1st Civil No. A135750

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

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JOHN S. KAO,

Plaintiff and Appellant,

vs.

THE UNIVERSITY OF SAN FRANCISCO AND MARTHA PEUGH-WADE,

Defendants and Respondents.

—o0o—

On Appeal From A Judgment Of The Superior Court Of California,
County Of San Francisco
Superior Court No. CGC-09-489576
The Honorable Wallace P. Douglass, Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION TO REPLY

Respondents UNIVERSITY OF SAN FRANCISO (herein "USF" or the "University") and MARTHA PEUGH-WADE (herein "Peugh-Wade") arguments ultimately rest on the idea that it can take action against Appellant JOHN S. KAO (herein "Dr. Kao") because some faculty members and administrators said he was frightening to them and USF therefore needed a comprehensive psychological evaluation of Dr. Kao to assess if Dr. Kao was dangerous.

This is a case where "'myths, fears and stereotypes' associated with disabilities" (*Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1037, disapproved on another point by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6) have become the driving force and the *de facto* legal standard governing Dr. Kao's employment.

This is not a case where Dr. Kao is being held to the same standards of conduct as non-disabled employees. See *Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 331-334 (disabled employees can be held to same standards of conduct as non-disabled employees). The conduct that caused these fears was not serious enough to subject Dr. Kao to any of the University's normal disciplinary or threat-prevention policies. RT 1596:9-14, 1579:14-1580:5, 1357:18, 1345:1-3 (Peugh-Wade). RT 935:11-19, 958:16 - 959:21 (Lawson).

Instead, these fears arose because of perceptions that Dr. Kao had a serious mental condition. In describing Dr. Kao's mental condition, USF administrators did not simply note his undisputed

history of depression, but whet further to describe him as having hallucinations, being "psychotic," having a "delusional disorder," "paranoid" or having a "major mental disorder." RT 1002, 1010, 2206-2207, 2208; AA 163, 201. Before the events in Spring 2008 that USF presented at trial, the complaining faculty members and administrators had already formed the opinion that Dr. Kao was dangerous. See RT 2098, 2115 (Turpin at 2007 convocation); RT 2120-2121 (Tristan Needham, Peter Pacheco and Paul Zeitz to Dean Brown in late 2007 and early 2008). This perception colored every interaction with Dr. Kao—to the point where staring becomes "glaring," argument becomes shouting, bumping or brushing becomes an assault and sudden movement in the hallway becomes charging.

In simple terms, Dr. Kao's history of depression transformed into a perception of a major mental disorder that then made these faculty members' and administrators' interactions with Dr. Kao frightening. From that transformation, USF asserts Dr. Kao had to submit to a comprehensive psychological examination so the USF could be sure he was not dangerous.

This case flies in the face of the rights of disabled employees. To protect the rights of disabled employees, the Fair Employment and Housing Act (FEHA) requires more than an employer's unilateral assertion of a need for a psychological examination with a company doctor to determine if fears arising from a perceived mental condition are justified. Rather, before an employer can demand a psychological examination with a company doctor—before such an examination can be a "business necessity" under the FEHA—the employer must exhaust the "interactive process" with the employee. This is the

process through which it can be determined if the employer needs medical/psychological information warranted at all and, if so, what information is needed. Where medical information is needed, the interactive process addresses how that information can be obtained in a way that meets the needs of both the employee and the employer. In particular, the interactive process begins with the employee providing medical information from the employee's own medical providers. The interactive processes addresses whether the medical information the employee provides is insufficient and whether necessary medical information can, in such a case, only be obtained through a company doctor's examination .

In this case, substantial evidence does not support USF's argument that the interactive process had been exhausted. There was no exchange of information or dialogue. USF never identified what medical information it needed or gave Dr. Kao an opportunity to provide it. The undisputed evidence is that USF refused to share information with Dr. Kao so he could meaningfully assess and address USF's concerns. Instead of interacting with Dr. Kao in a collaborative and problem-solving process, USF told Dr. Kao that he frightened people for the first time on June 18, 2008 (AA 138). On Friday June 20, USF told Dr. Kao that providing him more information would not be productive and that he had until Monday June 23 to provide nonspecific information to USF (AA 140). Then, on June 24 USF demanded that Dr. Kao attend the examination with Dr. Reynolds it had set for July 1 in San Jose (AA 142-143). Thereafter, USF consistently asserted that a comprehensive

examination with Dr. Reynolds was the only way to meet its needs. AA 160.

II. REPLY ARGUMENT

A. Substantial Evidence Cannot Support The Jury's Verdict Where USF Did Not Present Sufficient Evidence To Meet The Legal Standard For "Business Necessity" Under The FEHA.

