

No.

IN THE SUPREME COURT OF CALIFORNIA

—o0o—

JOHN S. KAO,

Plaintiff and Appellant,

vs.

THE UNIVERSITY OF SAN FRANCISCO AND MARTHA
PEUGH-WADE,

Defendants and Respondents.

—o0o—

On Petition For Review of a Decision of the Court of Appeal, First
Appellate District, Division Three, Case No. A135750

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

PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

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.

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I. ISSUES PRESENTED FOR REVIEW

Issue 1. Does the Fair Employment and Housing Act (FEHA) (Government Code Section 12940(f)(2)) permit an employer to demand a comprehensive psychological examination by an employer-selected physician without first exhausting an interactive process with the employee, including requesting medical information from the employee or the employee's psychiatrist before requiring an examination by a company psychiatrist.

Issue 2. Does the Unruh Civil Rights Act (Civil Code § 51) permit banning an individual from public events on an open university campus because of a subjective perception that the individual was dangerous until lack of dangerousness could be established by a psychological examination rather than objective evidence of that the individual posed a significant risk of danger?

II. WHY REVIEW SHOULD BE GRANTED

ISSUE 1.

The Fair Employment and Housing Act (FEHA) explicitly prohibits medical and psychological examinations of current employees, unless the employer can show the examination is “job related and consistent with business necessity” (Gov. Code § 12940(f)(2)).¹ What constitutes an examination that is “job-related” and “consistent with business necessity” presents an important issue affecting the rights of employees and employers under the FEHA.

¹ Unless otherwise indicated, statutory references are to the Government Code.

The issue presented in this case is whether the University of San Francisco (“USF”) can demand a mental examination of Dr. John Kao, a tenured professor, without first engaging in an interactive process with him to determine if a mental examination is necessary and the scope of the examination if one is needed. USF demanded the examination because Dr. Kao’s behavior was perceived as frightening. At the same time, USF acknowledged that none of Dr. Kao’s behavior would itself justify disciplinary action.²

The circumstances under which employees can be required to be examined by employer-selected doctors presents an issue of paramount importance under the Fair Employment and Housing Act. It directly impacts the right of both disabled and non-disabled employees to be free from intrusive medical or psychological examinations. This is particularly so as to mental health examinations where an examination may be especially invasive and present significant risks of social stigma associated with mental health conditions.

The role of the interactive process is well-established in the more usual context involving issues of accommodation of a disability when the disability causes job-performance issues to arise. See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261. In this context, the interactive process and its mutual obligations is critical to

² Accordingly, this is not a case where a disabled employee seeks a different standard of conduct than applicable to non-disabled employees. See *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).

protect the interests of employees under the FEHA. The Legislature restated the critical role of the interactive process in the 2000 amendments to the FEHA. Section 12926.1(e).³ The interactive process provides an established framework to determine what medical information, if any, is necessary in a particular case and to determine if a reasonable accommodation exists that would enable the employee to continue working. The interactive process provides a procedural process to address how medical or other information about an employee's disability will be disclosed. See Cal. Code Regs., Tit. 2, §§ 7294.0(c)(2, 3, 4), 7294.0(d)(5)(A-C). In particular, the interactive process, as more fully described in the recently amended regulations, limits the use of employer-selected physicians to situations where the employee's physician has been unable to provide adequate information. *Id.* § 7294.0(d)(5)(C).

In contrast to this typical case, neither case law, nor the regulations (see Cal. Code Regs., Tit. 2, § 7294.2(d)(2)), specifically address how the interactive process applies to employer-mandated examinations under Section 12940(f)(2). Examinations under Section 12940(f)(2) typically arise outside the context of a specific disability accommodation request.

³ Section 12926.1(e) provides: "The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990."

Yet, it is exactly in the context of an employer-required examination that the need for the interactive process is most acute. Without the interactive process, there is no established mechanism to determine what medical or psychological condition is affecting the employee's performance of essential job functions, if medical or psychological information is needed to determine if there is an underlying disability and if it can be reasonably accommodated, and how that information should be provided or obtained in a way that satisfies both the employer's need for job-related information and the employee's right to prevent unnecessary disclosure of medical or psychological conditions.

The Court of Appeal rejected application of the interactive process for examinations under Section 12940(f)(2) because Dr. Kao did not acknowledge he had a disability, his disability was not "obvious" and Dr. Kao was not seeking an accommodation for a disability. Sl.Op. pp. 14-15. This reasoning undermines the protections the FEHA provides for disabled employees.

By demanding a psychological examination, an employer is treating the employee as if they have some psychological condition that significantly affects work performance. Section 12940(f)(2) expressly requires any examination to be "job-related" and "consistent with business necessity." A demand for a Section 12940(f)(2) examination can only be based on the employer's perception that an employee has a medical or psychological condition that is preventing the employee from meeting the normal requirements of their job.

A medical or psychological condition affecting the ability to work is squarely within the scope of the FEHA's coverage of

disabilities. Section 12926(j)(1)(C); Section 12926.1(c). The FEHA’s definition of an employee with a disability includes employees who are perceived to be disabled by their employer. Section 12926(j)(4), (5).

The perception of medical condition affecting an employee’s job performance is sufficient to trigger the interactive process in other situations. The FEHA only requires a condition that “limits” a major life activity, including working. Section 12926(j)(1)(A); Section 12926.1(c, d). Observation of other information is sufficient to put an employer on notice of a disability. *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 870, 887 (bad back and reported anxiety disorder); *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 311-314 (observable walking and speech difficulties).

The Court of Appeal’s focus on USF’s need to provide a safe workplace as a “vital” business interest (Sl.Op. p. 15) again highlights the need for the interactive process for Section 12940(f)(2) examinations. Engaging in the interactive process is what determines if a medical or psychological examination is necessary at all. It is this process that protects the employer’s vital business interests in maintaining a safe workplace.

The FEHA provides employers with a specific health and safety defense to address risks in the workplace. That defense requires consideration of possible accommodations. Gov. Code § 12940(a)(1). Under the regulations, the health and safety defense requires engaging in the interactive process. Cal. Code Regs., Tit. 2, § 7293.8(c). USF’s concerns about workplace safety in connection with an

examination under Section 12940(f)(2) is not a reason to avoid application of the interactive process where that is a normal requirement under the FEHA in regard to the employer's vital interest in protecting workplace health and safety.

This Court needs to grant review to ensure that the interactive process will apply to employer-required examinations under Section 12940(f)(2). Otherwise, the Court of Appeal decision will provide a means for employers to use Section 12940(f)(2) to compel invasive examinations without the protections afforded by the established requirements of the interactive process that regulate when medical information is necessary and the process by which medical information may be obtained and evaluated. The Court of Appeal decision requires employees to disclose all their disabilities and related medical information directly to company-appointed doctors without the checks and balances the interactive process provides for such disclosures.

ISSUE 2.

The Unruh Civil Rights Act Unruh Civil Rights Act, Civil Code § 51, provides equal access to business establishments for persons with disabilities. Civil Code § 51(b), (f). USF has an open campus and invites the public to events on campus. It is a business establishment for purposes of the Unruh Act. See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 607-609; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 79.

As the Court of Appeal recognized, USF banned Dr. Kao from its campus because of its concern that Dr. Kao was dangerous absent

an independent evaluation establishing the contrary. Sl.Op. p. 17. The Court of Appeal concluded that the campus ban was legitimate because USF did not have a “discriminatory motive in keeping Kao away from campus” (Sl.Op. p. 17) and had not yet determined if Dr. Kao’s behavior was a result of a disability (*ibid.*).

First, under the Court of Appeal’s reasoning, the Unruh Act would apply only to persons who are determined to be suffering from an actual disability. This severely restricts the scope of the Unruh Act’s protections of disabled persons.

