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 OPENING BRIEF

CHRISTOPHER W. KATZENBACH (SBN 108006)
CONOR D. MACK (SBN 253878)
KATZENBACH LAW OFFICES
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
(415) 834-1778
(415) 834-1842 FAX
Email: ckatzenbach@kkcounsel.com
Attorneys for Plaintiff and Appellant
John S. Kao

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rules 8.208, 8.490, 8.494, 8.496 & 8.498)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.208(e)(1), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

Respondents, University of San Francisco and Martha Peugh-Wade, have a financial interest in the outcome of this case.

Appellant, Dr. John S. Kao, has a financial interest in the outcome of this case.

CHRISTOPHER W. KATZENBACH (SBN 108006)
KATZENBACH LAW OFFICES
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
(415) 834-1778
(415) 834-1842 FAX
Attorneys for Plaintiff and Appellant John S. Kao

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I. SUMMARY OF THE CASE

Appellant JOHN S. KAO (herein "Dr. Kao") brought this action under the California Fair Employment and Housing Act, the Unruh Civil Rights Act, the Confidentiality of Medical Information Act and for defamation against Respondents UNIVERSITY OF SAN FRANCISO (herein "USF" or the "University") and MARTHA PEUGH-WADE (herein "Peugh-Wade"). The case arises from USF's demand that Dr. Kao, a tenured associate professor of Mathematics, undergo a psychological examination because several other faculty members expressed concerns about Dr. Kao's mental state and that he frightened them. When Dr. Kao refused to go to the psychological examination because the University would not provide him any substantial information as to the basis for its alleged concerns, the University fired Dr. Kao and permanently banned him from USF's open campus.

During the course of the trial, the trial court granted non-suit in favor of USF and Peugh-Wade on the claim for defamation, finding that Peugh-Wade's communications with the psychiatrist hired to perform the examination on Dr. Kao were absolutely privileged under the California Litigation Privilege. RT 1734-1739; AA 97-98.[1] Following an adverse jury verdict on the remaining claims, Dr. Kao moved for a new trial and for entry of a different judgment on liability. AA 237. The trial court denied Dr. Kao's post-trial motions

[1] "AA" refers to the Appellant's Appendix. "RT" refers to the Reporter's transcript.

on May 23, 2012. AA 287. Appellant filed a notice of appeal on June 15, 2012. AA 301.

II. ISSUES PRESENTED

Issue 1. Does substantial evidence support that USF's demand for comprehensive mental examination was job-related and consistent with business necessity under the Fair Employment and Housing Act (FEHA) (Government Code Section 12940(f)(2)) when the demand was based on a perception of a mental disability, the examination was not tailored to address a specific issue of job performance, there was no evidence of any actual danger to safety and USF failed to use the interactive process to obtain medical information before requiring an examination by an employer-chosen psychiatrist.

Issue 2. Under the Unruh Civil Rights Act (Civil Code § 51), was Dr. Kao banned from USF's open campus where the only evidence of the reason for the ban was USF's subjective belief that Dr. Kao was mentally unstable.

Issue 3. Whether USF's demand that Dr. Kao release his medical information to the doctor performing the mental examination violated the Confidentiality of Medical Information Act's ("CMIA") prohibition on discrimination for an employee's refusal to release medical information (Civil Code § 56.20)?

Issue 4. Whether the Court erred in granting non-suit on the cause of action for defamation where USF's communications with Dr. Reynolds were not in connection with contemplated litigation and

there were disputed factual issues if litigation was imminent or if the communications were made with malice?

Issue 5. Did the trial court commit prejudicial error by admitting expert testimony that attacked Dr. Kao's character by asserting that his post-discharge mitigation efforts were insufficient, where USF offered no evidence of any comparable position that would have been available to Dr. Kao had he applied for it?

Issue 6. Did the trial court commit prejudicial error by refusing to admit evidence that USF destroyed a computer after Dr. Kao filed a motion to compel its production and refusing to give a jury instruction on spoliation of evidence?

III. STANDARDS OF REVIEW

The court applies the substantial evidence standard of review to a jury's verdict. *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660. "Substantial evidence . . . is not synonymous with 'any' evidence." *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871. Where the facts are undisputed, the issue is one of law and the appellate court is free to reach its own legal conclusion from the facts. *Id.*, at 872.

"A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." *Sweatman v.Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68. Where the issue is one of law, rather than

disputed evidence, the court reviews the issue *de novo. Id.* at 68; *Oakland Raiders v.Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1194. See also Code Civ. Proc., § 629.

The court reviews the grant of a motion for nonsuit *de novo* using the same standard as the trial court. *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458: "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor."

The court abuses its discretion on ruling on evidence only if its ruling is arbitrary, capricious or patently absurd. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124. The appellate court will reverse a judgment because of the erroneous admission of evidence only if it is reasonably probable that the appellant would have obtained a more favorable result absent the error, so the error resulted in a miscarriage of justice. *People v. Richardson* (2008) 43 Cal.4th 959, 1001.

A party is entitled to an instruction on each viable legal theory supported by substantial evidence if the party requests a proper instruction. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572. The refusal of a proper instruction is prejudicial error if "'it seems probable' that the error 'prejudicially affected the verdict.' [Citations.]" *Id.* at 580.

IV. STATEMENT OF THE CASE

Dr. Kao initiated this action by a complaint alleging six causes of action arising under the Fair Employment and Housing Act

("FEHA"), the Unruh Act, California Confidentiality of Medical Information Act ("CMIA") and common law claims for violation of privacy and defamation.[2] AA 20-45. USF filed a cross-complaint seeking an injunction prohibiting Dr. Kao from coming onto the USF campus permanently and under penalty of arrest, alleging that Dr. Kao posed an unacceptable risk of danger to faculty and staff. AA 51-59. See AA 58, ¶ 38.

The case was tried to a jury, the Honorable Wallace P. Douglass presiding. Prior to trial, Dr. Kao submitted motions *in limine* seeking, inter alia, to preclude testimony as to any failure to mitigate damages unless USF established that there existed a comparable position that Dr. Kao could have obtained by reasonable mitigation efforts. The court denied these motions on February 1, 2012. Motion In Limine No. 8, AA 68-70; Minutes For February 1, 2012, AA 74.

The trial commenced on February 7, 2012. At the close of Dr. Kao's presentation of evidence, USF moved for non-suit on the defamation cause of action. RT 1735. The trial court indicated that it would grant a non-suit as to defamation on the basis of the Litigation Privilege (RT 1734-1739) and granted non-suit. AA 97-98.

During the trial, Dr. Kao sought to introduce evidence that USF had destroyed a computer on which Dean Jennifer Turpin had written

[2] The Sixth Cause of Action was against both USF and Martha Peugh-Wade. AA 42.

emails concerning Dr. Kao.[3] Initially, USF had objected to producing the computer itself, but produced emails purportedly from the computer. AA 209; RT 2254:5-7. After Dr. Kao moved to compel production of the computer (AA 226-227), USF asserted that "the computer is no longer within the possession or control of the University; therefore, it is not available for inspection." AA 220; RT 2264:2-8.

The court refused to admit the motion to compel (AA 226-227) to show that USF did not assert that the computer had been lost until after Dr. Kao had moved to compel its production. RT 2497:20 - 2499:23. Thereafter, the Court refused to give Dr. Kao's proposed instruction on spoliation of evidence. RT 2877:2-15.

In both opening and closing, USF asserted that it was motivated only by a need to assess Dr. Kao to see if he was dangerous so that people could be reassured on that issue. RT 62, 63, 95 (opening); RT 2821, 2831-2833, 2834, 2837 (closing). USF offered no evidence that Dr. Kao was actually dangerous. Dr. Kao presented the testimony of his treating psychiatrist (Dr. Lenore Terr) that he was not dangerous. RT 838:24-839:19, 854:5-9.

USF offered the expert testimony of Hossein Borhani, an economist, on the availability of jobs for Dr. Kao. The superior court

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[3] At issue was if an email record of an encounter with Dr. Kao had been deliberately altered by Dean Turpin to make Dr. Kao appear more threatening. The two copies of this email produced in discovery had altered language. Compare, e.g., AA 203, line 20 of text (Dr. Kao "said loudly") with AA 205, line 11 of text (Dr. Kao "shouted"). The question was when this alteration occurred and if there were even earlier versions before the alterations began.

certified Dr. Borhani as an expert over the objection that Dr. Borhani was not qualified to opine on the areas of vocational rehabilitation, job placement, and the particularities of getting and maintaining a job as a university professor. RT 2339:23-2341:8.

Dr. Borhani testified that it would not make sense for Dr. Kao to remain unemployed and that the estimate of damages made by Dr. Kao's expert was unreasonable. RT 2342:7-8, 2343:9-2345:5. Dr. Borhani stated his opinion that "it would take a year or less for someone with Dr. Kao's qualifications to obtain other employment." RT 2365:8-10. The only employment Dr. Borhani considered were jobs in government or the private sector. RT 2342, 2346, 2349, 2351-2354, 2355- 2362, 2372, 2384- 2385. He did not determine if there were any tenured mathematics professorships available in the San Francisco Bay Area. RT 2398:7-19.

