See Ex. "G" to Decl. of William E.
24 Weiss)

25 It ignores the fact that it helped Samuel's criminal defense. If actively helping plaintiff's
26 assailant is not ratification then what is? If THC argues that this action is just about what
27 happened between two employees then why would it step in on the side of the assailant? There is
28 no legal reason it would need to do that because it would not affect its own liability. In fact, it

1 should have stayed miles away from the criminal action if it wanted to take the position that this
2 was between two employees and thus only the subject of Labor Code § 3601(b).

3 V. THIS ACTION IS NOT BARRED BY THE EXCLUSIVE REMEDY DOCTRINE

4 Plaintiff sued her employer because it ratified and adopted the conduct of its employee
5 Chanel Samuel, who brutally beat the plaintiff with a sewer pipe in an attempt to kill her. There
6 is no question the attack was willful and unprovoked.
7

8 In the case of *Iverson v. Atlas Pacific Engineering* 143 CA3d 219 (1983) the court found
9 that a willful act by a co- employee that is ratified by the employer is not barred by the
10 exclusivity doctrine.

11 Defendant relies upon *Fretland v. County of Humboldt* 63 CA4th 897 (1998), superseded
12 on other grounds in *Fretland v. County of Humboldt* 69 CA4th 1478 (1999) for the proposition
13 that defendant THC cannot be held vicariously liable under Labor Code § 3601(b), nor under
14 Labor Code § 3602 unless the willful physical assault was committed by the THC itself. That
15 assertion is in error and is the result of a misinterpretation of the law by defendant.
16

17 The *Iverson* court recognized that the prohibition against imposing vicarious liability on
18 an employer does not apply when there was "positive misconduct" by the employer such as when
19 the employer "ratified" the tortious conduct of its employee and thereby became "liable for the
20 employee's wrongful conduct as a joint participant." (*Iverson, supra*, 143 Cal.App.3d at pp.
21 228.) Other courts have also recognized that an employer can be held civilly liable as a joint
22 participant in assaultive conduct committed by its employee pursuant to the doctrine of
23 ratification. (See *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608,
24 1618; *Hart v. National Mortgage & Land Co.* (1987) 189 CA3d 1420, 1432. See *Fretland I* at
25 904.)
26

27 It is clear from the authorities cited above that ratification is "positive misconduct" and
28 that Samuel's attack on plaintiff was intentional unless one interprets lying in wait with a

1 weapon, springing out and repeatedly striking a person telling them you are dying today as
2 accidental or negligent.

3 Also, Samuel received a four year sentence in state prison with a strike. Plaintiff's
4 counsel is in the process of obtaining the official documents of the conviction and sentencing.

5 An employer may be liable for an employee's willful and malicious actions under the
6 doctrine of ratification. *See* Civ. Code § 2339; Rest.2d, Agency § 218. An employee's actions
7 may be ratified after the fact by the employer's voluntary election to adopt an employee's
8 conduct, in essence, by treating the conduct as its own. *See Rakestraw, supra* at pp. 73.

9 Ratification is a question of fact and may be proved by circumstantial evidence. *Hale v.*
10 *Farmer's Ins. Exch.* 42 CA3d 681, 691 (1974) disapproved on other grounds in *Egan v. Mutual*
11 *of Omaha Ins. Co.* 24 Cal3d 809 (1983), *Sivia v. General Tire & Rubber Co.* 146 CA3d 152
12 (1983). The theory of ratification is generally applied where an employer fails to investigate or
13 respond to charges that an employee committed an intentional tort, such as assault and battery.
14 *McChristian v. Popkin*, 75 CA 2d 249, 256-257 (1946)

15 VI. SPECIFIC INTENT TO INJURE

16 Once again defendant misinterprets the law on this subject. For example, defendant cites
17 *Williams v. International Paper* 129 CA3d 810 (1982) for the proposition that the employer must
18 have a specific intent to injure the employee in order to obtain relief from the exclusivity
19 doctrine. But in *Williams, supra* the plaintiff alleged that the employer acted as an employer and
20 in a separate role as a self-insurer who was grossly negligent for allowing dangerous conditions
21 to exist in its plant. There was no issue of co-employee assault and battery and ratification was
22 not a subject of the case. The court said to avoid the exclusivity doctrine the plaintiff had to
23 prove an intent to injure, not gross negligence. McGarr argues and proves that the defendant
24 THC ratified the conduct of a co-employee which is positive misconduct that subjects the THC
25 to liability in a civil action.