Perceived disabilities, as well as actual disabilities, are disabilities covered by the Unruh Act. Civil Code § 51(e)(1), incorporating Government Code Sections 12926 and 12926.1 of the Government Code in the Unruh Act’s definition of “disability.” Disabilities under Sections 12926 and 12926.1 include, “[b]eing regarded or treated by the employer” as having a mental disability. Gov. Code § 12926(j)(4, 5).⁴ USF’s perception or concern about Dr. Kao’s dangerousness falls squarely under the protection for persons with perceived disabilities.

Second, in approving banning Dr. Kao from public accommodations because of “concerns” of dangerousness, the Court of Appeal has sanctioned discrimination against persons with

⁴ Government Code Section 12926.1(b) also provides: “It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.”

perceived mental disabilities based subjective concerns rather than actual misconduct. Such a rule seriously undermines the rights of mentally disabled individuals by focusing on subjective reasons for a ban rather than objective evidenced of substantial risks.

Threats to health and safety must be analyzed under an objective standard involving proof a substantial risk to safety, not subjective concerns. *Bragdon v. Abbott* (1998) 524 U.S. 624, 649. Requiring objective evidence is necessary to protect against discrimination based on prejudice, stereotypes or unfounded fears. See *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1248; *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1090: “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.”

In adopting a standard that relied on USF’s subjective concerns, rather than objective evidence that Dr. Kao had committed harm or threatened harm, the Court of Appeal has undermined the Unruh Act’s protections for individuals who have perceived mental disabilities. This Court needs to grant review to ensure that disability discrimination under the Unruh Act included individuals with perceived disabilities and is based on objective evidence of significant risk, not subjective concerns.

III. STATEMENT OF THE CASE.

Petitioner, 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. During the Spring 2008 semester at USF—the period during which USF claims Dr. Kao’s behavior became frightening—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.

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.

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. RT 1345. 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 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. At the time he made this recommendation, Dr. Missett was unaware of any limitations on medical/psychological examinations in the ADA or FEHA. RT 2222.

On June 18, 2008, three weeks after the Spring 2008 semester was over, USF informed Dr. Kao of "a concern about your health which is based on your behavior and actions during the past few weeks." 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. 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 informed Dr. Kao he had to go to a psychological examination with Dr. Reynolds. 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.

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; 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. 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); RT 1881-1886 (Paul Zeitz, early January 2008); RT 2042:18-21 (Dean Brown, early January 2008); 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; 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 towards him as he was exiting restroom in June 2008; 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).

The case was submitted to a jury that returned a verdict in favor of USF and against Dr. Kao on all counts. AA 229-231. 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.

The Court of Appeal affirmed the judgment by unpublished decision entered on August 4, 2014. On September 2, 2014, the Court of Appeals entered an order certifying its decision for publication. No petition for rehearing was filed in the Court of Appeal.

IV. ARGUMENT

A. The Interactive Process Should Apply To Demands For Psychological Examinations Under Section 12940(f)(2).

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)). 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. 8.⁵ 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.

The FEHA does not define what is meant by “job-related” and “consistent with business necessity.” However, as in other areas of disability law, these are issues that are normally addressed through an interactive process between the employer and the employee.

“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

⁵ 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.

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.

The role of the interactive process is well-established in the typical context involving issues of accommodation of a disability when the disability causes job-performance issues to arise. See *Jensen v. Wells Fargo Bank*, supra, 85 Cal.App.4th at 261. The recently-adopted regulations describe the interactive process and the mutual obligations of the employer and employee in detail. See Cal. Code Regs., Tit. 2, §§ 7294.0(c)(2, 3, 4), 7294.0(d)(5)(A-C).⁶

In the context of an accommodation issue, the interactive process is normally triggered by a request for accommodation or by the employer’s observation of the need for an accommodation. *Id.*, § 7294.0(b)(1, 2). In this context, the interactive process limits the use of employer-selected physicians. Under the regulations, the employee is given the initial duty to submit appropriate medical information as to the disability and accommodation needed. If the employer considers the information inadequate, the employer must “explain why the documentation is insufficient and allow the . . . employee an

⁶ The final regulations were adopted by the Fair Employment and Housing Commission on December 18, 2012. While these new regulations were adopted after the trial of this case, they were intended to provide interpretation for statutory changes adopted before this case arose. 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.

opportunity to provide supplemental information in a timely manner from the employee's health care provider.” *Id.*, § 7294.0(d)(5)(C). “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.” *Ibid.* The regulations describe in further detail what constitutes “insufficient documentation” (*Id.*, § 7294.0(d)(5)(C)(1,2)). The regulations provide that any employer required examination is limited to determining the limitations that require accommodation (*id.*, § 7294.0(d)(7)): “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.”

The interactive process applicable to accommodation requests must apply equally to employer-required examinations under Section 12940(f)(2). Otherwise, section 12940(f)(2) would turn into a loophole for employer-required examinations that would side-step the interactive process and the mutual exchange of information that is the hallmark of that process. See *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at 261. Instead of a collaborative and open process, the process would be entirely one-way—with the employer unilaterally determining what kind of examination is required, what information the employee must provide to the employer or the employer-chosen doctor and the employer-chosen doctor determining what limitations exist and what accommodations are appropriate.

The facts of this case highlight the problem created by the lack of an interactive process.

First, Dr. Kao was not given enough information as to his behaviors to determine what job functions or behaviors were at issue. Without this information, he could not determine if the issues were disability-related or seek an accommodation if appropriate.

Second, the examination with Dr. Reynolds was unlimited in its potential scope, delving into Dr. Kao's entire psychological history and treatment and potentially into other medical issues or testing and into his social and financial situation. Without the interactive process, there was no way to narrow the scope of this inquiry or permit Dr. Kao to provide information from his own doctor that could address USF's concerns (once they were identified).

Third, while Dr. Reynolds was to make a report to USF as to Dr. Kao's condition and ability to do his job, the release explicitly provided that Dr. Kao would not see that report or any of the underlying information Dr. Reynolds relied upon. Without such information, Dr. Kao would have been entirely unable to make a meaningful challenge to Dr. Reynolds' conclusions or recommendations. This would put Dr. Kao in the position of having to accept Dr. Reynolds' conclusions as to his ability to work and any disability accommodations Dr. Reynolds required, without even knowing the purported medical conditions on which those accommodations were based or the reasons why they were necessary. In such a case, there would be no way for Dr. Kao to advance the interactive process in this disability and accommodation context.

Fourth, when Dr. Missett recommended an examination, he was entirely unaware that the FEHA and ADA restricted the scope of medical and psychological examinations. RT 2222. The interactive process would have permitted Dr. Kao and USF to address this oversight, to address the legal limitations on Section 12940(f)(2) examinations and to conform any examination to the requirements of the laws.

Put simply, the Section 12940(f)(2) examination USF demanded involved a process completely at odds with the procedures involved in the interactive process. There was no mutual exchange of information. Dr. Kao's medical professionals were entirely bypassed in this process. Dr. Kao was required to disclose medical and psychological information to the employer-selected doctor without regard to the relevancy of that information to accommodation issues. There was no cooperative relationship to develop reasonable accommodations if needed.

In its precedential decisions, the Fair Employment and Housing Commission (FEHC) held that the interactive process required the employer to seek medical information first from the employee and use a company doctor only if the information supplied by the employee was inadequate. *DFEH v. Avis Budget Group, Inc.* (2010), Decision No. 10-05-P. In *Avis Budget Group* at p. 24 (emphasis supplied), the FEHC held: “[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 further held that the employer violated Section 12940(f)(2) 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.

