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JOHN S. KAO

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

JOHN S. KAO, Dr. Kao, vs. UNIVERSITY OF SAN FRANCISCO, an entity of unknown organization; MARTHA PEUGH-WADE; and DOE ONE through DOE TWENTY, inclusive. . Defendants. AND RELATED CROSS-ACTION	No.: CGC-09-489576 Case Filed: June 17, 2009 Trial Date: January 24, 2011 **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR NEW TRIAL AND TO VACATE JUDGMENT OR DECREE** Judge Wallace P. Douglass Dept. 318 Date: May 17, 2012 Time: 8:45 A.M.

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I. INTRODUCTION.

USF's argument misses the key issue. The issue is not simply of the weight of the evidence. Rather, the issue here is that the evidence presented at trial—even weighted in USF's favor—cannot justify USF's demand for a mental examination as a matter of law. See *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.

USF is seeking to use a demand for a comprehensive mental examination to overcome the fact that it could produce no evidence that Dr. Kao was dangerous or engaged in any activity that would have justified disciplinary action. The undisputed evidence is that Dr. Kao was being targeted as "dangerous" in 2007, *before* the events of Spring 2008 that USF asserts justified its demand for a mental examination. USF, however, presented no evidence whatsoever of any conduct by Dr. Kao in 2007 that could have lead anyone to believe that he was dangerous under any conceivable standard. Rather, the only evidence of pre-2008 events concerns Dr. Kao's discrimination complaints and his occasional depression, including the times he had adverse drug reactions to anti-depression medications.

Put simply, if USF had a problem with Dr. Kao's conduct, it had to use its disciplinary process to address that issue and give Dr. Kao the same rights as non-disabled employees to address and correct issues of conduct within that process. If USF thought that Dr. Kao needed disability accommodation or posed a threat to others because of a disability, it had to invoke the interactive process under the FEHA to address any functional limitations and accommodations for such a disability and, as part of that process, determine in consultation with Dr. Kao is any mental examination was necessary.

What it cannot do is what it did here. It cannot demand a comprehensive mental examination simply to see what was "wrong" with Dr. Kao and to assuage alleged fears by some faculty members—particularly where those fears are not based on any conduct by Dr. Kao that could reasonable or rationally give rise to such fears. Dr. Kao's rights under the FEHA and his right to privacy do not allow USF to *begin* with an invasive mental examination until other normal courses of action—the disciplinary or the interactive process—have been exhausted or proven to be futile.

USF's ban of Dr. Kao from its open campus is unsupported by any evidence other than Mr. Philpott's testimony that it was because of a perception that Dr. Kao was mentally unstable. USF, with an open campus, is unlike other employers who may not be similarly subject to the Unruh Act's requirements.

II. REPLY ARGUMENT.

A. USF'S "BUSINESS NECESSITY" DEFENSE FAILS BECAUSE IT WOULD UNDERMINE THE FEHA'S POLICIES OF NON-DISCRIMINATION AND USE OF THE INTERACTIVE PROCESS TO ADDRESS JOB-PERFORMANCE CONCERNS.

1. USF acted on the basis of a perceived mental disability, not misconduct.

The "business necessity" identified by USF (see Opp. Mem. pp. 12-13) rests entirely on its *perception* that plaintiff's behaviors indicated some dangerousness because of a mental disability. USF did not offer evidence of any misconduct or other behavior by Dr. Kao that would justify a mental examination *but for* USF's perception of some mental disability that made it think Dr. Kao was dangerous.

The proof of this point is simple:

First, all of USF arguments make sense only if it believed Dr. Kao suffered from a mental disability.

- The only purpose of sending Dr. Kao for a mental examination was to see if he suffered from a mental disability.
- The only reason to argue that the normal disciplinary process or violence prevention process were inadequate is a belief that Dr. Kao had a mental disability that made such processes ineffective for him because of that very disability.
- USF's purported concern about "confidentiality" only makes sense in the context of preserving the confidentiality of medical or psychiatric information. There is no "confidentiality" to preserve in a disciplinary process involving misconduct.

Second, USF perceived plaintiff as dangerous *before* any of the events testified to at trial. As Professor Brown testified, by earlier January 2008, three faculty members were claiming fear

of plaintiff and at the August 2007 Convocation, Dean Turpin had asserted that she was afraid of plaintiff. USF offered no evidence whatsoever of any actions by plaintiff that could rationally explain this alleged fear of him in 2007.