On February 29, 2012, the jury returned a verdict in favor of USF and against Dr. Kao on all counts. AA 229-231. On April 3, the court entered judgment on the complaint and USF dismissed its cross-complaint with prejudice. AA 232, 234-235. On April 18, Dr. Kao moved to set aside the verdict, to have a new verdict on liability entered and for a new trial. AA 237, et seq. The Court denied these motions on May 23, 2012, and entered an amended judgment. AA 292-293, 294-295.

V. STATEMENT OF THE FACTS

Dr. John S. Kao was a tenured associate professor of Mathematics at USF. He graduated from the University of Utah at the

age of 17 with a Bachelor of Science degree in mathematics. RT 218:9-12. By the age of 23 he had earned a doctorate in applied and computational mathematics from Princeton University and had completed a one year postdoctoral fellowship from the University of North Carolina at Charlotte. RT 228:7-229:16. He was hired at USF in 1991 and received tenure in 1997. RT 230. As a tenured professor, Dr. Kao could not be fired without just cause, including the normal practice at USF of progressive discipline for performance problems. RT 150:20-151:2-7; 155:11-156:7; AA 115. Under USF's disciplinary policies, USF normally obtained both sides of a story before determining if discipline was appropriate. RT 2681-2682.

During the Spring 2008 semester at USF, Dr. Kao's teaching evaluations from students were above the National, USF and department averages. RT 267:1-13, AA 116-136. He served as an associate editor to a research journal in statistics. RT 25:10-17. He regularly interacted with students and other faculty at the weekly Math Teas. RT 255:4-257:13. He was also responsible for supervising weekly student Math Club meetings. RT 248:4-251:11. He, along with Dr. Robert Wolf, represented the Mathematics Department in meetings with the USF Business School over the content of a mathematics course for business students. RT 445-446, 822-825.

Over his life, Dr. Kao has suffered episodic clinical depression for which he has taken medications. RT 297:25-298:4, 844-848. USF and the Mathematics department faculty became aware of this condition when Dr. Kao had an allergic reaction to Prozac immediately before the Spring 2002 semester. RT 300:4-18. Taking

Prozac caused Dr. Kao to experience hallucinations, specifically auditory and visual distortions. RT 298:10-24. USF refused to allow him to return to work that semester. RT 300:14 - 301:21. Because his absence was unusual, Dr. Kao circulated a letter from his doctor explaining his adverse reaction to Prozac. RT 1602:8-13; AA 105.

Starting in 2006, Dr. Kao filed various internal complaints that the hiring and promotion process in the Mathematics department discriminated against minorities and females. RT 277:6-7, 315:11-16; AA 100-102. When he initially raised these concerns, Dr. Kao was the only minority in the department and there were no women. RT 302-304. He also complained that the compelled leave of absence in 2002 violated his rights under the Americans With Disabilities Act. RT 318:15-18; AA 103-104. Dr. Kao's most recent complaint addressed discrimination in the search for a new faculty member that was taking place during the Fall 2007 and Spring 2008 semesters. RT 433:1-16.

In late 2007 and early January 2008, several USF faculty members expressed concerns about Dr. Kao's behavior and mental state. RT 1873:2-3, 1882:4-11, 2042:18-21, 2047:10-17, 2281:16-23, 2295:4-9. In mid-February, USF consulted Dr. Paul Good, a psychologist, about Dr. Kao. Prior to this meeting, Dean Jennifer Turpin, Associate Dean Brandon Brown and Human Resources Vice-President Martha Peugh-Wade spoke to Dr. Good. RT 999:17-18, 1005:21-1006:1. Dean Turpin told Dr. Good about Dr. Kao's history of depression and episode of hallucinations. RT 1000, 1002; AA 201. Dean Brown described Dr. Kao to Dr. Good as paranoid and displaying non-verbal behavior that frightened people. RT 1009-

1010. Dean Brown also said that no one had told Dr. Kao that his behavior disturbed anyone. RT 1011-1012.

Dr. Good thereafter met with USF administrators on February 12, 2008. RT 1012. They discussed how to address violence issues in the workplace. RT 1014. Dr. Good told the administrators that, for purposes of a fitness-for-duty examination the employee "has to have a problem performing their job and that the -- there has to be something observable and identifiable to lead to a referral." RT 1016. At this meeting, the USF administrators said that they were not ready to demand Dr. Kao undergo a fitness-for-duty examination. RT 1016.

In late April and early May, USF interviewed Dr. Needham, Dr. Zeitz and Dr. Pacheco about Dr. Kao. These were the only Mathematics faculty members interviewed. RT 1345.

USF has a number of personnel policies that address misconduct in the workplace, harassment and violence, including USF's policy against harassment (AA 106, 108), a violence prevention policy that prohibits direct and indirect threats (AA 206) and the faculty collective bargaining agreement (AA 115).

Based on the information it had received, USF did not believe that Dr. Kao's conduct was purposeful or justified disciplinary action. RT 1357, 1579-1580, 1596. Dan Lawson, USF's director of public safety, did not believe Dr. Kao had engaged in threatening behavior falling under the USF violence prevention policy. RT 935:11-19, 958:16-959:21.

In mid-May, USF contacted Dr. James Missett to discuss Dr. Kao. In the initial discussions with Dr. Missett, USF administrators referred to Dr. Kao as "psychotic" and "having hallucinations". AA

228; RT 2206-2207. They discussed if Dr. Kao had a "delusional disorder," or was "paranoid" or had some other "major mental disorder." RT 2208; AA 163, 164.

Dr. Missett suggested a fitness-for-duty examination because USF did not "know too much of what might be going on with Professor Kao." RT 2157:2-3. Dr. Missett advised "it might be helpful for [USF] to require him to undergo a Fitness-for-Duty Evaluation, just to make sure that to the extent you can tell, you have some sense of whether this might be manageable for him. It might be something that he can deal with over time." RT 2157:4-8. See also RT 2159. Dr. Missett was also unaware of any limitations on medical/psychological examinations in the ADA or FEHA. RT 2222.

In reviewing the material given him by USF, Dr. Missett concluded: "I don't know that anywhere in there I saw what I would say is a credible report that requires, whatever, immediate action." RT 2171:22-25. Dr. Missett testified that a fitness-for-duty examination was not the only thing that could be done, but that USF had to do something. RT 2166. James Cawood, another of USF's expert witnesses, testified to alternatives to a fitness-for-duty examination, such as training co-employees how to interact with the problem employee. RT 2533:11 - 2535:4.

Dr. Missett recommended Dr. Norman Reynolds to do such an examination because, as a psychiatrist, Dr. Reynolds had experience "dealing with individuals who may actually be psychotic" (RT 2162) and had experience "diagnosing major mental disorders." RT 2109. As Dr. Missett understood this examination, it was not limited to issues of possible violence, but included an evaluation of Dr. Kao's

"ability effectively to function as a faculty member at the University of San Francisco." RT 2220:1-8.

In early June, Dr. Missett discussed with Ms. Peugh-Wade what to tell Dr. Reynolds as to this examination. RT 1639-1640, 1641-1642; AA166-169. In particular, he told USF that it should make a written request for Dr. Reynolds to conduct a thorough assessment that may include a personal or family history, education history, employment history, medical history, medications history, psychological or psychiatric history, substance abuse history and his experiences and past activities as they relate to USF, such as getting along in the department. AA 168-169. Dr. Missett also suggested encouraging Dr. Reynolds to do psychological testing or neuro-psychological testing. AA 169. Dr. Missett also suggested that USF should also, but verbally, tell Dr. Reynolds that Dr. Kao was bumping into persons, a "battery," that Dr. Kao was heard laughing alone in a way that seemed strange and that people are afraid for their safety. RT 1644-1645; AA 169.

As a result of these various meetings, USF formed the strategy to "get him out medically and keep him out medically." AA 179.

On June 18, 2008, three weeks after the Spring 2008 semester was over, USF informed Dr. Kao of "a concern about your heath which is based on your behavior and actions during the past few weeks." AA 138. USF told Dr. Kao that unidentified persons had reported that he frightened them by behaviors including "yelling," the appearance of "unfeigned anger," sudden movements that "cause people to believe you will suddenly run into them," bumping "in a manner that suggests intent to do so," rapidly repeating words or

phrases, facial expressions or gestures indicating Dr. Kao did not want to listen to what other people had to say and "bizarre chuckling in an intimidating tone that conveys the message you are doing so to frighten" people. AA 138.