Requiring the interactive process to apply to safety issues arising from perceived mental problems is equally justified by the terms of the FEHA’s health and safety defense. FEHA provides employers with a specific health and safety defense to address risks in the workplace, but that defense requires consideration of possible accommodations. Gov. Code § 12940(a)(1).⁷ Under the regulations, the health and safety defense requires engaging in the interactive

⁷ 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.”

process. Cal. Code Regs., Tit. 2, § 7293.8(c).⁸ USF’s concerns about workplace safety in connection with an examination under Section 12940(f)(2) represents another side of this health and safety defense. It is not a reason to avoid application of the interactive process where that is a normal requirement under the FEHA in regard to the employer’s vital interest in protecting workplace health and safety.

Where safety concerns are raised, the interactive process performs a vital function in assuring that employees are not being discriminated against because of fears and stereotypes rather than objective evidence of significant safety risks.

An employer’s subjective concerns or beliefs do not establish a risk to health or safety. *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 liability.”). Rather, the assessment of a risk must be based on objective evidence of a risk to health or safety. *Id.* 524 U.S. at 649. Similarly, the mere possibility of harm—even serious harm or death—is 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

⁸ § 7293.8 provides:

(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner which that would not endanger the health or safety of others because the job imposes an imminent and substantial degree of risk to others.

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. Arline* (1987) 480 U.S. 273.⁹

Requiring objective evidence is necessary to protect against discrimination based on prejudice, stereotypes or unfounded fears. See *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1248. The federal Circuit Court in *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1090, explained the reason for this requirement: “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.”

The interactive process provides a vital role in ensuring that safety concerns are both significant and objective. In addressing safety concerns through the interactive process, relevant objective evidence can be identified, the substantiality of risks addressed and unfounded fears resolved.

⁹ 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 require proof of “an imminent and substantial degree of risk”.

This case presents exactly why the interactive process was necessary to address USF's safety concerns. USF acknowledged that 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. See also RT 935:11-19, 958:16 - 959:21 (testimony of Dan Lawson, USF's director of public safety). During the entire Spring 2008 Semester, Dr. Kao remained on campus, doing his normal work and interacting with students and faculty notwithstanding USF's concern about Dr. Kao's dangerousness. RT 2098, 2115, 2120-2121. For months, USF could have used the interactive process to address its concerns and avoid escalating matters to the point where its demand for a mental health examination by a company-chosen doctor was the only thing that would satisfy USF. The interactive process would have allowed Dr. Kao to understand the nature of the concerns USF had and to then address them with appropriate medical information from his own psychiatrist based on this information. RT 854 (testimony of Dr. Terr that Dr. Kao was not dangerous). Because the interactive process requires exchange of information, both USF and Dr. Kao would have the assurance that any opinion of Dr. Kao's psychiatrist was based on all the relevant information USF had concerning the conduct that concerned USF.

The Court of Appeal rejected application of the interactive process for examinations under Section 12940(f)(2) because Dr. Kao did not acknowledge he had a disability, his disability was not "obvious" and Dr. Kao was not seeking an accommodation for a disability. Sl.Op. pp. 14-15. This reasoning simply highlights the

fundamental problem presented by employer-required examinations under Section 12940(f)(2) and the need for the interactive process to apply to them.

FEHA provides 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. To give broad protection to disabled employees, it is essential to treat an employer’s demand for a psychological examination under Section 12940(f)(2) as necessarily treating the employee as if they have some psychological condition that significantly affects work performance. Section 12940(f)(2) expressly requires any examination to be “job-related” and “consistent with business necessity.” Any demand for a Section 12940(f)(2) examination must be based on the employer’s perception that an employee has a medical or psychological condition that is preventing the employee from meeting the normal requirements of their job.

A medical or psychological condition affecting the ability to work is squarely within the scope of the FEHA’s coverage. Section 12926.1(c) (“Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”). The FEHA’s definition of an employee with a disability includes employees who are perceived to be disabled by their employer.¹⁰ Section 12926(j)(4), (5).

¹⁰ Section 12926(j) provides:

The perception of medical condition affecting an employee's job performance is sufficient to trigger the interactive process in other situations. See *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887. See also *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 311-314. As the Court of Appeal noted in these cases, the FEHA's definition of disability only requires a condition that "limits" a major life activity. A bad back and anxiety disorder previously reported to the employer (*Faust*, supra, 150 Cal.App.4th at 870, 887) and observable walking and speech difficulties (*Sandell*, supra, 188 Cal.App.4th at 311-313) meet this standard. A demand for a Section 12940(f)(2) examination is equally premised on observable facts that cause the employer to have a perception of a condition limiting the ability to work. A Section 12940(f)(2) examination should be treated the same as any other employer observation of a disability and trigger the interactive process in the same way.

The Court of Appeal's focus on USF's need to provide a safe workplace as a "vital" business interest (Sl.Op. p. 15) again highlights

"Mental disability" includes, but is not limited to, all of the following: * * *

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

the necessity for the interactive process to apply to Section 12940(f)(2) examinations.

As discussed above, under the FEHA and the regulations, the interactive process applies to health and safety concerns. In the area of health and safety, the interactive process serves to protect both the employer's vital business interests and the employee's right to protection from overly intrusive examinations. The interactive process determines if a medical or psychological examination is necessary at all. The interactive process is the appropriate way to address USF's concerns about workplace safety, to ensure that the employer's concerns are significant and objective and that a psychological examination is necessary to address these concerns.

In short, while safety concerns may be a "vital" business interest, the interactive process is the way in which the law allows the employer to address such vital concerns.

B. The Unruh Act Should Not Permit USF To Ban Dr. Kao From Its Campus Because It Perceived Him To Be Mentally Unstable Without Proof He Presented A Significant Risk Of Actual Danger.

The Unruh Civil Rights Act Unruh Civil Rights Act, Civil Code § 51, provides, in material part:

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

* * *

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

USF has an open campus and invites the public to events on campus. It is a business establishment for purposes of the Unruh Act. See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 607-609; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 79.

As the Court of Appeal recognized, USF banned Dr. Kao from its campus because of its concern that Dr. Kao was dangerous absent an independent evaluation by USF's selected physician establishing the contrary. Sl.Op. p. 17. The Court of Appeal concluded that the campus ban was legitimate because USF did not have a "discriminatory motive in keeping Kao away from campus" as USF had not yet determined if Dr. Kao's behavior was a result of a disability. Sl.Op. p. 17.

The Court of Appeal erred in two ways. First, the standard it applies makes the Unruh Act applicable only to persons with actual disabilities, rather than perceived disabilities. Section, the Court of Appeal used a subjective standard based on USF's motive or concerns rather than an objective standard requiring proof of a significant risk. As a result, the Court of Appeal has narrowed the protections afforded by the Unruh Act in a way that is unjustified by the language of the statute and the established case law protecting disabled individuals from discrimination based on subjective perceptions of their disabilities.

First, under the Court of Appeal’s reasoning, the Unruh Act would apply only to persons who are determined to be suffering from an actual disability. But the Unruh Act is not so limited. The Unruh Act includes perceived disabilities as disabilities covered by Act. Civil Code § 51(e)(1) provides that: “(1) ‘Disability’ means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.” Under these sections, a “mental disability” includes, “[b]eing regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult” and “[b]eing regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability”. Gov. Code § 12926(j)(4, 5).¹¹

There is no dispute that the ban was related to USF’s perception of Dr. Kao’s mental condition. Labor Relations Director David Philpott acknowledged that Dr. Kao’s ban from campus included the 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?

¹¹ Government Code Section 12926.1(b) provides: “It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.”

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.

This is not the only evidence that USF perceived Dr. Kao as suffering from a mental disability that made him dangerous. 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 that employees feared 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).¹²

Second, in approving banning Dr. Kao from public accommodations because of "concerns" of dangerousness, the Court of Appeal has sanctioned discrimination against persons with perceived mental disabilities based on subjective fears rather than actual misconduct. Threats to health and safety must be analyzed under an objective standard involving proof of actual and significant risk, not subjective concerns about dangerousness. *Bragdon v. Abbott*, supra, 524 U.S. at 649. See discussion supra, pp. 22-23.