1. The Court must grant a new trial where the evidence is insufficient to establish USF's "business necessity" defense.

USF errs (Resp.Brf. pp. 33-34) in arguing that the jury instructions somehow limit the scope of the court's review in this case. To the contrary, a motion for a new trial raises both factual and legal challenges to the verdict. *Pollak v. State Personnel Board* (2001) 88 Cal.App.4th 1394, 1406; *Finnie v. Dist. No. 1, Pac. Coast Dist.* (1992) 9 Cal.App.4th 1311, 1315-1316. The appellate court will reverse the denial of a motion for new trial based on insufficiency of evidence "if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." *Fassberg Const. v. Housing Authority* (2007) 151 Cal.App.4th 267, 297. This requires the court to determine which party has the burden of proof on an issue and if the evidence at trial is sufficient to meet that burden. *Reese v. Smith* (1937) 9 Cal.2d 324, 328. Similarly, a verdict is also against the law for purposes of a motion for new trial "if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict against the part[ies] in whose favor the verdict [was]

returned. [Citations.]." *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567. Accordingly, the appellate court examines the record to determine whether the verdict was, as a matter of law, unsupported by substantial evidence. *Ibid.* Thus "where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a financing in favor of the appellant as a matter of law." *In Re I.W.* (2009) 108 Cal.App.4th 1517, 1528.

Similarly, the jury instructions were in accord with the statutory language under the Fair Employment and Housing Act (FEHA), Gov. Code § 12940(f)(2) that the examination had to be "job-related and consistent with business necessity." The instructions required USF to prove that the purpose of the mental examination "was to operate its business safely and efficiently" and that the examination "would substantially accomplish this business purpose." RA 71.

2. The evidence was insufficient to establish a "business necessity" justification for the examination USF demanded.

In this case, the burden of proof on "business necessity" is on USF. The FEHA puts this burden of proof on the employer, as it prohibits medical and psychological examinations except that "an employer or employment agency may require any examinations or inquiries that *it can show* to be job-related and consistent with business necessity." Gov. Code § 12940(f)(2) (emphasis supplied).

In Appellant's Opening Brief, Appellant shows that a "business necessity" justification for a mental examination under the FEHA requires (a) use of the interactive process (App.Opn.Brf. pp. 25-35)

or a proper excuse for not doing so (App.Opn.Brf. pp. 36-46) , and (b) proof that the examination was tailored to address the employee's ability to perform job-related functions safely (App.Opn.Brf.. pp. 42-46). As shown in Appellant's Opening Brief, USF offered no evidence that it had complied with the interactive process, had a proper excuse for not using the interactive process or that the examination was appropriately tailored to address legitimate concerns about Dr. Kao's ability to perform job-related functions. USF's argument in its Respondents' Brief does not identify any substantial evidence that would support the jury's verdict.

a. Substantial evidence does not support an implied jury finding that USF complied with its obligation to engage in an interactive process.

USF argues (Resp.Brf. pp. 35-38) that substantial evidence supports an implied jury finding that it engaged in an interactive process. USF points to meetings where it considered Dr. Kao's objections to the mental examination and postponed a final decision. USF also points to its offer to have a neutral decision-maker decide if its demand for a mental examination was justified. Resp.Brf. pp. 36-37. USF asserts that Dr. Kao should also have provided USF medical information. Resp.Brf. pp. 37-38.

This evidence does not show that USF complied with the interactive process because it does not show the kind of dialogue and mutual exchange of information that is the hallmark of the interactive process under the law. Rather, the undisputed evidence is that USF refused to have a *dialogue* with Dr. Kao and demanded a

comprehensive psychological examination *without any discussion* or significant *interaction* with Dr. Kao as to the basis for USF's concerns or the need for this examination or its scope. App.Opn.Brf. pp. 13-14, 15-16.

The new FEHC regulations clearly spell out how the interactive process requires a three-step procedure for obtaining medical information from employees (App.Opn.Brf. pp. 27-28):

- The *first* step was for USF to request directly relevant medical information from Dr. Kao. Cal. Code Regs., Tit. 2, § 7294.0(c)(2); §7294.0(d)(5)(B).
- If Dr. Kao did not provide sufficient information after such a request, the *second* step was for USF to explain what additional information it needed and give Dr. Kao an opportunity to provide it. *Id.*, § 7294.0(c)(4); § 7294.0(d)(5)(C). See also *DFEH v. Avis Budget Group, Inc.* (2010), Decision No. 10-05-P, at p. 24. Discussed in App.Opn.Brf. p. 30.
- If the medical/psychological information Dr. Kao provided was still insufficient, then as the *third* step in this process, USF could demand a fitness-for-duty examination. *Id.*, § 7294.0(c)(2); § 7294.0(d)(5)(C), last sentence.

While these new regulations are more explicit than the regulations they replaced, they embody prior law as to how the interactive process applies to an employer's need for medical information. App.Opn.Brf. pp. 29-30.