This was the first Dr. Kao had heard of any concerns about his behavior. RT 448:1-6. Dr. Kao asked for more information so he could address these allegations and offered to have a "clear the air" meeting with anyone who had a complaint to reassure them that he meant no harm. AA 140, 141, 146. He asked for the specifics of the underlying incidents so that he could assess the demand in light of the evidence USF believed justified the examination. AA 141, 145. Dr. Kao noted that USF had not claimed that the events involved students or Dr. Kao's teaching duties and "that nothing Professor Kao is accused of interfered with any of the University's or the Department's operations". AA 141.

Given the time-frame stated in the June 18 letter, Dr. Kao could not recall anything that could possibly have involved behaviors of the kind stated in the letter. RT 498-500. He was concerned that, without more specifics, he would be unable to respond to these assertions in any examination. RT 500:2-6. He was also concerned about loss of privacy as to his own therapy records (RT 500:11-15) and the fact that Dr. Reynolds was being selected and paid by USF (RT 500:16-19): "This person is evaluating me and is being paid by the university. That individual might misinterpret something or misunderstand something. It seemed subject -- easily subject to manipulation."

USF rejected Dr. Kao's request for additional information and his offer to meet with people who had concerns. USF told Dr. Kao

that the university did not believe providing specifics "would be productive." AA 140; RT 1438.

By letter of June 24, 2008, USF again recited the allegations asserted on June 18, with the additional allegations that Dr. Kao had clenched his fists and engaged in inappropriate closeness, and demanded that Dr. Kao submit to a mental examination by Dr. Norman Reynolds. AA 142. A copy of this letter was sent to Dr. Reynolds; USF also sent Dr. Reynolds a detailed factual summary of allegations against Dr. Kao, faculty interview notes and other materials. RT 1397-1398, 1458-1459; AA 143.

In the June 24 letter, USF told Dr. Kao that he was to "provide all medical information the [psychiatrist] requests," attend the scheduled appointment "as well as any follow-up meetings" and "fully-cooperate" with him. USF also said that Dr. Reynolds would be providing USF with "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." AA 142, Nos. 2, 4, 5.

At the same time, USF banned Dr. Kao from its campus until after the evaluation with Dr. Reynolds was completed and USF had made a determination based on it. AA 143, Nos. 7, 8.

Persons referred for a "fitness-for-duty" examination have to sign consent forms governing the disclosure and use of their medical records. RT 2194-2197. They have to sign consent forms for release of medical records to the examining doctor as well. RT 2198-2199, 2228-2229.

On June 30, USF wrote to Dr. Reynolds and instructed him to perform a "comprehensive fitness-for-duty evaluation" of Dr. Kao. AA 152. USF instructed Dr. Reynolds to use (AA 152) a consent form that stated that the comprehensive psychiatric examination "will consist of: [¶] Review and analysis of complete history and background, e.g., current difficulties, medical history, legal and financial history, educational and work history, family, and social history [¶] Mental Status Examination [¶] Psychological test results [¶] Laboratory results [¶] Diagnostic assessment [¶ and] Analysis of findings, conclusions and recommendations[.]" AA 153.

The consent form also stated that "Dr. Reynolds will NOT provide me, or my designee, with a copy of the psychiatric report or a copy of Dr. Reynolds' records." AA 143. RT 1456-1457, 1459.

Dr. Kao was required to sign this form. AA 153. USF understood that the examination could not occur unless Dr. Kao signed this form. RT 1464-1468.

In October, Dr. Kao again met with USF and provided additional evidence that he was not perceived as frightening by most members of the university community, including students, faculty and staff. He noted that his teaching and service duties had continued uninterrupted throughout the semester. He presented additional evidence that he was highly evaluated as a teacher by his students. RT 518-519; AA 125 (Spring 2008 evaluation). He presented evidence that he was not seen as frightening by faculty and staff because he was repeatedly invited to faculty and student social events, given academic responsibilities for the Mathematics department,

advised the student Math Club and regularly participated in faculty meetings. RT 510-518, 2672-2675; AA 156-157, 159.

USF persisted in its demand for a mental examination. USF asserted that only its chosen psychiatrist could provide it adequate assurances. RT 1624, 2612, 2615-2616, 2617; AA 160. USF, from June 18 onward, did not provide Dr. Kao any additional information on the allegations against him. RT 2679:22 - 2680:18.

In February 2009, Dr. Kao was discharged for refusing to attend the mental examination USF demanded and banned indefinitely from the USF campus. AA 161. USF has an open campus with many events attended by the general public. RT 921 ("We have a wide open campus." RT 921:15).

At trial, USF presented testimony as to the specific incidents that caused it to have a concern about Dr. Kao.

In late 2007 or early 2008, before the start of the Spring 2008 semester, Dean Jennifer Turpin, Associate Dean of Sciences Brandon Brown and several faculty members in the Mathematics Department began asserting that Dr. Kao frightened them. 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); RT 1881-1886 (Paul Zeitz, early January 2008); RT 2042:18-21 (Dean Brown, early January 2008). During the course of the Spring 2008 semester, Dean Turpin, Dr. Needham and Dr. Zeitz had other encounters with Dr. Kao. RT 1871:3-5, 1872:10-20 (bumping into Dr. Needham in hallway). RT 1898:20-1899:11 (bumping into Dr. Zeitz). RT 1672:22-1673:5 (Dr. Needham: Dr. Kao irrationally angry at February meeting about faculty search). RT 1694:20-24, 1692:16-

1693:6. (Dr. Needham: Dr. Kao had disturbing laugh; Dr. Kao rapidly repeating words and then laughing in a conversation with Dr. Needham's wife at a retirement party in May 2008). RT 2282:13-2284:7 (Dean Turpin, late April 2008, Dr. Kao inappropriately close and staring at her during and after conversation outside while Dr. Kao was smoking). RT 2020:4-10 (Dr. Stephen Yeung, Dr. Kao veered at him as he was exiting restroom in June 2008, but not sure Dr. Kao saw him). RT 2012:25-2013:24, 1990:14-19 (Dr. Yeung, Dr. Kao mocking Dr. Pacheco and Dr. Kao making "theatrical bow" towards Dr. Yeung).

Also at trial, other faculty members and staff testified they had not perceived Dr. Kao as threatening or disturbing, including the Mathematics Program Assistant, who was present at department meetings and at social events involving students with Dr. Kao. RT 1089:25-1090:24, 1094:22-24 (Christine Liu). RT 100-101 (Liza Locsin, assistant to Dean Turpin). RT 121-122 (Dana Soares, adjunct professor). RT 967:5-973:20 (Dr. Robert Wolf, Mathematics Department tenured professor). RT 1161:25-1162:2; RT 1163:18-1164:3; RT 1167:2-23 (Dr. Benjamin "Pete" Wells, tenured professor in both the math and computer science departments).

VI. ARGUMENT

A. USF'S Demand For A Mental Examination Was Not Job-Related Or Consistent With Business Necessity.

1. Introduction

The FEHA prohibits medical and psychological inquires and examinations of current employees, unless the employer can show they are "job related and consistent with business necessity" (Gov. Code § 12940(f)(2)).

This case presents a stark contrast between two views of what this statute allows.

USF asserts that Section 12940(f)(2) is a "tool [for] employers" to use "to send [an employee] for a fitness-for-duty evaluation." RT 2815:3-9 (closing argument). USF asserts that this this "tool" permits USF to demand a mental examination by a company-hired doctor whenever it has concerns about an employee's mental health and to determine unilaterally the nature and scope of the examination.

Dr. Kao, on the other hand, asserts that the right to demand a mental examination under the statute can only be done through a transparent process that protects the rights of disabled employees from unnecessary or overly-invasive examinations. The established interactive process under the FEHA is such a process that requires mutual exchange of relevant information and mutual discussions before any examination by a company doctor can be required.

The impact of these contrasting views on the rights of disabled employees is stark and significant.

Under USF's view, Section 1240(f)(2) gives it the right to demand a mental examination whenever it has concerns about an employee like Dr. Kao, even if those concerns are based on subjective fears and stereotypes about mental illness and would be insufficient to meet the standards of a health or safety defense under Government Code 12940(a)(1). Under USF's view, it can pick the doctor without any input from the employee, unilaterally define the scope of the examination and conceal from the employee the details of the underlying events while providing its chosen doctor detailed written and oral information. Under USF's view it can require an employee to provide unlimited medical and other personal information and to submit to whatever drug, alcohol and other testing its chosen doctor may require. Under USF's view, the doctor determines unilaterally the employee's fitness to perform the job and what job accommodations, if any, should be made.