In adopting a subjective standard based on USF's concerns, rather than objective evidence that Dr. Kao had committed harm or threatened harm, the Court of Appeal has undermined the Unruh Act's protections for individuals who have perceived mental disabilities.

¹² 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.

Under the Court of Appeal’s rule, individuals with perceived mental disabilities will have to prove their lack of dangerousness to the satisfaction of employer-selected doctors. This reverses the established rule that requires objective evidence of significant risk to justify taking action against a disabled individual—including an individual perceived as disabled—for safety reasons.

The Court of Appeal should have applied the established standard for analyzing safety risks and required USF to present objective evidence that Dr. Kao’s presence on campus public events posed a significant risk of actual danger to others. As the courts have recognized, only an objective standard of proof of significant risk can protect disabled individuals from discrimination.

V. CONCLUSION

The Court should grant review and reverse the judgment of the Court of Appeals.

Dated: September 9, 2014.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), the undersigned certifies that the PETITION FOR REVIEW contains 7,715 words.

Dated: September 9, 2014.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JOHN S. KAO,

Plaintiff and Appellant,

v.

THE UNIVERSITY OF SAN
FRANCISCO et al.,

Defendants and Respondents.

A135750

(City and County of San Francisco
Super. Ct. No. CGC-09-489576)

Plaintiff John S. Kao sued the University of San Francisco (USF) for violations of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq. (FEHA)), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and the Confidentiality of Medical Information Act (Civ. Code, § 56 et seq.) in connection with the events surrounding his termination as a professor at USF. He also asserted causes of action against USF for violation of his right to privacy (Cal. Const., art. 1, § 1), and against USF and its Assistant Vice President for Human Resources, Martha Peugh-Wade, for defamation.

USF directed Kao to have a fitness-for-duty examination after faculty members and school administrators reported that his behavior was frightening them, and the university terminated his employment when he refused to participate in the examination. The court granted a nonsuit against Kao on the defamation cause of action, and a jury ruled against him on his other claims. Kao contests the judgment on multiple grounds, but his principal contention is that USF could not lawfully require the examination. We disagree and affirm the judgment for USF.

I. BACKGROUND

A. Kao's Threatening Behavior

Dr. Kao earned a Ph.D. in applied mathematics from Princeton, began teaching mathematics at USF in 1991, and became a tenured professor in 1997. Kao was concerned about a lack of diversity of the faculty of the math and computer science departments, and submitted a 485-page complaint to the school in May 2006 alleging race-based discrimination and harassment. He lodged a 41-page addendum to the complaint in August 2007, to which Assistant Vice-President Peugh-Wade responded in September 2007. Kao was not satisfied with Peugh-Wade's two-page response, which he said did not offer any remedies for the problems he perceived with the way the school recruited new faculty. The application period for hiring during the 2007-2008 academic year closed in December 2007, and fewer applications had been received than in prior years. On January 3, 2008, Kao met with mathematics professor Paul Zeitz and then Associate Dean for Sciences Brandon Brown about the school's failure to advertise in professional journals.

At trial, Zeitz described his January 3 meeting with Kao as "the most upsetting thing that's ever happened to me at my job." Kao was "speaking very politely" about the job search "and then suddenly . . . was unable to control his emotions." He was "very, very upset that . . . our employment ads did not include what he felt were the appropriate ads in print," and started "yelling and screaming." Zeitz said, "[I]t was very personal. It was as though I had personally done something horrible to him."

Zeitz was "terrified" by Kao's behavior. He said that Kao was "an expert in martial arts. . . . I remember years ago he told me he was the ivy league judo champion. And some years prior to this incident, he told me that he had bought . . . a used wooden mannequin for punching practice. And so he is somebody who punches a wooden mannequin and is an expert in judo, and he is not in control of his emotions and he's three feet away from me. I mean, I was extremely, extremely scared." Zeitz was hired by USF the year after Kao and had never before been afraid of him, "[b]ut in 2008, it was this sudden change to complete irrational, uncontrollable rage"

Kao testified that Zeitz told him Dean Brown had made the decision to advertise only in online databases, and Brown testified that Kao confronted him at his office on January 3. Brown said that Kao's fists were clenched and he seemed very tense and angry. He "immediately began shouting about the mathematics job search. He was just incredibly agitated, enraged, really, about the placement of these job ads." Brown testified, "I was frightened. I'd never been in a situation like that in the working world. Or anywhere else, really. . . . [I]f you want to give someone nonverbal clues that you are about to attack them, from my reading that's what was going on."

Zeitz, and mathematics professors Tristan Needham, Steven Yeung, and Stephen Devlin testified to disturbing behavior by Kao at a February 2008 faculty search committee meeting. Zeitz described Kao as having an "uncontrolled rant about things that made no sense . . . coupled with . . . changes in body language, changes in posture and changes in demeanor. It was very upsetting and very scary for me." Yeung said that Kao was "yelling" and "standing up and leaning towards people" at the meeting, and he was "afraid that it would be not just verbal but get physical." Needham said that Kao threw papers across the table, and "it was pretty intimidating." Devlin said that Kao was "shaking with anger" and "screaming" at the meeting.

Kao's concerning behavior continued throughout the spring semester. Needham, Yeung, and Zeitz testified that Kao became physically confrontational with them. Needham said that Kao "hit [him] quite forcefully on the shoulder" as they walked in opposite directions in a school corridor. Needham said he "knew how angry [Kao] was. It was clear. But to me, there was a big difference in crossing the line between the mental world and the physical world. I thought to myself if he can bump me, what's to stop him from shooting me." Zeitz said that Kao bumped into him twice and "this had never ever happened before." Yeung described an incident when Kao was walking on the opposite side of a school corridor "and all of a sudden he took a sharp turn, and . . . was charging toward me and then [turned] right before [a] collision actually took place" Yeung said, "As far as I could tell, he deliberately took this turn to approach me and then moved away. ¶¶ . . . I did not actually get hit, but it's just bizarre. And again, next time maybe

I wouldn't be that lucky. . . . I just couldn't understand what was going on. I was very frightened.”

Jennifer Turpin, who was the Dean of USF's College of Arts and Sciences, testified to an incident on April 22 when she encountered Kao while walking to her car. She knew that Kao's mother was ill and asked him how his mother was doing. Turpin was shocked when Kao became “enraged” by the question. “He kind of clenched his jaw and he looked mean and mad and he got right in my face and said, ‘Fine. Fine. How are you and how are your children doing?’ ” Turpin wondered whether Kao knew that her daughter had been hospitalized, but worried that the question was a threat, and “figured I better make a beeline to my car.” As she was starting her car, she saw him “standing there with clenched fists glaring at me, like leaned over looking at me angrily. . . . I was kind of in disbelief, like, oh, my God, did that just happen? You know, I was really scared.” Turpin reported the incident to Peugh-Wade and others that day.