The evidence cited by USF does not follow this three-step process, or show that USF did anything close to what this three-step process required.

Simply telling Dr. Kao that USF "would welcome explanations, information or anything else you and/or your attorney wish to provide" (AA 139) is not a specific request for anything. It is, in particular, not a specific request for necessary medical information. See Resp. Brf. p. 37.

USF was told that the information it had given Dr. Kao was insufficient for him to provide a meaningful response. Dr. Kao asked for more information precisely so he could respond and evaluate USF's demands. AA 141. He also noted that USF's safety concerns appeared to arise only from "subjective responses, none of which were considered serious enough to warrant even the action of advising Professor Kao of the subjective concerns at any time proximate to the alleged events giving rise to the claimed safety concerns." AA 147, third full paragraph, last sentence. USF simply would not interact with Dr. Kao at all. It refused to provide Dr. Kao more specific information and persisted in its demand for an examination by Dr. Reynolds. AA 140, 150. It never gave Dr. Kao any explanation why it could not give him more information or why it was unwilling to discuss with him the basis for its concerns and why an examination by Dr. Reynolds was the only option.

In fact, USF hardly gave Dr. Kao enough time to provide medical information even if USF had identified what medical information it needed. The undisputed evidence is that USF refused to provide specific information to Dr. Kao as to its concerns. USF

told Dr. Kao that he frightened people for the first time on June 18, 2008. AA 138. USF told him on Friday June 20 that providing him more information would not be productive and that he had until Monday June 23 to provide any information he wanted to give USF. AA 140. On June 24, USF demanded that Dr. Kao attend the examination with Dr. Reynolds it had set for July 1 in San Jose (AA 142-143).

Even assuming that its June 18 letter welcoming any information Dr. Kao wanted to provide were interpreted as a request for medical information—notwithstanding USF's failure to identify medical information as the kind of information it would welcome—this request is the kind of overbroad inquiry that the FEHA prohibits. See App.Opn.Brf. 31-32.

USF also jumped the gun when it demanded the examination with Dr. Reynolds before giving Dr. Kao an opportunity to provide specific medical information when Dr. Kao did not provide medical information by the due date USF set. Where a request for medical information is insufficient—again, assuming the June 18 letter and June 20 email constituted a request for medical information—USF was still required to identify that insufficiency and tell Dr. Kao specifically what he needed to provide. Cal. Code Regs., Tit. 2, § 7294.0(c)(4); §7294.0(d)(5)(C). See also *DFEH v. Avis Budget Group, Inc.* (2010), Decision No. 10-05-P, at p. 24, discussed in App.Opn.Brf. p. 30.

Simply listening to or considering the information Dr. Kao provided is not an interactive process at all. It is not mutual communication, exchange of essential information or a collaborative

effort to identify a reasonable accommodation if one is needed. See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261. It is not the "interactive process" the law envisions: "the interactive process is designed to bring the two parties together to speak freely and to determine whether a reasonable, mutually satisfactory accommodation is possible to meet their respective needs." *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62. "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party." *Id.* at p. 62, fn. 22. When Dr. Kao asked for more information about USF's concerns, he was asking for the information that USF had available to it and that Dr. Kao did not have. Exchanging such information is exactly what the interactive process required.

Dr. Kao exchanged information with USF to the extent he could do so. Dr. Kao provided information in October 2008 that his teaching evaluations for Spring 2008 were above average, his interactions with students and faculty had continued regularly throughout the semester and that he had received regular invitations to social events. This information was inconsistent with USF's claim that he was seriously frightening to persons to the point where he could not carry out effectively his normal teaching and academic duties. RT 510-519, 2672-2675; AA 125, 156-157, 159. At that point, the interactive process required some communication from USF on the issues. Yet, USF did not respond by explaining why others still found Dr. Kao frightening or why he could not continue to do his regular teaching and work with students as he had done throughout

the Spring semester. USF did not respond by explaining why it still needed medical information, what information it needed or why the only acceptable way to obtain medical information was through a comprehensive psychological examination by Dr. Reynolds.

Proposing neutral arbitration—binding or non-binding—is not an informal process to determine the need for a reasonable accommodation to enable the employee to perform the job safely. See *Gelfo v. Lockheed Martin Corp.*, supra, 140 Cal.App.4th at 61-62. The arbitration USF proposed was not an informal way of finding a reasonable accommodation for a disability, but as a way of inducing Dr. Kao to go to Dr. Reynolds for the comprehensive psychological examination USF demanded. USF proposed arbitration as a dispute-resolution procedure, not a collaborative, informal and problem-solving process. This arbitration was a formal legal process that is the opposite of what the interactive process is about. The interactive process "is more of a labor tool than a legal tool" and "a mechanism to allow for early intervention by an employer, outside of the legal forum, for exploring reasonable accommodations for employees who are perceived to be disabled. . . ." *Id.* at 61-62, quoting from *Jacques v. DiMarzio, Inc.* (E.D.N.Y. 2002) 200 F.Supp.2d 151, 170.