In contrast, Dr. Kao's view seeks to harmonize Section 12940(f)(2) with other parts of the FEHA, to give disabled employees consistent and broad protections in the workplace and ensure that they do not lose jobs because of stereotypes and fears arising from disabilities. In Dr. Kao's view, using a transparent procedure like the interactive process involves an established process, recognized in California law as the manner in which employers and employees should address disability issues in the workplace. The interactive process accommodates the rights and interests of both employers and employees, as it requires the mutual exchange of information, allows USF to obtain needed medical information from Dr. Kao and his doctor, limits the scope of any medical inquires to only that

information that is necessary to address the identified concerns, allows examinations by company doctors if the medical information supplied by Dr. Kao was insufficient, requires the parties to address together through good-faith communications matters involving performance of essential job functions or of health and safety, and requires the parties to determine on a mutual basis what, if any, accommodations are necessary to perform essential job functions or to resolve bona fide concerns as to health and safety.

USF's position reduces the protections afforded disabled employees under the FEHA, including the protections of the interactive process. It puts disabled employees—such as veterans with PTSD, recovered alcoholics or drug abusers, persons with mental disabilities and persons with diseases like AIDS—at risk of being determined "unfit for duty" or "unsafe" by company doctors, having their disabilities disclosed unnecessarily or having to give up employment to preserve their personal privacy and avoid the stigma that disclosure of a disability may cause.

USF's position cannot be squared with the FEHA's statement that it is "the public policy of this state . . . to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . physical disability [or] mental disability . . . ." (Gov. Code, § 12920.) USF's position narrows the rights of disabled employees under the law, contrary to the FEHA's command that its "provisions . . . shall be construed liberally for the accomplishment of the purposes thereof." Gov. Code, § 12993(a); accord, *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157. USF's position turns a limited

exception to the rule prohibiting examinations into an employer "tool" to demand examinations whenever the employer perceives the need to do so. Compare *Albert v. Runyon* (D.Mass. 1998) 6 F.Supp.2d 57, 67 (interpreting similar provisions in the Americans with Disability Act ("ADA"): The law "does not confer upon employers an affirmative right to conduct job-related examinations, but merely exempts such examinations from its prohibitions.").

In contrast, using the interactive process gives employers and employees an established, fair and transparent way to address workplace concerns, to allow medical examinations when truly necessary to resolve disability issues and to protect disabled employees from overbroad medical inquiries. This is the approach that best advances the legislative goal of protecting the rights of disabled employees to seek and retain employment without stigma or discrimination because of disability.

2. The FEHA prohibits disability inquiries to protect employees from denial of employment for reasons unrelated to the ability to perform the job.

The California Fair Employment and Housing Act (FEHA) provides broad employment protections for persons with disabilities, including persons who are perceived to be disabled. The purpose of the law is "to protect individuals rejected from a job because of the '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; See also Gov. Code § 12926.1(b).

As part of the protection against disability discrimination, the FEHA limits the right of employers to make medical and psychological inquiries and examinations. Gov. Code §§ 12940(e) (pre-employment), 12940(f) (post-employment). The provisions applicable to post-employment inquiries (Government Code Section 12940(f)) —the provisions applicable to this case—make it an unlawful employment practice for an employer "to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition." Gov. Code § 12940(f)(1). Post-employment examinations are allowed in only limited cases: "[A]n employer * * * may require any examinations or inquiries that it can show to be job related and consistent with business necessity." Gov. Code §12940(f)(2).

These restrictions on medical inquiries and examinations, while applicable to all employees, are designed to protect disabled employees from "unwanted exposure of the employee's disability and the stigma it may carry." *EEOC v. Prevo's Family Mkt., Inc.* (6th Cir.

1998) 135 F.3d 1089, 1094 n. 8.[4] These provisions ensure that persons with disabilities are not compelled to disclose these disabilities and risk denial or loss of employment for reasons other than their qualifications to perform the work. *Leonel v. American Airlines, Inc.* (9th Cir. 2005) 400 F.3d 702, 709. See also *Fredenburg v. Contra Costa County Dept. of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1182.

3. USF's demand was a psychological examination or inquiry as to the nature and scope of a perceived mental disability.

There is no question but that the comprehensive psychiatric examination demanded of Dr. Kao fell under Section 12940(f) of the FEHA. It was a "psychological examination" of Dr. Kao, a "psychological inquiry" of him and an "inquiry whether [Dr. Kao] has a mental disability" or an "inquiry regarding the nature or severity of a … mental disability, or medical condition." Gov. Code § 12940(f)(1).

Equally undisputed is the broad and comprehensive scope of the examination USF demanded. In the June 24 letter, USF told Dr. Kao that he was to "provide all medical information the [psychiatrist] requests," attend the scheduled appointment "as well as any follow-up meetings" and "fully-cooperate" with him. AA 142, Nos. 2, 4. This

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[4] Federal cases interpreting the ADA are relevant to the construction of similar language in the FEHA. However, the FEHA "'provides protections independent from those in the [ADA]' and 'afford[s] additional protections [than the ADA]' (§ 12926.1, subd. (a)), state law will part ways with federal law in order to advance the legislative goal of providing greater protection to employees than the ADA." *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57.

examination included the review and analysis of medical history and background, including medical history, legal and financial history, educational and work history, family, and social history, a "Mental Status Examination," psychological testing, laboratory testing and diagnostic assessment. AA 153 (last paragraph and bullet points); RT 2187-2189.

The information USF said it wanted also sought information as to the "nature or severity" (Gov. Code § 12940(f)(1)) of any mental disability Dr. Reynolds might find. USF told Dr. Kao that Dr. Reynolds would be providing USF with "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." AA 142, No. 5 (emphasis supplied).

4. A psychological examination by an employer-chosen doctor cannot be job related and consistent with business necessity unless the employer uses the interactive process.

a. The FEHA requires an interactive process to address issues of disability, health/safety and accommodation.

"Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." *Prillman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948, quoting from *Nassau County v. Arline* (1987) 480 U.S. 273, 289 fn. 19. The process by which functional limitations caused by a disability and

possible accommodations are determined and accommodated is called the "interactive process."

"The 'interactive process' required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively." *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195 (citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261). "The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees". *Jensen*, supra, 85 Cal.App.4th at 261, quoting from *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1114. As part of this process, "[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." *Jensen*, supra, 85 Cal.App.4th at 261.

Under California law, the obligation to engage in the interactive process applies both to employees with actual disabilities and to employees who are perceived to have disabilities. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54-62 and fn. 18. As such, the interactive process protects against misperceptions and "is a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled." *Id.* at 61(citation omitted).

There are no magic words triggering the duty to engage in the interactive process. *Prillman v. United Air Lines, Inc.*, supra, 53 Cal.App.4th at 954. An employer "knows an employee has a disability when the employee tells the employer about his condition,

or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887, quoting from *Schmidt* v. *Safeway, Inc.* (D.Or. 1994) 864 F. Supp. 991, 997. See also *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 311-314 (employer's observation of use of cane put employer on notice that employee was disabled for purposes of FEHA). See also *Prillman*, supra, 53 Cal.App.3d at 950-951 (an employer who knows of a disability has an affirmative duty to offer accommodations).

In Dr. Kao's case, the facts are undisputed that USF was aware Dr. Kao suffered from clinical depression. In 2002, Dr. Kao circulated a letter from Dr. Parris describing his depression and adverse reaction to Prozac that had resulted in him being put out on involuntary leave. RT 1602:8-13; Exh. 3 p. 27. In 2006, Dr. Kao included Dr. Parris's letter and a follow-up letter from Dr. Terr in his formal complaint of discrimination. RT 1602:8-13; Exh. 3 pp. 25-26.

USF also perceived Dr. Kao as suffering from serious mental disabilities. In USF's consultations with Dr. Good and Dr. Missett, USF administrators described Dr. Kao's history of depression, referred to him having hallucinations, described him as "psychotic" and questioned if he had a "delusional disorder," was "paranoid" or had some other "major mental disorder." RT 100, 1002, 1009- 1010, 2206-2207, 2208; AA 163, 201. In connection with its June 18, meeting with Dr. Kao, USF stated that the meeting concerned "health-related matters" (AA 137) and a "concern about your health" (AA 138). USF put Dr. Kao on an involuntary sick leave pending the examination and its results. AA 142-143, Nos. 1, 7, 8.

b. The interactive process is how an employer can obtain medical information from employees.

The interactive process is designed to address issues of medical information, the scope of what information can be obtained and when medical examinations are necessary. This is specifically reflected in the FEHC's newly-amended disability regulations. Cal. Code Regs., Tit. 2, §§ 7294.0(c)(2, 3, 4), 7294.0(d)(5)(A-C). These new regulations reflect long-standing legal requirements under the ADA and FEHA. An employer, like USF, has no business need—or right—to side-step the interactive process in favor of an employer-controlled "fitness-for-duty" examination.

i. The FEHC's regulations require an employer to seek medical information first from the employee and allow examinations by company doctors only if the information supplied by the employee is insufficient.

The FEHC's recently-adopted regulations allow the employer to make medical inquiries as part of the interactive process, but limit the employer's ability to demand an examination by a company-chosen doctor to situations where information provided by the employee or the employee's doctor is insufficient to resolve the issues.