Needham testified to a similar incident at a math department party toward the end of the semester. Needham's wife asked Kao how his mother was doing, and his “reaction was instantaneous rage. . . . [H]e got in her face and very close to her and again rigid with anger and raised his voice and said, ‘How's your mother? How's your mother? How's your mother?’ ” in a “startling frightening way.” He “seemed out of control,” and “left right after that.” Needham testified that “you could actually see [Kao] rigid with anger” on other occasions, “like white knuckles then the foaming at the mouth.” Another “new thing that semester is [Kao] started this wild cackling laugh”

Needham, Yeung, and Zeitz testified that they feared Kao and worried about having contact with him. Needham was “afraid of [Kao] and afraid of provoking further anger by attempting to talk to him.” Needham felt “extremely uneasy being on campus” that semester, and said that “even with office hours and so on, I tended to keep my door shut unless I had to have it open.” Yeung said he tried “not to be too close, especially . . . one-on-one . . . with Dr. Kao, because . . . I feared for my safety.” “When I say I worry about my safety . . . I mean . . . whether I will be alive or dead, that kind of physical safety.” Zeitz said that coming to work “was very unpleasant, it was scary. . . . [W]hen I

walked towards my office, I would think about exit routes. I would . . . make sure I had a phone with me. I tried to be aware of the location of Dr. Kao. I would try to avoid him . . . I would do everything I could not to have any interactions with him of any kind.” He said his fear of Kao was “the dominating thing of that spring for me.”

Zeitz said his colleagues shared his concerns: “[W]e’re not talking about happy people this spring. Everyone is looking kind of pale and shaken and . . . the dominant emotion is fear and confusion, because . . . it’s not expected. It’s not something that any of us had ever dealt with before. We don’t know what’s happening. We don’t know what’s going to happen. That’s how my colleagues were.”

B. USF’s Investigation

USF began investigating the situation in January. Peugh-Wade met with Brown on January 8 to discuss Kao’s interaction with Brown and Zeitz on January 3. Brown recorded in an email to himself on January 9 that Zeitz told him about his encounter with Kao and had “lost a good bit of sleep since this incident.” Kao was “threaten[ing] the work environment of his departmental colleagues. . . . [¶] Including conversations of the last week, I have had three professors (requesting anonymity) tell me they fear that John may be capable of some sort of great violence. ‘I would not be surprised if he (harmed himself or others) at some point,’ is the typical quotation.” Brown noted that he was “not qualified to determine if [Kao] is a threat to himself or others, but his behavior cannot be described as logical, predictable or within basic professional norms.”

On January 22, Dean Turpin contacted Paul Good, a clinical and forensic psychologist. Good testified that USF “was looking for some input on an educational level about markers for violence or things to look for that might suggest an escalation of hostilities . . . and how best for the institution to respond.” Good had a meeting with Turpin and Peugh-Wade on February 12 “about predicting violence, explaining risk factors such as psychopathy and narcissism and other risk prediction schemes that might be related to their issues with Dr. Kao” Good referred the deans to a threat assessment manual for schools prepared by the FBI.

Peugh-Wade met with Needham on April 28, and Zeitz on May 1, and learned much of the same information about Kao that was described in their trial testimony. Peugh-Wade also met on May 1 with Professor Peter Pacheco, the chairperson of the math department. Pacheco told her that he had no personal experiences with Kao like those of Needham and Zeitz, but when asked what Kao was like “one-on-one,” Pacheco answered, “His temperament is such I avoid any interaction with him.” Peugh-Wade also interviewed Deans Brown and Turpin. She was trying to determine whether “there was consistent concern from a number of people such that I needed to look into it further or someone, an expert needed to look into it further.”

On May 20, Peugh-Wade and several colleagues met with forensic psychiatrist James Missett, an expert on threat assessment and fitness-for-duty evaluations (hereafter FFDs). Peugh-Wade had provided Missett with summaries of her faculty interviews, and Brown told Missett about his concerns. Missett told the group that the only way to assess whether Kao could “do his job . . . in a safe way was to have an independent medical exam by an independent physician.” Missett testified that USF was required to provide a campus where people could safely work, and had “an affirmative obligation to take action with respect to Professor Kao.” He believed that the action “that appeared to offer both [USF] and Professor Kao the most in a way of . . . a possible good outcome would be [an FFD].” He explained that an FFD is confidential, and no psychiatric diagnosis can be disclosed to the employer. The evaluator can only tell the employer whether the employee is fit to perform the job, not fit, or fit with accommodation. He recommended three doctors who would be qualified to perform an FFD of Kao. Peugh-Wade contacted the three doctors, and selected Dr. Norman Reynolds, whom Missett had recommended the most highly.

Peugh-Wade directed Reynolds not to provide any “medical diagnosis or other clinical information.” She sent Reynolds a consent form for Kao to complete, which stated: “I DO NOT authorize Dr. Reynolds to release records to anyone. [¶] Nevertheless, Dr. Reynolds . . . is permitted to release to my employer a statement that I am fit-for-duty or that I am not fit-for-duty and specify functional limitations. Dr.

Reynolds is not permitted to release information regarding causation or any other matters.” The form stated the “Comprehensive Psychiatric [Fitness-for duty] Evaluation 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 [¶] Analysis of findings, conclusions and recommendations.”

C. USF’s Interaction With Kao and Termination of his Employment

Peugh-Wade met with Kao and his attorney on June 18. Peugh-Wade gave Kao a letter of that date, labeled “Draft – Discussion Item,” which contained this description of his behavior: “[T]here have been multiple reports from a variety of well-intentioned individuals who are, quite frankly, frightened by your conduct. There are reports of you[] yelling, exhibiting highly contorted facial expressions that suggest unfeigned anger (staring/glaring, e.g.), impeding or attempting to impede others’ physical movements (e.g. sudden movements in the hallways that cause people to believe you will suddenly run into them or impede their pathway), similarly, bumping and/or nearly bumping into people in a manner that suggests intent to do so, rapidly repeating the same words during meetings and conversations, displaying an expression or gesture that indicates you cannot or do not want to listen to what others have to say, and bizarre chuckling in a[n] intimidating tone that conveys the message you are doing so to frighten whomever may hear it.”

The letter stated that his behavior raised “concern about [Kao’s] health,” and that Peugh-Wade was considering “a recommendation to University authorities that will result in one or more of the following: [¶] 1. Placing you on a leave of absence, without duties or physical presence at the University; [¶] 2. Requiring a health ‘fitness for duty’ evaluation of you by an independent physician (‘IP’) selected by the University, at the University’s expense, with the IP issuing a report to the University regarding your fitness for your faculty functions here at the University. You will be required to cooperate with this process, provide your medical records for the past years to the IP, and meet with the

IP cooperatively. The IP, however, would not disclose your medical records, or medical diagnoses of your health professionals, to the University. ¶ 3. Other actions yet to be considered.” The letter concluded: “Once again, before making a final decision, the University, through me, would welcome explanations, information or anything else you and/or your attorney wish to provide that may assist us in fulfilling our duties as an institution of higher learning. We want to proceed thoughtfully and with respect for you, as well as for all others on the campus.”

On June 20, Peugh-Wade sent an email to Kao and his attorney saying: “I want to reiterate that if you have any information you believe the University should consider in making its decision on this matter, please either provide the information to me, or let me know the nature of the information by Monday, June 23. . . . ¶ With regard to your request for detailed information about the reports that form the basis for concern, I do not believe providing that information would be productive.” Kao’s attorney responded that day, objected to the June 23 deadline, and said: “You are asking Professor Kao to agree to a detailed medical/psychological examination and to produce all his medical records for that purpose. It is not unreasonable (or unproductive) to ask the University to give more detail as to the events apparently underlying that request so that Professor Kao can evaluate the University’s demand in light of the evidence asserted to justify it.”

In a letter dated June 24, Peugh-Wade put Kao on a “leave of absence without duties,” prohibiting him from being on campus while on leave, and directing him to participate in an FFD by Reynolds on July 1. The letter listed the behaviors of concern, which were the same as those set forth in her June 18 letter except that the “highly contorted facial expressions” were said to have been “with fists clenched,” and an allegation of “inappropriate closeness” was added to those about bumping into people.