Arbitration is also a costly, formal and non-interactive process. Using arbitration as a substitute for the interactive process imposes additional and unnecessary costs on a disabled employee. Rather than engaging in an exchange and discussion of reasonable alternatives, arbitration would allow only such exchange of information as the arbitrator might direct and involves no interactive dialogue or

discussion between the parties other than in formal arbitration proceedings.[1]

b. Substantial evidence does not support a finding that the mental examination was properly limited in scope.

USF argues that the psychological examination was limited in scope because it was limited to assessing Dr. Kao's ability to perform his duties as a professor. Resp.Brf. p. 38. USF argues that it was proper to leave it up to Dr. Reynolds to decide how to conduct the evaluation of that issue. *Ibid.* USF also argues that Dr. Kao never asked Dr. Reynolds or USF what information would be requested. Resp.Brf. pp. 38-39.

The FEHA does not allow medical/psychological examinations to determine generally the ability to perform a job in the abstract. Rather, examinations are limited to the determination of specific functional limitations needing accommodation. Cal. Code Regs., Tit. 2, §7294.0(d)(7) provides: "Any medical examination conducted by the employer's and other covered entity's health care provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation."

USF, however, never stated what functional limitations it believed Dr. Kao had that required a medical/psychological to

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[1] While arbitration does not preclude informal discussions outside of the arbitration process, it does not require them either. The interactive process *requires* an informal exchange of information and mutual problem-solving. *Gelfo*, supra, 160 Cal.App.4th at 61-62 and fn. 22.

determine. Without first identifying limitations at issue, any examination by Dr. Reynolds was necessarily overbroad.

Similarly, asking for all medical records is improper. Section 7294.0(d)(5)(B) of the regulations provides: "The employer or other covered entity shall not ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records, because those records may contain information unrelated to the need for accommodation." The principle that an employer's request for medical information must be limited to the ability to perform essential job functions or heath/safety issues is long-established. *Conroy v. New York State Dept. of Correctional Serv.* (2nd Cir. 2003) 333 F.3d 88, 98. This means "the request is no broader or more intrusive than necessary." *Id.* at 98.

Leaving it up to the doctor performing the examination to determine what medical records the employee must provide undermines this principle. An employee is entitled to know in advance what the medical issues are and what information the employee must produce. The employer is obligated to be specific as to why existing medical information is insufficient before the examination by the company doctor. Cal. Code Regs., Tit. 2, § 7294.0(c)(4); § 7294.0(d)(5)(C). This is especially important because the employer's demand for a medical examination may arise from a misperception of a disability or its effect on the employee's ability to work. *Gelfo*, supra, 160 Cal.App.4th at 54-62. The Legislature expressly intended the FEHA "to provide protection when an individual is erroneously or mistakenly believed to have any physical

or mental condition that limits a major life activity." Gov. Code § 12926.1(d).

Rather than complying with these principles, USF never identified what "functional limitations" were at issue or how the examination by Dr. Reynolds would determine them. USF did not, for example, state that Dr. Kao had a functional limitation in his ability to work with people because he suffered from hallucinations, was "psychotic," had a "delusional disorder," was "paranoid" or suffered from a "major mental disorder." There were the conditions USF had asserted in its consultations with Drs. Good and Missett. RT 100, 1002, 1009- 1010, 2206-2207, 2208; AA 163, 201.

USF did not limit the information it demanded Dr. Kao to provide to information relevant to any functional limitations it had identified. It did not state, for example, that it needed medical information to determine if Dr. Kao suffered from hallucinations, was "psychotic," had a "delusional disorder," was "paranoid" or suffered from a "major mental disorder." Such information could have been easily obtained from Dr. Kao's psychiatrist. Instead, USF told Dr. Kao that he must "provide all medical information" Dr. Reynolds requests and that Dr. Kao "fully cooperating with Dr. Reynolds in a timely manner is a condition of your continued employment." AA 142, Nos. 2, 4. The medical information release form that USF instructed Dr. Reynolds to have Dr. Kao sign was comprehensive, not limited in any way. See App.Opn.Brf. p. 15. Dr. Missett's advice to USF was to have Dr. Reynolds conduct a thorough assessment, including a personal or family history, education history, employment

history, medical history, medications history, psychological or psychiatric history, substance abuse history. AA 168-169.

c. Mr. Cawood's testimony as to "best practices" is not substantial evidence as it attempts to instruct the jury on the law and relies on general national standards contrary to the FEHA's policy of providing greater protection for disabled employees in California.