The employer's duties are described in section 7294.0(c). The employer must ask first for medical documentation from the employee. § 7294.0(c)(2). After receiving medical documentation

from the employee, the employer may make further necessary inquiries. §7294.0(c)(3). If the information provided by the employee needs clarification, the employer must specifically address what clarifications it needs and give the employee time to provide additional information (§ 7294.0(c)(4)).

Section 7294.0(d)(5) more specifically addresses how medical information will be provided to the employer. Again, the employer must first seek information from the employee. § 7294.0(d)(5)(A, B). The employer can only seek directly relevant information and "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." § 7294.0(d)(5)(B). The employer is required to ask the employee for supplemental information if the employer believes the employee's initial response is insufficient, identifying exactly the insufficiency. § 7294.0(d)(5)(C). Finally, the employer may demand an examination by an employer's doctor only if the information provided by the employee is still insufficient after the initial and follow-up requests. Section 7294.0(d)(5)(C) (last sentence) explicitly states this rule: "Thereafter, if there is still insufficient documentation, the employer may require an employee to go to an appropriate health care provider of the employer's or other covered entity's choice."

ii. The FEHC's Interactive Process regulations reflect pre-existing legal standards.

While the FEHC's new regulations spell out in more detail how the interactive process is used to obtain necessary medical

information, including the point at which an employer may use the employer's doctor, the regulations are based on pre-existing law and long-standing legal principles.

(a) Use of interactive process to obtain medical information first from employee before demanding a medical examination by a employer-chosen doctor.

In the 2000 amendments to the FEHA, the Legislature reaffirmed the importance of the interactive process. Gov. Code § 12926.1(e). The FEHC adopted the new regulations to conform this legislation. FEHC, *Initial Statement of Reasons for Proposed Amended Disability Regulations* (herein "FEHC Initial Statement"), October 3, 2011, at pp.1, 33-35. The regulations governing the interactive process were based on the EEOC's *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans With Disabilities Act (ADA)* (EEOC Notice No. 915.002) (7/27/00) (herein "EEOC *Medical Examination Enforcement Guidance*").[5] FEHC *Initial Statement*, at pp. 33-35.

The EEOC *Medical Examination Enforcement Guidance* (at Question 11) addressed how examinations by an employer's physician would be justified only if medical information first provided from the employee was insufficient: "The ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice *if the employee provides*

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[5] The EEOC *Medical Examination Enforcement Guidance* is published on the EEOC's website at http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

insufficient documentation from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation."

The FEHC's precedential decision in *DFEH v. Avis Budget Group, Inc.* (2010), Decision No. 10-05-P, adopted and applied this rule before the new FEHC regulations were adopted. *Id.* at p. 24 and fn. 11, citing to EEOC *Medical Examination Enforcement Guidance*, Question 11. The FEHC held in *Avis Budget Group* at p. 24 (emphasis supplied): "[I]f an employee provides insufficient documentation in response to the employer's initial request, the burden is on the employer to explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information 'in a timely manner' *before* rejecting the proposed accommodation or *imposing additional conditions such as requiring that an employee be examined by a company-provided doctor*." In *Avis Budget Group*, the FEHC held that the employer violated the FEHA's restrictions on medical inquiries (Gov. Code § 12940(f)) precisely because the employer did not engage in an interactive process by allowing the employee to provide supplemental medical information before demanding the employee go to the company doctor (*Avis Budget Group*, supra, at p. 26):

> In this case, we find that respondent violated Government Code section 12940, subdivision (f), by initially requiring Reed to submit her psychiatric medical file or to allow respondent access to her doctor; and, thereafter, by not allowing Reed or her doctor the opportunity to answer respondent's further questions before insisting that Reed see its company-provided psychologist.

(b) Limitation on medical information an employer can demand.

Requiring that an examination or inquiry be tailored to the job requirements themselves or required accommodations is also a long-standing legal requirement. *Conroy v. New York State Dept. of Correctional Serv.* (2nd 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."). Again, the EEOC *Medical Examination Enforcement Guidance* explained at Question 10 (cited in *Avis*, supra, at p. 24, fn. 10): "[I]n most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation."

Broad and untailored inquiries are prohibited because such inquiries undermine the goal of protecting disabled employees from compelled disclosure of their disabilities beyond the minimum necessary to identifying job limitations and justifying accommodations. *Taylor v. Phoenixville School District* (3d Cir. 1999) 184 F.3d 296, 315, cited and quoted in *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578, 1598):

> Disabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal unnecessarily every detail of their medical records because much of the information may be irrelevant to identifying and justifying accommodations, could be

> embarrassing, and might actually exacerbate workplace prejudice.

The FEHC in *Avis Budget Group* also concluded that the employer's demand for access to medical records was an overbroad request and therefore illegal under Section 12940(f)(2) (at p. 24):

> The Accommodation Request Form, on its face, required a respondent employee requesting accommodation to allow access to the employee's "pertinent" medical records and to allow respondent access to the employee's doctor regardless of whether the doctor provided sufficient information. The form was impermissibly overbroad, as it required information that was not needed if the employee's doctor provided sufficient information.

c. USF failed to use an interactive process, demanded Dr. Kao see Dr. Reynolds before seeking medical information from Dr. Kao and made an overbroad demand for medical information and examination.

USF never engaged in an interactive process with Dr. Kao. USF refused to do so and insisted on using an examination by Dr. Reynolds as the only way to address its concerns.

USF never acted timely to address concerns with Dr. Kao. These concerns arose in January 2008 or even earlier, yet USF never communicated any concerns to Dr. Kao until June 2008. USF never asked Dr. Kao to supply information from his own doctor about any functional limitations on his ability to work or danger to others. When Dr. Kao asked for additional information explaining USF's concerns, and proposed a meeting to "clear the air" over the concerns USF expressed, USF rejected the proposal outright and declined to provide any additional information. RT 464, 465; AA 140.

Dr. Kao explicitly described his need for such information to assess USF's demands. RT 474-477; AA 141. Dr. Kao also explained his concerns that he "was not consulted in an attempt to resolve any problems," that USF "had declined to identify any specific problems" and had "not identified any health condition at issue" and that USF was engaged in in a "psychological fishing expedition". AA 45, next to last paragraph.

Dr. Kao attempted to address USF's concerns even in the absence of information from USF. In October, Dr. Kao presented additional evidence that he was highly evaluated as a teacher by his students. RT 518-519; AA 125. He presented additional evidence that he was not seen as frightening by faculty and staff because he was repeatedly invited to faculty and student social events, given academic responsibilities for the Mathematics department, advised the student Math Club and regularly participated in faculty meetings. RT 510-518; AA 156-157, 159. USF nevertheless persisted in its demand that only an examination by Dr. Reynolds would satisfy it. RT 519, 2661:1-4, 2668-2669; AA 160.

USF's failure to engage Dr. Kao in a meaningful discussion precluded Dr. Kao from assessing the nature of USF's concerns, from addressing the specific events that caused persons to say they were frightened, from determining what medical information he could provide USF to address its concerns, or to propose accommodations if any appeared needed.

USF also did not use an interactive process to formulate a narrow or tailored examination. In the June 24 letter, USF told Dr. Kao that he was to "provide all medical information the [psychiatrist]

requests," attend the scheduled appointment "as well as any follow-up meetings" and "fully-cooperate" with him. AA 142. This examination included virtually everything about Dr. Kao: a review and analysis of medical history and background, including medical history, legal and financial history, educational and work history, family, and social history, a "Mental Status Examination," psychological testing, laboratory testing and diagnostic assessment. AA 153; RT 2187-2189.

The information Dr. Reynolds was to give USF went beyond a description of functional job limitations. USF requested Dr. Reynolds to give it "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." AA 142, No. 5 (emphasis supplied). USF did not identify any particular faculty functions that Dr. Reynolds was to address or that it felt Dr. Kao could not perform.

USF offered no testimony that such a comprehensive examination was necessary to determine any job functional limitations that existed. In fact, the examination was designed to investigate Dr. Kao's perceived disabilities, not his ability to perform specific job duties. Dr. Missett testified that he recommended the examination because USF did not "know too much of what might be going on with Dr. Kao." RT 2157:1-5. Dr. Missett testified that, when recommending a fitness-for-duty examination, he did not limit the records that Dr. Reynolds might seek. RT 2216:22 -2217:8. He testified that it would be up to Dr. Reynolds to decide what records to seek and review. RT 2217-2218. Dr. Missett left the scope of the

examination largely up to USF and Dr. Reynolds. RT 2218:8-10 ("I mean, this was not as if I had called Dr. Reynolds and outlined the parameters for the evaluation. I left that to the University.") The examination was not limited to issues of dangerousness but included Dr. Kao's "ability effectively to function as a faculty member." RT 2219:20-2220:8. The only limits were time and what Dr. Reynolds might ask for. RT 2219:11-19. Dr. Missett was unaware that the ADA or FEHA imposed any limitations on fitness-for-duty examinations. RT 2222. Dr. Reynolds did not testify at all as to the necessity of this information or as to the issues he understood the examination was to address.