Kao’s counsel responded at length in a letter dated June 26, and advised that Kao would not attend the FFD. The letter reiterated that USF had not given “any dates or time frames for the events, locations, [or] persons involved” The letter stated: “[T]he University had never advised Professor Kao of any of these allegations or incidents before our meeting on June 18. Treating Professor Kao as a danger to others is, frankly,

bizarre under these circumstances. Surely, if Professor Kao was the danger the University claims, the University would have acted promptly on at least one of these incidents. To allow Professor Kao to continue working through the end of the year, without taking any action or even advising him of these concerns indicates to us that the University's purported concerns about safety are exaggerated, unreal and pretextual. [¶] . . . [¶] At our June 18 meeting, we proposed some form of letter or meeting to clear the air over these concerns and to assure everyone that . . . Professor Kao intends no harm to anyone." However, the University had "apparently rejected this straightforward solution to the apparent problem of people's misperceptions as to Professor Kao" The letter argued that USF's demand for an FFD was unlawful, and "appear[ed] to be in retaliation for Professor Kao's internal grievances that have alleged, among other things, discrimination and violation of University policies."

In a letter to Kao dated June 30, Peugh-Wade acknowledged receipt of his counsel's June 26 letter, and repeated her demand for an FFD. Dean Turpin sent Kao a July 8 letter directing him to contact Reynolds immediately for an FFD, and warned him of disciplinary action if he failed to comply.

David J. Philpott, USF's Director of Employee and Labor Relations, set up a meeting with Kao and Kao's counsel on October 27 to start the process of progressive discipline required under USF's collective bargaining agreement with Kao's faculty union, and to try to persuade Kao to submit to the FFD. The meeting was attended by Philpott, Kao, Kao's attorneys, and Elliot Neaman, Kao's union representative.

Philpott was friendly with Kao and was "personally hoping to . . . interact with John in some informal setting. [¶] In the world of labor relations, a lot of times things can be accomplished if it's a different messenger or different voice or someone that you might know." Philpott was "hoping that John would either agree to participate in the fitness for duty or possibly come up with some other scenarios, other than 'I'm not participating,' that I could take back to my colleagues and try to use that as leverage to change our mind or change our position." However, "the conversation was mostly with [Kao's counsel], who was inquiring on what legal right we had to request a fitness for

duty, and I deferred these type of questions to my boss and the outside legal counsel that we were relying on for their expertise and guidance.”

Philpott testified that when Kao’s counsel asked for the dates and individuals involved in the allegations, he told them USF was not comfortable providing that information. Philpott said he observed at the meeting “behaviors [by Kao] that I had read about from some of John’s colleagues, and it was the first time that I had witnessed it in my interactions with John over the 10 to 12 years that I had known him. He was leaning back in his chair . . . he had clenched fists. I could see the whites of his knuckles.” Philpott said Kao was “occasionally nodding his head, rapidly blinking his eyes, and had a grin on his face that . . . I had not seen. And based on what I had read and had heard from others, that I could see how someone could feel uncomfortable if they had witnessed that.”

Kao provided Philpott various documents at the meeting, including invitations to social events he had received from members of the math department in May, June, and September, and a record of the above-average student evaluations he had received in the spring semester.

Philpott wrote Kao a letter dated December 29, stating that USF had considered the information he presented at the meeting, that he was being suspended without pay, and that his employment would be terminated if he did not submit to an FFD by January 15, 2009. The letter noted that Kao’s attorneys disputed whether USF could lawfully require the FFD, and USF offered to arbitrate the dispute under the collective bargaining agreement. Alternatively, USF offered to submit the dispute for “a final and binding decision by a mutually selected retired jurist. The University would be prepared to pay your share of the professional fees of the retired jurist. If the jurist decided in your favor, the University would rescind the suspension and award you appropriate remedial relief.”

Philpott explained at trial that USF wanted to provide “at least two options, to try to remedy the situation or at least find some common ground and get past the lock-in we had on this issue of fitness for duty.” He said, “[T]he general feeling was we didn’t want to move to terminate. We were trying to find a different way, a creative way. We were

exploring all options. And our hope was by proposing two, it would open up the door for a conversation that either they could propose some other options or they would take us up on the two that we had put forward, which we thought were reasonable”

In a January 12 letter, his counsel replied that Kao “has no desire to surrender any of his legal rights, including his right to institute legal actions against USF for discrimination and violation of federal and California law in appropriate courts, with the right to full discovery, a jury trial, damages, attorney fees and the availability of an appeal to correct errors of law. As you are aware, agreeing to arbitration would [e]ffect a complete surrender of these rights and give a ‘retired jurist’ the power to determine all the issues without full discovery, oversight or review. . . . [¶] . . . At this point, given USF’s repeated unwillingness to describe the events that it asserts justify a mental examination, it appears to us that only the full discovery procedures available in court will enable Professor Kao to determine the factual basis or, more accurately, lack of factual basis for USF’s demands.”

Philpott replied in a letter dated January 16: “I checked with University attorneys after I received your last letter, and I can now confirm that the jurist procedure does not need to be ‘final and binding’ on you, although my last letter stated otherwise. You will not be required to sign any waiver of lawsuit rights and you may have discovery of whatever the retired jurist approves. [¶] We would agree that the jurist procedure will be advisory to you, and binding only on the University. That is, the University would abide by the jurist’s opinion if it were against the University, but if it were against you, you would not have to abide by it—you would retain your rights to sue or file a grievance under the collective bargaining agreement.” Philpott testified that he kept Neaman, Kao’s union President, apprised of these developments, and Neaman did not object to USF’s proposals. Philpott requested a response from Kao by January 22, and set a January 31 deadline for completion of the FFD.

Kao rejected USF’s offer in a letter from counsel dated January 22. The letter stated that the offer “would only add additional time and expense in asserting [Kao’s] legal rights. The non-binding advisory arbitration procedure prevents Professor Kao

from receiving the full benefits and protections of a court action.” The letter reiterated Kao’s belief that a “clear the air” letter or meeting would be an appropriate way to address USF’s concerns. Philpott testified, “Based on the information that I had and what had been shared with me, I don’t believe many of John’s colleagues would have attended that meeting.”

Philpott wrote Kao on January 23: “Your attorney has once again suggested the University resolve this matter by accepting a letter from you, or allowing you to attend a meeting, in which you would assure the University you intend no harm to anyone. While it is undeniably true that the University seeks such assurance, and has sought such assurance since it first directed you to participate in the evaluation, in light of your behavior, you are not the one who can provide the level of assurance the University requires. The assurance the University requires must come from someone with the necessary expertise, *i.e.*, an independent physician.”

Dean Turpin terminated Kao’s employment in a February 3 letter for his failure “to carry out the work-related instructions of the University to cooperate with an independent medical evaluation.”

D. Other Trial Evidence

(1) *Kao’s Case*

Kao testified that he never intentionally tried to frighten, threaten, or bump into anyone while he worked at USF. He said that he talked in a normal tone of voice but a little louder than normal when he met with Zeitz on January 3 because he wanted Christine Liu, a math department program assistant who was sitting nearby, to hear what was being said. When he spoke to Brown that day he did not raise his voice and they had a “friendly” discussion. He said that the February 2008 faculty meeting had the tone of a “debate,” and that he spoke “[i]n an ordinary fashion for a discussion in which there’s some disagreement. . . . [M]y voice maybe got a little louder sometimes, but other people’s voices also got louder sometimes.” He denied throwing papers at the meeting. The only person he recalled bumping into at the school in the 2008 semester was a Dr. Cruse. He said that he laughed when he was nervous, feeling socially awkward, or did

not know what to say. This was a Japanese cultural trait he observed in his mother, and it could have been “misperceived.”