USF argues that Mr. Cawood's testimony as to "best practices" establishes that the examination was justified and necessary. Resp.Brf. pp. 31-32. To the contrary, "best practices" testimony improperly instructs the jury as to legal obligations on the facts of the case and is contrary to the goal of the FEHA to provide greater protection for California employees than federal or other state laws might provide.

Expert witnesses may not give opinions as to the meaning of legal obligations or their opinions as to a parties' liability. *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1179 and cases discussed at pp. 1179-1185. In *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841, the appellate court explained the reason for the rule against such testimony: " 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.' [Citations.]." Accordingly, "[s]uch legal conclusions do not constitute substantial evidence." *Ibid.*

While expert testimony on industry practices may be admissible in some cases, such as whether a party was negligent or as to the

meaning of standard contract terms (see *Summers*, supra, 69 Cal.App.4th at 1180-1181), industry standards are irrelevant to the issues under the FEHA in this case and misleading as to the proper standards to apply.

The FEHA prohibits unjustified medical/psychological examinations whatever the industry standards or "best practices" in the United States might be. Applying industry standards or "best practices" undermines the specific goal of the FEHA to provide greater protection for California employees. The Legislature expressly stated this goal (Gov. Code § 12926.1(a)): "(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."

Mr. Cawood's testimony was expressly based on such national standards. Preceding the "best practices" testimony cited by USF (Resp.Brf. p. 31), USF asked: "So Mr. Cawood, what are the best practices, you know, *nationally* -- and you know what the *best practices are nationally*, don't you?" RT 2458:21-24, emphasis supplied. Mr. Cawood also expressly premised his "best practices" testimony on national standards. He referenced "best practice . . . in the forensic community" (RT 2459:2-2) and "the general context of what is reasonable in colleges and universities as well as in every other form of organization." RT 2460:15-17. These national "best practices" were the "best practices" on which USF asked for Mr.

Cawood's opinion immediately after he had referenced these national standards. RT 2460:18-23.

Mr. Cawood's testimony that he agreed with a fitness-for-duty examination (Resp.Brf. pp. 31-32) is not "best practices" testimony at all. To the extent that it is an opinion that what USF did was reasonable, reasonableness is not the FEHA's standard; "business necessity" is the standard. To the extent that this could be construed as "best practices" testimony, it was again based on the national experience Mr. Cawood cited in describing his background as an expert. RT 2424-2434.

Testimony as to national "best practices" incorporates practices or standards implemented under federal and other state laws that may (and often are) less protective of employee rights than the FEHA. "Best practices" can only be developed in the context of the various federal and state laws that may limit or permit medical evaluations. Such national "best practices" cannot show, or limit, what the FEHA requires in California. Such testimony is misleading as to the duties and obligations in California under the FEHA. Using "best practices" as a standard undermines the protections the FEHA gives disabled employees. Such testimony and evidence is not, and cannot be, substantial evidence of what the FEHA requires. *Downer v. Bramet*, supra, 152 Cal.App.3d at 84.

B. The Safety Concerns Asserted To Justify Dr. Kao's Ban From The Campus Arise Solely Because USF Perceived Him To Have A Mental Disability.

USF argues that Dr. Kao was excluded from its campus because he refused to go the psychological examination and this created a safety concern. Resp.Brf. p. 41. USF argues that this was a legitimate reason for excluding Dr. Kao after his discharge.

In the area of disability discrimination, the Unruh Act does not require intentional discrimination against disabled persons. *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665, 673. Rather, it is sufficient that a disabled person is denied equal access or is subject to rules that tend to screen out disabled persons.[2]

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[2] The Unruh Act incorporates the standards in the Americans with Disabilities Act (ADA). Civil Code § 51(f). The ADA provides (42 U.S.C. § 12182: "(a) General rule — No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. * * * (b) Construction [¶] * * * (2) Specific prohibitions [¶] (A) Discrimination — For purposes of subsection (a) of this section, discrimination includes —(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered".

The safety concern USF asserts is nothing other than USF's reaction to a perceived disability. Such a concern denies disabled persons equal access and tends to screen out disabled persons from access to its campus.

Under USF's logic, it could exclude anyone from its campus who was perceived as having a mental condition that made them frightening until the person went to a USF doctor to determine they were not dangerous. As USF would apply this safety-first rule, only disabled persons are going to be targeted and screened out. USF does not need mental examinations to exclude persons who are actually dangerous and a rule against actually dangerous persons does not tend to screen out the disabled.

USF errs in arguing that the allegations in the cross-complaint are not evidence because it was not verified. Resp.Brf. p. 40. The cross-complaint's allegations are admissions that that can be used as evidence against USF to show its motives and purpose in banning Dr. Kao from the campus. *Aim Insurance Co. v. Culcasi* (1991) 229 Cal.App.3d 209, 213 at fn. 1.