1 *Soares v. City of Oakland* 9 CA 4th 1822 (1992) is also wrongly cited. That case dealt
2 with the issue of specific intent to injure between co-employees. As the *Soares* court states at
3 1831: "The jury's finding that Williams lacked any specific intent to injure appellant disposed of
4 any claim against both respondents. **We do not reach the city's contention that there was**
5 **insufficient evidence to hold it liable for ratifying or condoning Williams's conduct.** (See
6 *Iverson v. Atlas Pacific Engineering, supra*, 143 Cal.App.3d at pp. 228.)" (Emphasis supplied)
7 The THC cites *Hart v. National Mortgage & Land Co.* 189 CA3d 1420 (1987) and says that the
8 case requires three factors to satisfy in order to sue an employer. First of all, these three factors
9 do not appear on page 1430 as defendant THC suggests.

11
12 The *Hart* case involved sexual harassment involving physical contact that was reported
13 by the plaintiff to superiors and that was ignored by the employer to the point that the plaintiff
14 suffered emotional distress. The court says at 1430: "There can be little doubt Campbell's acts, as
15 alleged, had a questionable relationship to employment, and were neither a risk, an incident, nor
16 a normal part of Hart's employment with National. National can be charged with knowledge of
17 the acts by virtue of the fact Hart allegedly reported them to Debbie Adams, and National failed
18 to take action against Campbell. National can be said to have ratified Campbell's tortious
19 conduct, and thus became a joint participant in it." (*Iverson v. Atlas Pacific Engineering, supra*,
20 143 Cal.App.3d at pp. 228, *Meyer v. Graphic Arts International Union* (1979) 88 CA3d
21 176,178.) Of course, it must be shown National did this for the purpose of causing Hart
22 emotional distress. (*Cole v. Fair Oaks Fire Protection Dist., supra*, 43 Cal.3d at pp. 159; *Johns-*
23 *Manville Products Corpp. v. Superior Court, supra*, 27 Cal.3d at pp. 476.)

26 We believe Hart has adequately alleged ratification by claiming he reported Campbell's
27 activity to Debbie Adams, and she and Mary Drury "condon[ed] this conduct ... with knowledge
28 that plaintiff had objected and plaintiff would suffer further emotional and physical distress." If

1 he is able to allege National acted with the intent to injure, he should be permitted to do so. (*See,*
2 *e.g., McGee v. McNally, supra*, 119 Cal.App.3d at pp. 896.)”

3
4 The THC did intentionally cause plaintiff's injuries because it became a joint participant
5 in assaultive conduct committed by its employee pursuant to the doctrine of ratification. The
6 *Hart* case supports plaintiff, not the THC.

7 Hartland Hotel manager Jesus Lopez already knew plaintiff and Samuel did not get along
8 because plaintiff said Samuel was acting weird and did not want to work along side her. Samuel
9 was witnessed by Laurie McElroy threatening the plaintiff with violence a day or two before the
10 attack of May 30, 2008 and totally ignored the THC's rules for dealing with the threat. Then
11 Lopez received a written report of Samuel violating rules by going behind the desk while off
12 duty and after being admonished about it slamming the door to the front desk area and shouting
13 at plaintiff. Plaintiff called Lopez and told him about it and told she feared violence would ensue
14 due to Samuel's rage.

15
16 After Samuel received a mild admonishment from Colleen Carrigan she returned to the
17 hotel in a rage and shouted threats at plaintiff and told plaintiff she would get her. Not only did
18 plaintiff report this in writing but she also called Lopez again and told him she felt threatened
19 and afraid. He ignored the complaints, did nothing and faxed the incident report plaintiff
20 authored to Carrigan. Carrigan received it in the morning and after receiving it she gave Samuel
21 her paycheck, discussed Samuel's desire to be an assistant manager without ever mentioning
22 McGarr's second incident report and without doing anything about it at all.

23
24 Finally, shortly before the attack Samuel stalked plaintiff around the hotel while plaintiff
25 was working. McGarr reported this to Lopez too and he joked about it. Desk clerk Kang twice
26 prevented Samuel from going into the basement but she apparently went there through the
27 elevator. Before his Deposition, Carrigan told Kang to remember that “it was none of their fault”,
28

1 not his or anyone else's. Apparently Carrigan reminded more people about this and that in order
2 to save their jobs they needed to get their stories together.