Third, the behaviors identified by USF are meaningless except in the context of a perception of a mental disability. Grimacing, glaring, anger, yelling, arguing and the like are not indicators of dangerousness. If such conduct ever rose to the level of misconduct in the workplace, the routine disciplinary process applicable to all employees would normally apply as the appropriate corrective action.

Fourth, USF offered no evidence to establish that Dr. Kao posed any actual threat to anyone. Nevertheless, USF filed a Cross-Complaint against Dr. Kao that expressly asserted that allowing Dr. Kao on campus would present "an unacceptable risk that such entry by [Dr. Kao] will result in harm or injury to the persons present on the University campus." Exh. 115 at p. 7:18-20.

2. USF's "Business Necessity" defense must be analyzed in the context of the FEHA as a whole and its goals to prohibit disability discrimination based on stereotypes and biases against persons with disabilities, to require an interactive process to address the ability of disabled persons to perform jobs and to prohibit intrusive medical examinations.

USF argues that any disturbing or aberrant behavior justifies a comprehensive medical examination. USF Opp. Mem. pp. 12-13. This argument fails to put the "business necessity" defense in the context of the FEHA's prohibition on disability discrimination and the requirement that employers use the "interactive process" to address job-performance issues that may be disability related.

First, because the law requires equal treatment (*Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 331-334), USF cannot substitute a mental examination for the normal disciplinary or violence prevention action that would otherwise apply to non-disabled employees. That is what USF is trying to do in this case. USF is relying on conduct to show a basis for fearing Dr. Kao. If Dr. Kao engaged in misconduct, the disciplinary process, not a mental examination, is the appropriate response.

It is not appropriate to rely on expressions of fears by a small number of faculty members based on equivocal or uncertain observations of behaviors that USF never inquired into. The law is designed to prevent employers from acting on stereotypes about persons with disabilities. See *Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1037 ("[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the `myths, fears and stereotypes' associated with disabilities"), disapproved on another point by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6. On the evidence in this case, USF's reliance on faculty members' expressions of fear is no different than relying on "myths, fears and stereotypes" about mental disabilities to discriminate against persons with perceived mental problems.

In particular in this case, the alleged fear about Dr. Kao arose in 2007—*before any of the incidents testified about at trial*. The only evidence of events that pre-date 2008 are Dr. Kao's identification of himself as suffering from occasional depression and adverse reactions in 2002 and 2006 to medications prescribed for this depression. Rather, the evidence is that USF was basing its actions on a perception that Dr. Kao had a mental disability, rather than any misconduct by him. See Pltf. Mem. p. 4:10-23.

Nor can USF avoid the normal disciplinary/violence prevention policies by speculating that Dr. Kao might react adversely to their invocation. That is pure speculation, unsupported by any evidence. In particular, even after being banned from campus and work in June 2008, Dr. Kao did nothing of a violent or improper nature. Certainly by January 2009, USF could not have any rational belief that using the normal disciplinary process would cause Dr. Kao to become violent.

Second, the law is designed to use an "interactive process" to determine whether actual or perceived disabilities can be accommodated in the workplace. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54-62; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261. This interactive process involves narrowly-tailored inquiries into the ability of an employee to perform essential job functions. *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n*

(2004) 121 Cal.App.4th 1578, 1598; *Conroy v. New York State Dept. of Correctional Serv.* (2 Cir. 2003) 333 F.3d 88, 98 (the employer must show that "the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary.").[1]

California law under the FEHA is more restrictive in this area than federal law under the ADA. In particular, under the FEHA, the failure to engage in an interactive process is itself an independent violation of the law. *Gelfo v. Lockheed Martin Corp.*, supra, 140 Cal.App.4th at 54-55; Gov. Code § 12940(n) (unlawful practice "For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."). In contrast, and unlike California, federal law does not make the failure to engage in the interactive process a violation of the law. *McGregor v. National R.R. Passenger Corp*. (9 Cir. 1999) 176 F.3d 1249, 1252 ("an employer is not liable under the ADA for failing to initiate an interactive process.").