Kao testified that he began taking Prozac for depression in January 2002, and that the drug caused him to suffer hallucinations. The hallucinations went away when he went off the medication, but he did not agree to the conditions Needham imposed for his return to work, and so he chose not to teach that semester. Psychiatrist Lenore Terr testified that she began treating Kao in 2003, and that she had prescribed various medications for his episodic major depressive disorder. Kao testified that tremors in his arms and legs were a side effect of medications he began taking in 2007. Apart from a 15-month period in 2004 and 2005, Terr had seen Kao once a week since October 2003. She had seen “absolutely nothing” in her treatment that indicated Kao was a danger to anyone at USF.

(2) *USF’s Case*

James Cawood, former President of the Association of Threat Assessment Professionals, opined that USF acted reasonably in requiring Kao to undergo an FFD. In Cawood’s view, an FFD was warranted by the increased frequency and intensity of the feelings Kao expressed, and the “degree of disturbance” reported by the people who feared him. Cawood had “learned not to discount people’s instincts.” He acknowledged that USF took a risk by waiting several months before confronting Kao about the problems he was causing, but “it worked for them” because no serious harm was done. He said that institutions typically overreact to any threats of violence and do unnecessary harm to reputations “so that no one can second guess them in the future and say that they did something wrong.” He thought that when USF informed Kao of its concerns, it reasonably withheld names and dates to protect the people involved from possible retaliation. He believed that Kao’s proposed “clear the air meeting” was inadvisable and would just have “made people even more anxious”

II. DISCUSSION

A. Requiring the FFD

(1) *Interactive Process*

Kao's central contention in this appeal is that USF had to engage in an interactive process before it could refer him for an FFD. But in the circumstances presented here, no such interactive process was required.

FEHA permits an employer to require a medical or psychological examination of an employee if it can show that the examination is "job related and consistent with business necessity." (Gov. Code, § 12940, subd. (f)(2).) Current Fair Employment and Housing Commission (FEHC) regulations similarly provide that an employer "may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees that are both job-related and consistent with business necessity." (Cal. Code Regs., tit. 2, § 11071, subd. (d)(1).)

Kao contends that a "psychological examination by an employer-chosen doctor cannot be job related and consistent with business necessity unless the employer uses the interactive process." Sometimes, but not always. An employer must reasonably accommodate an employee's disability unless doing so would produce undue hardship to its operation, (Gov. Code, § 12940, subd. (m)), and an employer has an additional duty "to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations . . ." (Gov. Code, § 12940, subd. (n).) FEHA thus ties the interactive process to disability accommodations, not FFDs. (Compare Gov. Code, § 12940, subs. (f) & (n).) The requirement for an interactive process was not implicated here because Kao never acknowledged having a disability or sought any accommodation for one.

Unless a disability is obvious, it is the employee's burden to initiate the interactive process. (*Gelfo v. Lockheed Martin Corp* (2006) 140 Cal.App.4th 34, 62, fn. 22; 2 Wilcox, Cal. Employment Law (2013) § 41.51[3][b], p. 41-278.) Kao cannot plausibly claim it should have been obvious to USF that he was disabled because he never admitted any disability in the workplace. When a disability is not obvious, the employee must

submit “reasonable medical documentation confirm[ing] [its] existence.” (Cal. Code Regs., tit. 2, § 11069, subd. (d)(2).) Kao did nothing of the sort. He provided no information to USF after learning of the university’s concerns other than documents at the October 2008 meeting with Philpott, which were aimed at showing that those concerns were illusory.

Consistent with the evidence in the case, the jury was not instructed to consider, in deciding whether an FFD could lawfully be required, whether USF had engaged in an interactive process.¹ No interactive process was necessary, and there is no substance to Kao’s argument that USF improperly failed to participate in that process.²

(2) *Substantial Evidence*

Kao also contends that USF did not present substantial evidence that the FFD was “job related and consistent with business necessity” as required by Government Code section 12940, subdivision (f). “In evaluating this claim, we apply the familiar substantial evidence standard of review: We view all of the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving every

¹The jury was instructed in accordance with Government Code section 12940, subdivision (f): “ ‘John Kao claims that the university wrongfully required a medical and psychological examination (fitness-for-duty or FFD). [¶] . . . The University of San Francisco asserts that the medical or psychological examination (fitness-for-duty or FFD) request was lawful because it was necessary to the university’s business. To succeed, the university must prove both of the following: 1, that the purpose of the FFD was to operate its business safely and efficiently; and 2, that the FFD would substantially accomplish this business purpose. [¶] . . . If the university proves that the FFD is necessary to the university’s business, then the FFD is lawful unless John Kao proves both of the following: 1, that there was an alternative to the FFD that would have accomplished the university’s business purpose equally well; and 2, that the alternative would have had less adverse impact on John Kao.’ ” Nor was the jury required to make any finding as to an interactive process. The general verdict form simply asked: “Is there liability of University of San Francisco to [J]ohn [K]ao on the claim related to the medical and psychological examination?” and the jury answered, “No.”

²Kao’s request for judicial notice of administrative materials in connection with this argument is denied.

conflict to support the judgment.” (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24.)

An FFD is “job-related” if it is “tailored to assess the employee’s ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.” (Cal. Code Regs., tit. 2, § 11065, subd. (k).) Kao’s jury had ample evidence from which to find that an FFD was necessary to determine whether he posed a danger to others in the workplace. Multiple people reported multiple instances of threatening behavior on his part. USF’s decision to require him to have an FFD was based on expert advice, and USF presented unrefuted expert testimony that an FFD was appropriate under the circumstances. Kao asserts that USF had no “objective” evidence he was dangerous. He notes he did not explicitly threaten anyone, and believes he did not “hit or assault anyone in a way that indicated any significant or imminent risk of violence.” These at best are jury arguments, and the jury could reasonably reject Kao’s benign view of the situation.

There is a “business necessity” for an FFD if “the need for the disability inquiry or medical examination is vital to the business.” (Cal. Code Regs., tit. 2, § 11065, subd. (b).) USF unquestionably has a duty, as its consultant Missett testified, to maintain a campus where people can safely work. The jury heard testimony that Kao frightened school administrators and that his behavior cast a pall of “fear and confusion” over the math department. The jury could reasonably find that it was vital to the university’s business to obtain an independent assessment of his fitness for duty.

B. Unruh Act

Kao argues that, by banning him from campus, USF violated the Unruh Civil Right’s act prohibition against disability discrimination (Civ. Code, § 51, subd. (b)). This contention hinges on Kao’s claims that “the ban arose from a perception that [he] suffered from some mental disability that made him unusually dangerous and unpredictable,” and that there was “no evidence of any actual danger—just USF’s subjective perceptions.” These claims are untenable.

As we have previously explained, there was substantial evidence for a legitimate concern that Kao was dangerous absent an independent evaluation to the contrary. Moreover, the thrust of the evidence was that USF did not know what was causing Kao's behavior, not that it had determined his behavior resulted from a disability. For example, when Philpott was asked whether he perceived Kao to be mentally unstable, he answered, "I can't draw a conclusion if he was mentally unstable. We weren't quite sure what was going on and that's why we wanted the evaluation. [¶] Q. In other words, mental instability was a factor in continuing the ban from campus? [¶] A. It could be put 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." Similarly, when Brown began reporting his concerns about Kao, he observed that he was "not qualified to determine if [Kao] is a threat to himself or others."

The evidence did not as a matter of law establish that USF had a discriminatory motive in keeping Kao away from campus.

C. Confidentiality of Medical Information Act

Kao argues that USF violated the Confidentiality of Medical Information Act (CMIA) by firing him for "exercise of rights under the CMIA to refuse to release medical information" to Reynolds for the FFD.

Civil Code section 56.20, subdivision (b) provides that "[n]o employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part." "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" (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861, italics omitted.)