C. There Is No Substantial Evidence That USF Had A Reason To Fire Dr. Kao Independently Of His Refusal To Release His Medical Records.

Under the CMIA cause of action, USF argues that substantial evidence supports the jury's finding that it was necessary to fire Dr. Kao for refusing to release medical information in connection with the examination. Resp. Brf. pp. 39-40. USF argues that the same

evidence that the examination was justified by business necessity also supports this verdict. *Id.* at 40.

Whether the examination was justified by business necessity under the FEHA and whether Dr. Kao's discharge was justified by necessity under the CMIA are different questions. Under the FEHA, assuming that the examination was justified, the consequence of refusing to go to the examination or provide medical information is that the employee may lose the right to a reasonable accommodation. *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 985, 987; *Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154,1173-1174. That simply puts the employee back under the same standards as applicable to non-disabled employees. *Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 331-334. That does not mean that the employee can be automatically fired. Rather, the employee has to fail to perform some job-related function. It is entirely possible, for example, that even after giving up a right to accommodation, the employee could still perform the job well enough to keep it without any accommodation.[3]

In this case, USF fired Dr. Kao because he would not go to the examination. By basing its decision on Dr. Kao's exercise of rights under the CMIA to refuse to release medical information, USF violated the CMIA. App.Opn.Brf. pp. 48-49. USF did not claim that Dr. Kao had committed other misconduct justifying disciplinary

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[3] An obvious example would be a situation where an extension of a medical leave was denied as an accommodation, the employee came back to work and was still able to perform the job successfully at a level that prevented discharge.

action and acknowledged that he had not done so. RT 1596:9-14, 1579:14-1580:5, 1357:18, 1345:1-3 (Peugh-Wade). RT 935:11-19, 958:16 - 959:21 (Lawson). There is no evidence that Dr. Kao had failed to perform his teaching and other academic duties satisfactorily. There was, accordingly, no substantial evidence justifying Dr. Kao's discharge as "necessary" independently of his refusal to release his medical records. Rather, the only evidence is that Dr. Kao is being punished for not releasing his medical records—exactly what the CMIA prohibits. Civil Code § 56.20(b). App.Opn.Brf. p. 48.

D. USF's Arguments Cannot Overcome The Court's Error In Granting Non-Suit On The Defamation Cause Of Action.

1. The communications with Dr. Reynolds were not litigation-related or in connection with contemplated litigation.

USF asserts that the Litigation Privilege applies because civil litigation was "likely." Resp.Brf. p. 43.

The Litigation Privilege does not apply merely because civil litigation is foreseeable or likely sometime in the future. *Edwards v. Centrex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 36-37. The privilege comes into play only when there is "the actual good faith contemplation of an imminent, impending resort to the judicial system for the purposes of resolving a dispute." *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1380.

USF's communications with Dr. Reynolds were in support of its demand for a mental examination, not litigation. At that point,

litigation was remote and speculative. Dr. Kao had not yet refused to go to the examination. USF did not even assert the litigation privilege as a defense in its Answer. AA 47-49.

The very remoteness of the possibility of litigation precludes application of the Litigation Privilege in this case, particularly as to a non-suit. At best, the issue of whether litigation was imminent and seriously contemplated as a way of resolving this dispute would have been a factual issue for the jury. *Eisenberg*, supra, 74 Cal. Appl.4th at 1381 ("It remains a triable issue of fact whether, at the time of the retraction, imminent litigation was seriously proposed and actually contemplated in good faith as a means of resolving the dispute between respondents and Fairfield.").

2. The alternative grounds for non-suit USF asserts rest on disputed factual matters.

a. Repeating what others said is not "truth."

Respondents assert that reporting what others said is a truthful statement and cannot be defamation. Resp.Brf. p. 44.

The repetition of charges by others does not make the communication truthful or less defamatory. *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26-27: "When a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor. [Citation omitted.] 'If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means.... [I]t would be but a repetition by [C] of a slanderous charge. His defense must consist in showing that in fact B is a thief.'

[Citations omitted.]." Accord: *Ray v. Citizen-News Co*. (1936) 14 Cal.App.2d 6, 8-9, 57 P.2d 527 ("A false statement is not less libelous because it is the repetition of rumor or gossip or of statements or allegations that others have made concerning the matter.").

The burden of proving the underlying truth of the accusation is on the defendants. *Draper v. Hellman Commercial Trust & Sav. Bank* (1928) 203 Cal. 26, 41; *Shumate v. Johson Publishing Co*. (1956) 139 Cal.App.2d 121, 131. The court cannot grant non-suit on a defense that had yet to be litigated.

b. The qualified privilege does not support a non-suit.