Finally, the interactive process requires the mutual exchange of information. *Jensen*, supra, 85 Cal.App.4th at 261. However, Dr. Kao would not be permitted to see any report by Dr. Reynolds or the underlying information Dr. Reynolds relied upon. The consent form Dr. Kao was to sign stated that "Dr. Reynolds will NOT provide me, or my designee, with a copy of the psychiatric report or a copy of Dr. Reynolds' records." AA 153, ninth bullet point.

Concealing Dr. Reynolds' report and underlying information from Dr. Kao would have prevented him from addressing the facts, identifying errors and proposing alternative reasonable accommodations if necessary. These are the very things that the interactive process is expected to address in an open and transparent manner. *Ibid.*

5. USF cannot avoid the interactive process because of a concern that Dr. Kao frightened other faculty members.

The FEHA provides employers with a health and safety defense to address risks in the workplace. Section 12940(a)(1) provides: "This part does not . . . subject an employer to any legal liability resulting from . . .the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." Gov. Code § 12940(a)(1). The health/safety defense is an affirmative defense. *Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252. This defense is designed to address precisely the kinds of claims of dangerousness that USF made against Dr. Kao.

USF did not plead this defense. AA 47-50. USF did not present the kind of evidence that would have established a health/safety defense. Similarly, USF did not engage in the interactive process that would have been required to determine if health/safety concerns could be accommodated and did not show that accommodation would have been impossible.

i. USF did not present substantial evidence of inability to accommodate.

The health and safety risk defense is only applicable where accommodation is not possible. Gov. Code § 12940(a)(1). This

requires that the employer exhaust the interactive process with the employee to determine if there is a reasonable accommodation available or show that no accommodation was possible. Cal. Code Regs., Tit. 2, § 7293.8(c).[6] *Mantolete v. Bolger* (9th Cir. 1985) 767 F.2d 1416, 1423 (quoting from *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 308: "the burden of proving inability to accommodate is on the employer.").

USF presented no evidence that it could not accommodate Dr. Kao's disability. There was no evidence that Dr. Kao posed any actual danger. See infra, pp. 38-41. The evidence from USF's expert, Mr. Cawood, was that training co-employees how to interact with the subject employee was a successful alternative to a fitness-for-duty examination. RT 2533:11 - 2535:4. Use of an interactive process could have led to solutions of the kind Mr. Cawood identified.

ii. USF did not present substantial objective evidence that would have supported a health/safety defense arising from co-employees' fears.

An employer's subjective concerns or beliefs cannot establish a risk to health or safety for purposes of this defense. *Bragdon v. Abbott* (1998) 524 U.S. 624, 649 ("His belief that a significant risk existed, even if maintained in good faith, would not relieve him from

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[6] The FEHC's new regulations (Cal. Code Regs., Tit. 2, § 7293.8(c)) explicitly state that the health/safety defense requires exhaustion of the interactive process and inability to accommodate. The prior regulations also required proof of inability to accommodate. Cal. Code Regs., Tit. 2, § 7293.8(c) (superseded regulations).

liability."). Rather, the assessment of a risk must be based on objective evidence (*id.* 524 U.S. at 649) that is "tailored to the individual characteristics of each [employee]." *Sterling Transit Co.* v. *Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 798. The employer must be able to show the employee has a present inability to do the job safely. "The law clearly was designed to prevent employers from acting arbitrarily against physical condition that, whether actually or potentially handicapping, may present no current job disability or job-related health risk." *American National Ins. Co.* v. *Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 610.

The mere possibility of harm—even serious harm or death—is also not enough to establish this defense. There must be objective evidence that injury is "a significant risk." *Jasperson v. Jessica's Nail Clinic* (1989) 216 Cal.App.3d 1099, 1109 fn. 5, citing *Chalk* v. *U.S. Dist. Court Cent. Dist. of California* (9th Cir. 1988) 840 F.2d 701, 705. See also *Jarvis v. Potter* (10th Cir. 2007) 500 F.3d 1113, 1123. "Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon v. Abbott*, supra, 524 U.S. at 649, citing *School Bd. of Nassau Cty. v. Arlilne* (1987) 480 U.S. 273.[7] Requiring objective evidence is necessary to protect against discrimination based on prejudice, stereotypes or unfounded fears. See *Nunes v. Wal-Mart*

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[7] The new (Cal. Code Regs., Tit. 2, § 7293.8(c)) and old FEHC regulations (Cal. Code Regs., Tit. 2, § 7293.8(c) (superseded regulations) both required proof of "an imminent and substantial degree of risk".

Stores, Inc. (9th Cir. 1999) 164 F.3d 1243, 1248; *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1090: "The purpose of creating the 'direct threat' standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm."

USF did not have objective evidence of dangerousness. Dr. Kao did not threaten anyone. He did not hit or assault anyone in a way that indicated any significant or imminent risk of violence. Dr. Kao remained on campus, doing his normal work and interacting with students and faculty throughout the Spring 2008 semester and notwithstanding USF asserted it had a concern about Dr. Kao's dangerousness since early January 2008 and even before then. RT 2098, 2115, 2120-2121. Ms. Peugh-Wade testified that nothing Dr. Kao had done had risen to the level where USF believed it was intentional or justified disciplinary action. RT 1596:9-14, 1579:14-1580:5, 1357:18, 1345:1-3. Dan Lawson, USF's director of public safety, testified that Dr. Kao had not done anything to trigger application of the USF violence prevention policy. RT 935:11-19, 958:16 - 959:21.

USF also offered no expert evidence at trial that Dr. Kao presented any significant or imminent safety risk.[8] To the contrary, Dr. Missett testified: "I don't know that anywhere in there I saw what I would say is a credible report that requires, whatever, immediate action." RT 2171:22-25. In fact, the only evidence presented at trial on this issue was from Dr. Terr—Dr. Kao's psychiatrist—who testified that Dr. Kao was not dangerous. RT 854.

The reaction of the complaining faculty members arose from a stereotype that Dr. Kao suffered from some mental illness. USF repeatedly referred to Dr. Kao in mental disability terms ("paranoid", "hallucinations", "psychotic", "delusional," "major mental disorder"). Supra, pp. 9, 10-11. USF planned to "get him out medically & keep him out medically." RT 1474:17-18; AA 179. The various complaining faculty members used similar language indicating they perceived Dr. Kao had a mental disability. Dr. Needham and Dr. Yeung compared Dr. Kao to the Virginia Tech killer. RT 1275-1276, 1401-1402, 2031:4-19; AA 184. Dr. Needham thought that Dr. Kao was angry "out of proportion with reality" (RT 1275:23-25; AA 184) and wanted Dr. Kao to be "normal or resign" (AA 185). Dr. Zeitz said he, Needam and Yeung were worried about Dr. Kao "going postal" (RT 1317:23-25; AA 9194, 198), Dr. Kao "was not in full control of emotions" and "can't control [his] body" (RT 1882:15; AA 197).

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[8] USF had available discovery tools to use to attempt such a proof. *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 10-13; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1019.

Employers cannot act based on stereotypes about persons with disabilities. *Diffey v. Riverside County Sheriff's Department*, supra, 84 Cal.App.4th at 1037. USF's evidence rests on just such stereotypes. This is a very long way from the kind of objective evidence necessary to show a health/safety risk under established standards.

In *Den Hartog v. Wasatch Academy*, supra, 129 F.3d at 1090, the evidence showed "direct threats to members of the Wasatch community — including Loftin's own four-year-old daughter — and demonstrated his propensity to carry them out, including breaking the ribs of one of his former schoolmates and engaging in other violent behavior."

In *EEOC v. Amego, Inc.* (1st Cir. 1997) 135 F.3d 135, the objective evidence that a nurse was dangerous in administering medication to disabled patients involved two prior suicide attempts using drugs that were available at the place of work, a missing medication log, drugs found in the employee's apartment, stopping attendance at therapy sessions and the inability of the employee's health care providers to provide assurances in response to the employer's expressly stated concerns. *Id.* at pp. 145-146.

In *Jarvis v. Potter*, supra, 500 F.3d at 1116, 1123-1124, the objective evidence included striking other employees, the employee's doctor's letter stating the employee was a threat in the workplace, the employee's own statements he could no longer stop at the first blow, that if he hit someone in the right place he could kill him, and that he could not return to the workplace and be safe.

6. Even apart from the failure to use the interactive process or present evidence of dangerousness, USF did not present substantial evidence that the comprehensive mental examination was job-related or consistent with business necessity.

Even if USF could justify a mental examination without engaging in the interactive process and without a factual basis for believing that Dr. Kao had engaged in actions supporting a health/safety defense, USF did not present substantial evidence that the examination it demanded was job-related or consistent with business necessity.