Consistent with these authorities, the jury was instructed that if Kao proved his refusal to authorize release of confidential medical information for the FFD was “the motivating reason for [his] discharge,” USF “nevertheless avoids liability by showing that . . . its decision to discharge Kao was necessary because John Kao refused to take the FFD examination.”

The evidence described above that supported findings that the FFD was job related and consistent with business necessity also supported a finding that his discharge was “necessary” within the meaning of Civil Code section 56.20, subdivision (b) because of his refusal to release the medical information required for the FFD.

D. Defamation

Kao contends that the court erred by granting USF and Peugh-Wade’s motion for a nonsuit on his cause of action for defamation. The defamation claim was predicated on the fact that Peugh-Wade sent Reynolds a copy of her June 24 letter directing Kao to participate in the FFD, which listed the frightening behavior people attributed to him. The nonsuit motion was based on the litigation privilege (Civ. Code, § 47, subd. (b)), the official duty privilege (Civ. Code, § 47, subd. (a)), and the common interest privilege (Civ. Code, § 47, subd. (c)).

The qualified common interest privilege protects “a communication, without malice, to a person interested therein . . . by one who is also interested.” (Civ. Code, § 47, subd. (c).) USF, Peugh-Wade, and Reynolds had a common interest in the efficacy of Kao’s FFD, and Reynolds needed to know the concerns that prompted it. Where, as here, the statements at issue are within the qualified privilege, the plaintiff has the burden to establish that they were made with malice. (5 Witkin, Summary of Cal. Law (10th ed. 2005) § 600, p. 883.) Given the defense verdicts on all of the other causes of action, there is no reasonable probability the jury would have found that the reports of Kao’s behavior were malicious, or that USF or Peugh-Wade acted maliciously in advising Reynolds of them. (See generally *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [standard of prejudice for reversible state law civil trial error].) Thus, even if the court erred in granting a nonsuit on the defamation claim, the error was harmless.

E. Mitigation of Damages

Kao argues that the court erred when it denied his motion in limine to exclude evidence that he could have mitigated his damages by obtaining employment outside a university. He argues that any job other than a tenured college faculty position would not have been substantially similar to the one he lost at USF. “[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived” (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 182.) The jury instructions stated that Kao’s damages should not be reduced by money he could have earned from other employment unless USF proved “that employment substantially similar to [his] former job was available to him,” and listed various factors to consider in deciding whether employment is substantially similar. When the court denied the in limine motion about other available jobs, it noted that Kao could “cross examine regarding that evidence.”

USF’s labor economist questioned the assumption underlying Kao’s damage claim that he would be out of work for the next 25 years, and identified jobs in government and industry that a computational mathematician like Kao, especially one with his Princeton Ph.D., could obtain. The economist cited data indicating that more mathematicians are employed in the federal government and in scientific research positions than in universities, and that those mathematicians generally make more money. Kao’s argument for prejudice is that this testimony suggested he could be “rightly faulted as greedy, lazy or looking for a big payout from USF because he unreasonabl[y] failed to seek alternative employment in a non-teaching job.” USF argued to the jury: “We ask that [Kao] not be awarded any money in this case, not only because there’s no liability—the university didn’t violate the law—but also because he made the choice to give up his secure job and then 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?”

There was no error. The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury. (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 985 [whether the plaintiff has acted reasonably in mitigating damages is a question of fact]; *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 25 [admission of expert testimony is reviewed for abuse of discretion].) Moreover, there was no prejudice. Since the jury never had to reach the issue of damages, it is not reasonably probable the verdicts would have been different if the evidence of other jobs had been excluded. (Evid. Code, § 354 [erroneous admission of evidence must cause a miscarriage of justice]; *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574 [different outcome must be reasonably probable].)

F. Spoliation of Evidence

Kao argues that the court erroneously excluded evidence of a discovery request he made, which allegedly would have supported a jury instruction on spoliation of evidence by USF. His argument is not at all persuasive. The background is as follows.

The day after Dean Turpin's April 22 encounter with Kao on the way to her car, she made notes of the incident in an email to herself. The notes stated that, after she asked Kao about his mother, he said "*loudly*, 'fine, fine and how is your family, how are your children?'" (Italics added.) The notes further stated: "As I walked away, I felt John again very close to me, hovering over my *head*. *The whole incident* felt as if he was about to snap and about to hit me." (Italics added.) When Turpin sent the notes to Peugh-Wade in a June 26 email, she changed the words "said loudly" to "shouted," "head" to "back," and "[t]he whole incident" to "it." Turpin testified that she sometimes edits memoranda she writes to herself, and could not recall when she made the foregoing changes.

Turpin was then questioned about the computer on which the emails were written. She said that her office computer is regularly replaced by USF's IT department, and that the computer she was currently using was likely different from the one she used in 2008. Through Turpin, Kao introduced USF's May 27, 2011 response to Kao's discovery

request to inspect data on her computer relating to emails involving Kao from April 21 to June 27, 2008. USF responded that it had produced all relevant emails to or from Turpin during this period, and that USF “will not produce the requested computer[] for inspection.” Kao also introduced USF’s amended July 21, 2011 response to the discovery request, which stated that USF “has performed a diligent search for the computer used at the stated times by Jennifer Turpin, and the computer is no longer within the possession or control of the University. Therefore, it is not available for inspection.”

Kao thereafter sought to put in evidence his July 14, 2011 motion to compel production of Turpin’s computer. The court sustained USF’s relevance objection to introduction of this document. Kao contends that the court erred in so doing because the document would have supported an inference of spoliation on USF’s part. He reasons that Turpin’s 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. . . . 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.”

The trial court correctly concluded that the facts surrounding the request for production were irrelevant. When Kao asked for Turpin’s computer, USF first said that it had produced all pertinent emails, and then said that the computer could not be produced even if Kao had some reasonable need for it. Kao’s beliefs that USF lost or destroyed the computer to prevent him from inspecting it, and that the spoliation was prompted by his request for production in between USF’s discovery responses, are entirely speculative.

Kao argues: “Evidence on the computer was reasonably likely to show that Dean Turpin had repeatedly revised her account of the April incident to make [him] 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." We disagree. Turpin was not the only one who was frightened by Kao, and the minor changes she made to her initial description of the incident did not materially alter her account or suggest that she had anything to hide on her computer.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.

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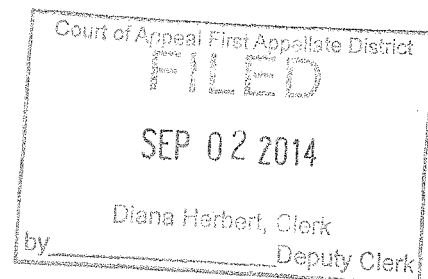
Filed 9/2/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE



JOHN S. KAO,
Plaintiff, Cross-defendant, and
Appellant,

v.

THE UNIVERSITY OF SAN
FRANCISCO et al.,

Defendants, Cross-complainants,
and Respondents.

A135750

(City and County of San Francisco
Super. Ct. No. CGC-09-489576)

**ORDER CERTIFYING OPINION
FOR PUBLICATION**

THE COURT:

The opinion filed in the above-entitled matter on August 4, 2014, was not certified for publication in the Official Reports. For good cause, the request for publication by defendants and respondents is granted.

Pursuant to rule 8.1105(b) of the California Rules of Court, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports.

DATE: SEP 02 2014

Siggins, J.

Siggins, Acting P.J.

PROOF OF SERVICE

I declare that I am employed in the County of Marin, State of California. I am over the age of eighteen years and not a party to the within cause; my business address is 912 Lootens Place, 2nd Floor, San Rafael, California, 9490; I am 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 September 9, 2014, by the method marked below, I served a true copy of the following document(s) described as:

PETITION FOR REVIEW

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 Rafael, 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.

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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 September 9, 2014, at San Rafael, California.

Christopher W. Katzenbach