Respondents assert that the communications with Dr. Reynolds are protected by the qualified common-interest privilege under Code of Civil Procedure Section 47(c). Resp.Brf. pp. 44-45. Respondents assert that USF and Dr. Reynolds shared the common interest of arranging for a fitness-for-duty examination.

Respondents cite no case that applies the common interest privilege to an independent physician who has been sought out to perform an examination. Compare *Peoples* v. *Tautfest* (1969) 274 Cal.App.2d 630, 637 (no common interest privilege: "The accusations were made to persons sought out by appellants and were unsolicited."). Merely hiring a doctor is not the kind of "proprietary or narrow private interests" to which the privilege has been applied. See *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 737.

But even if the privilege applied, there were disputed issues of malice that should have gone to the jury. See App.Opn.Brf. pp. 51-

52. In particular, USF stated it wanted to "get him out medically [and] keep him out medically" (AA 179). The complaining faculty members told USF they "hated" Dr. Kao because of a belief he was gathering evidence for a lawsuit. AA 192 ("he feels everyone hates him; we do because we are afraid he is collecting data for lawsuit."). USF described Dr. Kao in derogatory mental health terms and compared him to the Virginia Tech killer, including a specific reference to Virginia Tech and "homicides on college campus" in the Cross-Complaint (AA 55, ¶ 18).

3. The "official duty" privilege applies only to government officials.

Respondents assert that the "official duty" privilege protects the statements to Dr. Reynolds. Resp.Brf. pp. 45-46.

The "official duty" privilege applies only to high-ranking public officials discharging their public duties. *Maranatha Corr. v. Dept. of Corrections* (2008) 158 Cal.App.4th 1075, 1087-1088. It does not apply to private individuals. *Slaughter v. Friedman* (1982) 32 Cal.3d 149, 155-156. Ms. Peugh-Wade is not a public official.

4. The jury's verdict did not require it to determine the truth of the allegations against Dr. Kao or if the accusations were made with malice.

Respondents assert that the jury's verdict precludes the possibility of a verdict for defamation. Resp.Brf. pp. 46-47.

The thrust of the communications with Dr. Reynolds was that Dr. Kao was intentionally harassing and assaulting persons because of

a mental illness. See AA 142. Such allegations are defamatory because they directly attack Dr. Kao's reputation, character and competency as an employee. See 5 Witkin, Summary 10th (2005) Torts, §§ 543, 544 (collecting cases).

Even accepting the jury's finding of business necessity for an examination does not mean that statements made to Dr. Reynolds were not defamatory, false, malicious or unprivileged. These are different issues. Whether representations about Dr. Kao were true, or made without malice, are different issues than whether these allegations, or some of them, justified an examination. Nothing in the jury instructions on the examination demand required the jury to decide the truth of the claims against Dr. Kao.

The truth of the allegations as showing purposeful conduct, harassment or assaults is disputed. For example:

Even though Ms. Peugh-Wade presented the facts to Dr. Reynolds as if they involved intentional misconduct, she did not in fact consider that Dr. Kao's actions were purposeful. RT 1579:19-20. While Tristan Needham testified Dr. Kao shouted and threw papers at the February 6 meeting (RT 1672-1673), Stephen Yeung only recalled Dr. Kao handing out papers at this meeting (RT 1999), Paul Zeitz testified he did not think Dr. Kao threw papers at this meeting (RT 1932) and Christine Liu testified she recalled Dr. Kao only distributing papers (RT 1072-1074). Ms. Liu also told Dr. Needham (one of the key complaining faculty members) that she had not observed any behavior from Dr. Kao that bothered her or made her nervous. RT 1084. Robert Wolf testified he never observed any behavior by Dr. Kao that he perceived as frightening, threatening,

deranged or unstable, including: glaring, clenching fists, yelling, getting inappropriately close to people, bumping, veering or charging. RT 968-973. Other faculty members testified similarly. See App.Opn.Brf. p. 17.

The "bumping" incidents Ms. Peugh-Wade referred to in her communications with Dr. Reynolds were not reported until May 2008. RT 1290. Neither Dr. Zeitz (RT 1950) nor Dr. Needham (RT 1872-1873) could recall even the month these incidents occurred which month it occurred or how much time elapsed before these were reported. While Dr. Yeung asserted the Dr. Kao had veered or charged at him as Dr. Yeung was exiting the restroom, he could not be sure that Dr. Kao even saw him. RT 2020.

In the April incident with Dean Turpin in which she claimed Dr. Kao was inappropriately close, her written accounts of the interaction did not refer to Dr. Kao repeatedly asking about her mother (RT 2249-2250), she acknowledged that Dr. Kao never followed her into the parking lot (RT 2249) and that he remained a significant distance from her car all the time in the location she had spoken to him (RT 2273-2274).