In recognition of the important role of the interactive process under California law, the Fair Employment and Housing Commissions has recently proposed amendments to its regulations to clarify that the defense of safety of self or others can only be invoked *after* complying with the interactive process and that any medical inquiry must involve to job-related limitations caused by a disability. See Declaration of Christopher W. Katzenbach, Exhibit A (Notice of Rulemaking dated March 2, 2012), Exhibit B (Initial Statement of Reasons) and Exhibit C (Proposed Regulations). The FEHC's proposed Regulations clarify that

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[1] In proposed new Regulations, the Fair Employment and Housing Commission has expressly adopted the *Conroy* standards, including the requirement of a narrowly tailored examination. See CWK Decl. Exh. B at p. 39 (Initial Statement of Reasons, § 7294.3) and p. 40 (§ 7294.3(d)(2)) and Exh. C [Proposed Regulations] at pp. 21 (§ 7294.3(d)(1)(A) ["narrowly tailored to assess the employee's ability to carry out the essential functions of his or her job, or to determine whether an employee imposes a direct threat due to a medical condition") and § 7294.3(d)(2) [fitness for duty examination "the employer. . . must ensure that whatever medical inquiries are made are related to the essential functions of the employee's job."].

- Any request for medical information is limited to "job-related limitations" on the employee's ability to perform essential job functions. The FEHC expressly used the term "limitations" to conform to medical privacy laws and to distinguish an inquiry into "limitations" from a prohibited inquiry into the "nature and severity" of a disability. CWK Decl. Exh. B [Initial Statement of Reasons] at p. 16 [§ 7293.8] and p. 32 [§ 7294.1(d)(1) [definition of "relevant medical information"].
- A defense based on health or safety to the employee or others requires proof that the interactive process was used and completed. "The amendment clarifies that an employer has the burden of proving that, after engaging in the interactive process, there was no reasonable accommodation which would allow the employee or applicant to perform the essential functions of the position in question because of his or her disability as part of the 'health and safety of others' affirmative defense." CWK Decl. Exh. B [Initial Statement of Reasons] at p. 16 [§ 7293.8(c)].

In this case, USF did not present any evidence that it complied with the interactive process or that the information it sought was "narrowly-tailored" to address job-related limitations on Dr. Kao's ability to perform his essential job duties. USF did not engage Dr. Kao in any dialogue about its concerns or seeks any exchange of information that is the hallmark of the interactive process.

Likewise, the demand for a mental examination was not "narrowly-tailored" in any sense, but was a comprehensive examination into Dr. Kao's psychological condition and history. The purpose of the examination was not to address any specific limitations or accommodations that might be necessary because of a disability, but to determine if any disability existed at all. As USF explained in its letter to Dr. Kao (Exh. 34, p. 1, item 5), "The IP will provide the University a report setting forth his opinion as to your condition and fitness to perform your faculty functions in a manner that is safe and healthy for you, your faculty colleagues and others in the University community."

If this kind of unlimited mental examination to determine an employee's "condition" and general "fitness" to work can be justified by "business necessity" without the need to follow the normal disciplinary procedures for misconduct or the interactive process for work problems related to a perceived disability, then the "business necessity" exception would swallow the FEHA's limitations on mental examinations and undermine the FEHA's requirements for both equal treatment and the interactive process. Employees' rights to maintain confidentiality of their medical records, to prevent disclosure of their disabilities or unnecessary medical information and to address issues of job-performance and accommodation within the interactive process (see *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n*, supra, 121 Cal.App.4th at 1598) would become non-existent whenever an employer could claim some "concern" about the employee's performance.

Under USF's view, once it has a "concern" that a "fitness-for-duty" examination might address, it can demand a comprehensive mental examination to see what turns up, avoid the normal procedures for addressing misconduct and side-step the interactive process entirely. Rather than having the scope of a mental/medical examination defined through the interactive process, USF asserts the "business necessity" to have a comprehensive examination first, before the interactive process defines the job-performance limitations that need to be addressed. The FEHA's policy of non-discrimination, the requirement for an interactive process and the limitations on compelled mental examinations all point in a different direction. In short, USF's argument puts the cart before the horse. The need for a mental examination would arise only after the disciplinary process fails to address misconduct and only in the context of the need for medical information determined through the interactive process.