To be "job-related," a medical examination must be tailored to assess an employee's ability to carry out essential job functions or whether the employee poses a danger to him/herself or others. *Conroy v. New York State Dept. of Correctional Serv.*, supra, 333 F.3d at 98. That means "the request is no broader or more intrusive than necessary." *Id.* at 98. The examination USF demanded was comprehensive, not tailored in any way. Supra, pp. 12, 14-15. Dr. Missett proposed the mental examination to determine what was wrong with Dr. Kao, not to address his ability to perform a specific job function. RT 2157, 2159.

Beyond asserting that Dr. Kao "frightened" several faculty members, USF presented no evidence that Dr. Kao was unable to perform his job functions.[9] To the contrary, Dr. Kao worked the

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[9] Dangerousness was not communicated as an issue in USF's communications with Dr. Kao. These communications asserted that he frightened persons, not that he was actually dangerous. AA 138-139, 142-143, 160.

entire Spring 2008 semester notwithstanding these subjective fears, including teaching, meeting with students, participating in Math Teas and supervising the Math Club and representing the Department in negotiations with the Business School over course content. USF never asked him to change any of the behaviors that USF asserted frightened others or even told Dr. Kao of any concern it had that he was frightening some people until June 18, when the semester was over.

"Business necessity" requires evidence that the examination is vital to the business and no other equally-effective alternatives exist. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 989-990. See also Cal. Code Regs., Tit. 2, § 7286.7(b). At a minimum, this requires "significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions." *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140, 1146. [10]

Without engaging in any interactive or similar process with Dr. Kao to discuss its concerns and what could be done about them, USF had no "genuine reason to doubt" whether Dr. Kao could do his job effectively. Indeed, he worked successfully throughout the Spring

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[10] *Brownfield* arises under the ADA. As noted above, the FEHA provides greater protections than the ADA (supra, p. 23, fn. 4), particularly as to the use of the interactive process when employers perceive disability-related job performance issues (supra, p. 25).

2008 Semester. A discussion with Dr. Kao—before demanding a mental examination—is precisely what California law normally requires of employers when they become concerned that a disability is affecting an employee's job performance. See *Gelfo v. Lockheed Martin Corp*., supra, 140 Cal.App.4th at 54-62.

USF cannot assert a business necessity that only its chosen psychiatrist, Dr. Reynolds, make the determination that Dr. Kao was not dangerous.[11] RT 2566-2567, 2612, 2615-2616, 2617; AA 142-143, 150, 151, 160. USF offered no substantial evidence that only an employer-chosen psychiatrist was competent to make that decision.

Contrary to USF's position, all psychiatrists in California are legally obligated to warn if a patient presents a danger to anyone else. RT 837-838, 839. An employer's need for assurance that an employee poses no significant safety risk is met by the employee's doctor's legal obligation to warn if such a risk exists, without any necessity for examination by a company doctor. *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 447 ("In other words, Du Pont's (and Mendonca's) interest in a safe workplace would have been as well served if the psychiatrists had simply honored their duties under existing law.").

USF was aware that Dr. Kao had his own psychiatrist, Dr. Terr. AA 103-104. USF offered no evidence that Dr. Terr was incompetent to fulfill her legal duty to warn if Dr. Kao was dangerous. USF never

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[11] However, actual dangerousness was not an issue in USF's communications with Dr. Kao about this examination. See supra, p. 42, fn. 9.

communicated with Dr. Terr to determine what information she might be able to provide herself or get Dr. Kao to authorize her to provide. RT 880-881, 884.

USF's demand for Dr. Reynolds' assurance is the equivalent of demanding a subjective guaranty against all risk. USF asserted as much in its closing argument: "we're not going to take a risk . . . until he does his part [by going to the examination]". RT 2832. The ADA and FEHA do not allow employers to demand a subjective risk-free environment, but only an absence of "significant" actual and objective risks. *Bragdon v. Abbott*, supra, 524 U.S. at 649 and cases discussed supra at pp. 37-39.

USF's insistence on Dr. Reynolds is contrary to the standards under the interactive process. Under the interactive process, information from the employee or the employee's health care provider is the principal source of information regarding a disability. An employer-chosen doctor is appropriate *only* where information from the employee is insufficient in a specific and objective way. See supra pp. 27-28, 30. USF presented no evidence why it had a "business necessity" to insist on Dr. Reynolds before seeking information from Dr. Kao and his health care providers.

USF cannot reasonably claim an employer-chosen doctor was necessary to calm fears held by some faculty members. The law prohibits employers from acting on the basis of subjective fears. *Diffey v. Riverside County Sheriff's Department*, supra, 84 Cal.App.4th at 1037. See also supra pp. 37-39. There is no objective reason that Dr. Terr could not have provided adequate assurances to USF if a medical opinion were necessary. Likewise, USF could not have

disclosed to faculty members that Dr. Kao was examined by its chosen mental health professional and found safe. The results of any examination are confidential and could not be disclosed even to calm faculty members' subjective concerns. 42 U.S.C. §§ 12112(d)(3)(B), (d)(4)(C). See also Cal. Code Regs., Tit. 2, § 7294.0(g), 7294.2(d)(4).

Finally, USF had no business need to demand the examination to enforce its normal disciplinary rules and procedures. *Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 331-334 (disabled employee must adhere to the same rules of conduct as non-disabled employee). An employer cannot impose disciplinary action for refusing to go to a medical examination where there is no underlying performance problem independently justifying discipline. Question 9 of the EEOC *Medical Examination Enforcement Guidance*, explains: "Any discipline the employer decides to impose [after a refusal to go to a company doctor] should focus on the employee's performance problems. Thus, the employer may discipline the employee for past and future performance problems in accordance with a uniformly applied policy."

B. Dr. Kao Was Banned From The Campus Because USF Perceived Him To Be Disabled.

Labor Relations Director David Philpott acknowledged that Dr. Kao's ban from campus was because of a perception of Dr. Kao's mental state. He testified (RT 2689:7-12):

> Q. . . . In other words mental instability was a factor in continuing the ban from campus?

> A. It could be into the bucket of concerns that we had. It was one of -- it was a concern but I don't want to say it was mental illness. I'm not trained in that arena.

USF's Cross-Complaint also justified the ban on the grounds that Dr. Kao's entry onto the campus would result "in an unacceptable risk that such entry . . . will result in harm or injury to the persons present on the University campus." AA 58, ¶ 38. The Cross-Complaint alleged overtly threatening acts (AA 54-55, ¶¶ 15-18) that caused employees to fear an incident like "Virginia Tech (homicides on college campus)" (AA 55, ¶ 18) and that Dr. Kao "lack[ed] personal control over his emotions" (AA 55, ¶ 19), as well as a threat that Dr. Kao would enter the campus (AA 57-58, ¶¶ 33-35, 37).). The Cross-Complaint asked for an injunction permanently barring Dr. Kao from USF under penalty of arrest because USF believed that Dr. Kao "will at some time enter upon the University campus, notwithstanding the instructions of the university not to do so." AA 58, ¶ 37.

After trial, Dr. Kao moved to dismiss the Cross-Complaint for lack of proof. RT 2719-2721. USF thereafter dismissed the Cross-Complaint with prejudice. AA 232.

Banning Dr. Kao from campus because of a perceived "mental instability" is discrimination on the basis of disability and a violation of the Unruh Act. See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 61, 665, 673. USF offered no evidence of any reason for the ban other than safety concerns arising from its perception of Dr. Kao as mentally disabled or unstable. Linking the ban to Dr. Kao's refusal to attend a psychological examination, on its face, demonstrates that the

ban arose from a perception that Dr. Kao suffered from some mental disability that made him unusually dangerous and unpredictable. There was, however, no evidence of any actual danger—just USF's subjective perceptions. Supra, pp. 39-41.

C. Dr. Kao Was Fired For Refusing To Release Medical Records, In Violation Of The CMIA.

The CMIA prohibits an employer from discriminating against employees who refuse to authorize release of medical information. Civil Code § 56.20(b). "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11)". *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 (emphasis supplied).

USF's demand that Dr. Kao authorize disclosure of all his medical information to Dr. Reynolds (AA 142) violated the prohibition requiring disclosure of an employee's medical information "to the employer or others" (*Loder*, supra at 861). When the employee refuses to give an authorization, the CMIA only permits an employer to take "such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part." Civil Code § 56.20(b). *Loder*, supra, at 861.

USF did not assert that it fired Dr. Kao for any reason *other than* his refusal to release this medical information for a mental

examination. USF's sole justification for discharging Dr. Kao was his refusal to attend the examination, not other misconduct. AA 161. In firing Dr. Kao for "insubordination" in not attending the mental examination, USF is simply seeking an end-run around the statute's prohibition of penalizing employees for refusing to release medical information that USF was requiring he provide for the examination by Dr. Reynolds.