3 In order to tamp down the lawsuit and save their jobs, employees were marshaled to the
4 courthouse to testify in support of Samuel's defense by bad-mouthing plaintiff. To top it off the
5 THC's lawyer supplied the criminal defense lawyer with Deposition transcripts and documents
6 so he could effectively cross-examine witnesses.
7

8 The THC argues innocence because there had been no previous incidents or prior
9 animosity between plaintiff and Samuel. One guesses this must refer to the time before plaintiff
10 asked to not have to work with Samuel because she was acting weird, or before threats of
11 violence, or shouting at plaintiff in a rage and slamming doors, or shouting at plaintiff that she
12 would get her and various insults, or stalking plaintiff while she worked or ignoring plaintiff's
13 communications that she was afraid and feeling threatened by Samuel. Maybe it was before they
14 knew Samuel smoked crystal meth or that she acted twitchy or could erupt in a rage. Carrigan's
15 "belief" that nothing would happen is irrelevant. She obviously liked Samuel and acted to protect
16 her by ignoring the warning signs and ignoring the THC's rules on how to deal with this kind of
17 situation.
18

19 Finally, Lopez confessed to plaintiff's sister, DiJada Durden, that he felt bad because he
20 did nothing about plaintiff's complaints and requests for help. That says it all.
21

22 VII. CONCLUSION

23 Defendant THC's reference to cases not directly related to the issues here is evidence of
24 the motion's weakness. Citation to cases dealing with suits against employers where ratification
25 of another employee's acts is not the issue does not control here.

26 The conduct of the THC and its staff does not paint a pretty picture: They totally failed to
27 follow their own rules about threats of violence and illegal drug use, ignored plaintiff's pleas for
28

1 help and protection when she came to them for help and after she was severely injured they acted
2 to distance themselves from the plaintiff.

3 Colleen Carrigan, Samuel's direct supervisor went to staff people telling them they
4 needed to get their stories together or they might lose their jobs and they don't need a lawsuit.
5 She told James Kang before his deposition that he should remember "It is none of their faults"
6 and not his fault what happened.
7


8 They let Samuel's tenancy by abandonment because they said it was simpler and cheaper.
9 The Director of Housing Services-who oversees tenant issues-said she had never heard of this
10 before.

11 In order to protect their jobs and limit their liability they embarked on a thuggish course
12 of character assassination, denigrating plaintiff so Samuel could claim self-defense.

13 Finally, in a cynical attempt to derail this case they actively helped Samuel's criminal
14 defense by supplying documents, depositions and delivering witnesses figuring that if she was
15 acquitted the lawsuit would go away. This is more than positive misconduct-it is despicable. No
16 one did anything to help Ms. McGarr after she was in the hospital. Because of this they ratified
17 and condoned everything Samuel did. They are standing in her prison-issue shoes and should be
18 called to account for their unethical conduct. This motion should be denied.
19
20

21 Date: July 9, 2009

LAW OFFICES OF WILLIAM E. WEISS

23
24 
25 WILLIAM E. WEISS
26 Attorney for Plaintiff,
27 MYDRA MCGARR
28

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 130 Sutter Street, 7th Floor, San Francisco, CA 94104.

On July 9, 2009, I served the within documents:

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; POINTS AND AUTHORITIES; DECLARATION OF WILLIAM E. WEISS; DECLARATION OF DIJADA DURDEN; PLAINTIFF'S UNDISPUTED MATERIAL FACTS AND RESPONSES TO DEFENDANT'S UNDISPUTED MATERIAL FACTS; PLAINTIFF'S OBJECTION TO DECLARATION OF COLLEEN CARRIGAN; REQUEST FOR JUDICIAL NOTICE

BY ELECTRONIC SERVICE: Based on an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: by placing the document(s) listed above in a sealed addressed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

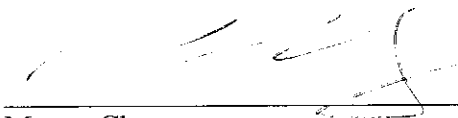
BY PERSONAL SERVICE: by placing the document(s) listed above in a sealed addressed envelope and transmitting the document(s) listed above to a professional courier/messenger, for personal delivery service of such envelope to the office of the addressee at the address set forth below.

BY OVERNIGHT MAIL/EXPRESS DELIVERY: by placing the document(s) listed above in a sealed addressed envelope and affixing a pre-paid air bill, and causing the envelope to be given to an overnight mail service at San Francisco, California to be hand delivered to the office of the addressee on the next business day.

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Executed on July 9, 2009, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Mason Chen