Third, USF's citation to various federal cases (USF Mem. p. 12) both ignores the differences between federal and California law, context of these cases and the evidence in them.

Unlike California, federal law does not make the failure to engage in the interactive process an independent violation of the law (*McGregor v. National R.R. Passenger Corp*., supra, 176 F.3d at 1252) and the duty to accommodate under federal law does not clearly apply to persons who are only perceived as disabled (*Gelfo*, supra 140 Cal.App.4th at 56-59 (noting split

in federal courts on this issue)). Additionally, California uses a broader definition of disability than federal law; California only requires a condition that "limits" participation in major life activities, not one that "substantially limits" major life activities. *Colmenares v. Braemar Country Club, Inc.*, supra, 29 Cal.4th at 1025.

Accordingly, for purposes of federal law, the failure to engage in an interactive process for someone perceived as disabled under federal law's narrower standards does not necessarily affect the analysis of business necessity or direct threat. Indeed, because the interactive process under federal law typically does not apply to persons with perceived disabilities and has a narrower definition of "disability," under federal law there may be arguably a greater business interest in demanding a medical examination to determine if a disability exists before the interactive process can begin at all. No similar justification exists under California law, since the interactive process does not require an actual disability and the broad definition of "disability" does not require significant medical evaluation. Under California law, there is no need to inquire whether an employee has an actual disability in order to begin an interactive process to determine if an employee can perform the job duties, if the employee is a threat to health or safety or if an employee needs an accommodation.

The facts in the federal cases are dramatically different as well. In *Sullivan v. River Valley Sch. Dist.* (6 Cir. 1999) 197 F.3d 804, the employee made direct threats, disclosed confidential information, used abusive language and would not stop when asked and refused to meet with management to discuss this conduct (at pp. 807-810). Even more significantly, the employer used the disciplinary process against the employee because of this misconduct and the misconduct was found to have occurred and justify substantial disciplinary action (a three-year suspension). *Id.* at 810. The mental examination was directed only *after* the disciplinary process had concluded and determined that this misconduct had taken place. *Ibid.*[2]

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[2] Apart for these factual distinctions, the *Sullivan* court applied a subjective standard as to the issue of direct threats based on an employer's "honest beliefs" that the employee cannot do the job rather than an objective standard. *Id.* at 812-813. The United States Supreme Court, however, has mandated that the "direct threat" defense must be based on objective evidence of such a threat and not a good faith belief of it. *Bragdon v. Abbott* (1998) 524 U.S. 624, 649-650.

Similarly, in *Fritsch v. City of Chula Vista* (S.D.Cal. 2000) 2000 WL 1740917, the attorney became unable to perform in court prompting an inquiry by the judge as to her condition. *Id.* *4. In *Brownfield v. City of Yakima*, supra, 612 F.3d 1140, the demand for a mental examination concerned a police officer—a factor that "heavily colored" the Ninth Circuit's decision (*id.* at 1146-1147)—and followed an undisputed series of extreme incidents, including domestic violence and veiled threats. *Id.* at 1146.

B. USF OFFERED NO REASON FOR THE CAMPUS BAN OTHER THAN PHILPOTT'S TESTIMONY.

USF asserts that Dr. Kao is relying on Mr. Philpott's testimony as to the campus ban in isolation. However, there is no other evidence of any reason for the ban other than the perception that Dr. Kao was mentally unstable.

The fact that experts may have advised the ban or that Mr. Cawood testified that bans are typical in violence cases, does not present a reason for the ban that is independent of a perception that Dr. Kao was disabled. None of these witnesses could validly give an opinion that a ban like this was lawful under the Unruh Act.

Likewise, whether such bans are typical does not directly address the issue of discrimination under the Unruh Act. USF, unlike other employers, has an open campus and is subject to the Unruh Act's requirement of equal rights to the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Civil Code § 51(b). The ban is unlawful here because USF is subject to the Unruh Act and the ban is based on a perception that Dr. Kao is disabled. The situation as to other employers is irrelevant and could not justify USF's violation of the Unruh Act.

III. CONCLUSION.

The Court should, (a) Grant a new trial for the reasons stated in this motion, and/or (b) correct the decree and/or judgment as stated in this motion.

Dated: May 10, 2012.

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