D. The Court Erred In Granting Non-Suit On The Defamation Cause Of Action.

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).

The Court granted non-suit on the defamation cause of action, relying on the litigation privilege. RT 1734-1739; AA 97-98. This was error.

First, the litigation privilege does not apply to USF's communications with Dr. Reynolds. The facts show that this communication was not in connection with anticipated litigation; at best, there were disputed factual issues as to whether litigation was sufficiently imminent or immediate to bring the privilege into play.

The Litigation Privilege protects a pre-litigation communication "only when it relates to litigation that is contemplated in good faith and under serious consideration." *Action Apartment Assn., Inc. v.*

City of Santa Monica (2007) 41 Cal.4th 1232, 1251. "Whether a pre-litigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact." *Id.* at 1251-1252.

It is not enough that litigation might be the outcome if the dispute were not resolved. *Edwards v. Centrex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 36-37. "It is not the mere *threat* of litigation that brings the privilege into play, but rather 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. That was a business purpose unrelated to litigation. At that point, litigation was simply a remote possibility if the dispute over the demand for a mental examination could not be resolved. Indeed, USF did not even assert the litigation privilege as a defense in its Answer. AA 47-49. Even if USF were to claim that it believed litigation was imminent, that would have been a factual issue for the jury.

Second, disputed factual issues preclude a non-suit on the qualified privilege under Code of Civil Procedure Section 47(c).

To invoke the qualified privilege, the communicator and recipient must have a common interest that is furthered by the communication. *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846. It is restricted to "proprietary or narrow private interests." *Brown v. Kelly Broadcasting Co.* (1989) 48

Cal.3d 711, 737. See also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914.

USF and Dr. Reynolds do not have such a "common interest" in communicating the allegations against Dr. Kao. Dr. Reynolds was "an independent physician". AA 142-143. USF sought out Dr. Reynolds to examine Dr. Kao in this case. See *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.").

In addition, malice defeats the qualified privilege. "Such malice is established by a showing that the publication was motivated by hatred or ill will toward the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Hailstone v.Martinez* (2008) 169 Cal.App.4th 728, 740.

A failure to conduct a reasonable and full investigation indicates bad faith. See *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 108; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 277-280. USF's normal policies call for a full investigation of all sides of the story. RT 2681-2682. However, USF did not tell Dr. Kao of the underlying facts, did not ask Dr. Kao for his side of the story and did not investigate the claims of fear with other staff and faculty that worked with Dr. Kao.

In addition: 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 (supra, pp. 39-40), including a specific reference to Virginia Tech and "homicides on college campus" in the Cross-Complaint (AA 55, ¶ 18).

E. Testimony That Dr. Kao Should Have Sought Employment In Jobs Other Than University Professor Was A Prejudicial Attack On Dr. Kao's Character.

Dr. Kao unsuccessfully moved to exclude USF's proposed expert testimony as to the availability of non-teaching jobs that Dr. Kao might have obtained. AA 68-70, 74; RT 2339:23-2341:8. Thereafter, USF's economic expert, Hussein Borhani, testified that the estimate of damages made by Dr. Kao's expert was unreasonable. RT 2343:9-2345:5. Dr. Borhani gave an expert opinion that "it would take a year or less for someone with Dr. Kao's qualifications to obtain other employment." RT 2365:8-10. Dr. Borhani relied on the availability of mathematics jobs in the government or in the private sector, not on any available university positions. RT 2342, 2346, 2349, 2351-2354, 2355- 2362, 2372, 2384- 2385, 2398.

It is defendants' burden to show the existence of comparable jobs: "the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be

resorted to in order to mitigate damages." *Parker v. Twentieth Century-Fox Film Corp* (1970) 3 Cal.3d 176, 182.

Dr. Kao was a tenured university professor at a four-year college. A non-teaching job in government or the private sector is not comparable or substantially similar to the job of a tenured university professor. *Gonzales* v. *Internat. Assn. of Machinists* (1963) 213 Cal.App.2d 817, 822-823 (union employee not required to accept that "did not have the protective cloak of respondent's union."), cited with approval in *Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 Cal.3d at 182 fn. 5.

Allowing Borhani's expert testimony allowed USF to present plaintiff as greedy in seeking damages for loss of his tenured position at USF. USF attacked plaintiff's economic expert on exactly that point. 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.

The jury could only have assumed from the admission of Dr. Borhani's testimony that Dr. Kao was rightly faulted as greedy, lazy or looking for a big payout from USF because he unreasonable failed to seek alternative employment in a non-teaching job. Portraying Dr. Kao in this way was a prejudicial attack on his character and necessarily influenced the jury against him. See *Winfred D. v. Michelin North America* (2008) 165 Cal.App.4th 1011, 1038, 1039-1040 (inadmissible evidence used to portray plaintiff as greedy as a motive for overloading van causing accident).

This evidence was especially prejudicial where USF attacked Dr. Kao by claiming that he chose to "give up his job," to bring this lawsuit "diverting the scarce resources of a nonprofit to Dr. Kao's profit" and "to sit there for three years and spend his time suing and not once, not once, even try to look for a job." RT 2818. Indeed, USF explicitly put Dr. Kao's character in the forefront of this argument, asserting that Dr. Kao refused to "make amends" for his alleged actions by not attending the examination with Dr. Reynolds. RT 2832.

F. The Court Erred In Not Admitting Evidence That That Dean Turpin's Computer Disappeared Only After Dr. Kao Moved To Compel Its Production And Denying A Spoliation Instruction.

Dr. Kao demonstrated that Dean Turpin had altered an email that purported to be a description of her interaction with Dr. Kao in April. What Dr. Kao did not know, however, was at what point these alterations started, how long after the fact the emails USF produced had been created and what, if anything, the original email said.

Accordingly, Dr. Kao sought to inspect the computer used to create and send these emails. RT 2498-2499. USF refused to produce the computer. AA 209 (Request No. 20 and Response, Amended Response). Instead, in its May 27, 2011, Amended Response, USF asserted that it "has produced herewith all emails sent by Jennifer Turpin relating to John Kao" during the relevant period. AA 209, Amended Response To Request No. 20). Dr. Kao moved to compel production of Dean Turpin's computer on July 14, 2011. AA 226-

227. After the motion to compel was filed and served, USF made a Second Amended Response, dated July 21, 2011, stating: "the computer is no longer within the possession or control of the University." AA 220.

Dr. Kao sought to show this sequence of events—in particular that the computer was apparently in existence in May when the emails were allegedly printed out from it, but lost or destroyed only *after* he moved to compel its production in July. RT 2499. The trial court, however, refused to admit the key document in this sequence of events: The motion to compel that preceded USF's claim that the computer was gone. Without that key document reflecting the sequence and timing, the facts of the changed discovery responses lacked significant impact as evidence of loss or destruction of evidence. The court, thereafter, refused to give the jury a spoliation instruction. RT 2877:2-15; AA 71-72 (CACI 204).

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572. Alteration or creation of false evidence justifies an inference that the evidence suppressed would be unfavorable. *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 836 fn. 2. The evidence of suppression can go to the weakness of USF's entire case. *Bihun v. AT & T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 992-995, disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664; *Thor* v. *Boska* (1974) 38 Cal.App.3d 558, 365 ("The fact that defendant was unable to produce his original clinical record concerning his treatment

of plaintiff after he had been charged with malpractice, created a strong inference of consciousness of guilt on his part."). The failure to admit such evidence is prejudicial. *Id.*, 38 Cal.App.3d at 566-568.

The prejudice in this case is apparent. USF repeatedly argued that it was only acting in good faith because it believed Dr. Kao was possibly dangerous. RT 2821, 2831-2833. Showing that USF and Dean Turpin suppressed evidence went directly to USF's good faith and its alleged pure motive of a concern for safety. Likewise, a jury instruction on spoliation would have alerted the jury to the significance of this evidence.

VII. CONCLUSION

The judgment should be reversed. The superior court should be instructed to grant judgment on liability in Dr. Kao's favor on the claims under the First, Third and Sixth Causes of Action (unlawful medical examination under the FEHA, discrimination in violation of CMIA and violation of Unruh Act) and grant a new trial on damages under these Causes of Action and a full new trial on the other Causes of Action in Complaint.

Dated: January 4, 2013.

CHRISTOPHER W. KATZENBACH (SBN 108006)
CONOR D. MACK (SBN 253878)
KATZENBACH LAW OFFICES
Attorneys for Plaintiff and Appellant
John S. Kao

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), the undersigned certifies that the APPELLANT'S OPENING BRIEF contains 13,994 words.

Dated: January 4, 2013.

CHRISTOPHER W. KATZENBACH (SBN 108006)
KATZENBACH AND KHTIKIAN
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
(415) 834-1778
(415) 834-1842 FAX

Attorneys for Plaintiff and Appellant
John S. Kao