E. The Attack On Dr. Kao For Not Taking Dissimilar Jobs Cannot Be Justified By Any Legal Duty Of Mitigation.

USF argues that it was entitled to present Dr. Borhani's testimony because mitigation is a factual issue for the jury to resolve. Resp.Brf. p. 47.

The problem is that Dr. Borahni's testimony did not square with the legal standards for mitigation and was therefore inadmissible. App.Opn.Brf. pp. 52-54.

Instead, Dr. Borhani's testimony painted Dr. Kao as greedy in seeking damages for loss of his tenured position at USF. This was a significant point of attack for USF. It attacked plaintiff's economic expert and suggested that Dr. Kao was unreasonable and greedy. RT 1487:15– 1488:8, 1490:12-15, 1501:21-25. In closing argument, USF accused Dr. Kao of making "the choice to give up his secure job and then to sit there for three years and spend his time suing and not once, not once, even try to look for a job. Who does that these days?" RT 2818:17-21.

Portraying Dr. Kao in this way was a prejudicial attack on his character and necessarily influenced the jury against him. See App.Opn.Brf. p. 53. The fact that the jury may have been correctly instructed on damages did not undo the prejudicial attack on his character from this evidence.

F. The Sequence Of Events Showing Destruction Of Turpin's Computer *After* A Motion To Compel Its Production Was Filed Went Directly To USF's Claim That Dr. Kao Frightened Persons, Including Dean Turpin In The April Incident That She Described In Later Emails Written On This Computer That Were Altered.

Respondents argue that the notice of motion was properly excluded as irrelevant because it was not under oath and contained no substantive information. Resp.Brf. p. 48.

The notice of motion was the critical document in the sequence of events concerning the destruction of Dean Turpin's computer. See App.Opn.Brf. p. 54-56. The motion to compel preceded USF's claim that the computer was gone. Without that key document, USF's changed discovery responses lacked significant impact. It is one thing to amend a discovery response. It is a different thing to do so as a way to avoid producing a computer which, *until faced with a motion to compel*, USF was asserting it still had.

This whole issue concerned Dean Turpin's testimony about her confrontation with Dr. Kao in April. App.Opn.Brf. pp. 5-6, 54. Since the jury could reasonably find that USF destroyed relevant evidence about this event, Dr. Kao was entitled to a jury instruction on spoliation and that the destruction of the computer indicated a consciousness of guilt or wrongdoing. App.Opn.Brf. pp. 55-56.

This evidence and an appropriate instruction would have allowed Dr. Kao to argue more effectively against USF's claim that it was only acting in good faith because it believed Dr. Kao was possibly dangerous. App.Opn.Brf. p. 56. Evidence on the computer was reasonably likely to show that Dean Turpin had repeatedly revised her account of the April incident to make Dr. Kao look worse. Such evidence would have permitted the argument and inference that USF's entire claim that Dr. Kao was engaging in frightening behavior was false or exaggerated as well. This went to the heart of USF's claimed need for the psychological examination. The court's rulings were therefore highly prejudicial.

III. CONCLUSION

The judgment should be reversed as requested in Appellant's Opening Brief.

Dated: May 15, 2013.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), the undersigned certifies that the APPELLANT'S REPLY BRIEF contains 7,063 words.

Dated: May 15, 2013.

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PROOF OF SERVICE

I declare that I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within cause; my business address is 1714 Stockton Street, Suite 300, San Francisco, California, 94133-2930 and I am readily familiar with the practice of this office for the collection and processing of correspondence for mailing with the United State Postal Service, overnight delivery services and messenger services, and that such correspondence would be deposited with the United States Postal Service, with an overnight delivery service or with a messenger service on the same day in the ordinary course of business.

On May 15, 2013, I served a true copy of the following document(s) described as:

- **APPELLANT'S REPLY BRIEF**

_X_ (BY MAIL) By sealing the foregoing document(s) in envelope(s) with first-class postage thereon fully prepaid addressed to the persons shown below, and placing such envelope(s) for collection and mailing on this date following the office's ordinary business practices for deposit with the United States Postal Service at San Francisco, California.
___ (BY FACSIMILE), by transmitting the said document(s) via facsimile to the number(s) shown below.
__ (BY OVERNIGHT DELIVERY), By sealing the foregoing document(s) in envelope(s), delivery fees provided for, and placing such envelop(s) for collection on this date following the office's ordinary business practices for deliver to an authorized driver or other facility maintained by the express delivery service for delivery by the next business day to the addressee(s) shown below.
_ (VIA MESSENGER SERVICE), By sealing the foregoing document(s) in envelope(s), delivery fees provided for, and placing such envelop(s) for collection on this date following the office's ordinary business practices for deliver to an authorized driver or other facility maintained by a messenger service for delivery on this date to the addressee(s) shown below.

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I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on May 15, 2013, at San Francisco, California.

Christopher W. Katzenbach