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3 **IN THE UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **MARCELLA JACKSON,**

7 **Plaintiff,**

8 **vs.**

9 **KAPLAN HIGHER EDUCATION, LLC, a**
10 **Delaware limited liability company,**
11 **KAPLAN HIGHER EDUCATION**
12 **CORPORATION, an unknown business**
13 **entity, KAPLAN, INC., a Delaware**
14 **corporation, and DOES 1 through 20,**
15 **inclusive,**

16 **Defendants.**

1:14-CV-00073-AWI-BAM

**MEMORANDUM OPINION AND
ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
FOLLOWING RESPONSES TO
COURT'S ORDER TO SHOW CAUSE**

Doc. #'s 27 & 35

16 On May 5, 2015, the court issued a Memorandum Opinion and Order on the motion of
17 defendants Kaplan Higher Education, LLC. (“Defendants”) for summary judgment (hereinafter
18 the May 5 Order”). Doc. # 35. The May 5 Order granted Defendants’ Motion for summary
19 judgment as to plaintiff Marcella Jackson’s (“Plaintiff’s”) first claim for relief for age based
20 discrimination in violation of California’s Fair Employment and Housing Act (“FEHA”), her
21 sixth claim for relief for retaliation for the filing of a complaint under FEHA and her seventh and
22 eighth claims for relief for retaliation under the California Family Rights Act and the federal
23 Family Medical Leave Act, respectively. Plaintiff’s remaining claims for relief – the second,
24 third, fourth and fifth claims – were alleged for violation of various aspects of FEHA and the
25 May 5 order directed the parties to show cause why summary judgment should not be granted as
26 to these claims based on Plaintiff’s failure to show she suffered from a “disability” within the
27 meaning of FEHA. The parties have responded to the court’s May 5 Order. For the reasons that
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1 follow, the court will find that Defendants are entitled to summary judgment as to the remainder
2 of Plaintiff's claims.

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4 **I. Plaintiff's Response to the Order to Show Cause**

5 There is no dispute that Plaintiff's job performance was satisfactory or better from the
6 time of her employment until Tamara Honohan ("Honohan") became her supervisor in
7 November 2012. It is also not disputed that Plaintiff requested medical leave under the
8 California Family Medical Leave Act ("FMLA") beginning on January 7, 2013, and that she
9 displayed symptoms of depression and anxiety which she attributed in substantial part to the
10 problematic nature of her interactions with Honohan. The court's May 5 Order expressed the
11 court's legal doubt that the inability of an employee to function under the supervision of a
12 particular supervisor because of symptoms that gave no hint of existence prior to the employee's
13 encounter with the particular supervisor cannot be the basis for disability claims under
14 California's Fair Housing and Employment Act ("FEHA"). Plaintiff's response to the court's
15 May 5 Order consists substantially of evidence to show that Plaintiff did, in fact, have an
16 articulable psychiatric condition that preexisted her encounter with Honohan, but that the
17 condition remained occult until it was triggered by her interaction with Honohan in November of
18 2012.

19 There are a number of exhibits attached to Plaintiff's response to the court's May 5
20 Order. These exhibits fall into two groups. The first group consists of several exhibits
21 documenting Plaintiff's encounters with mental and medical healthcare providers and
22 demonstrates the continuation of Plaintiff's symptoms of stress, anxiety and depression, and the
23 continuation of her status on medical leave under FMLA. The second group consists of a single
24 exhibit, Exhibit "U" to Doc. # 36-1, which present opinions by Forensic Neuropsychiatry Group,
25 Inc. of Plaintiff's mental health status based on a review of Plaintiff's Complaint, the records of
26 Community Medical Centers, records of Fresno County Department of Behavioral Health,
27 records of Anderson Medical Associates and records of Kaiser Permanente, Fresno. Doc. # 36-1
28 at 24-25. Exhibit "U" expresses the psychiatric opinion of Dr. James E. Rosenberg, M.D. and

1 will be referred to hereinafter as the “Rosenberg Report.” It should be noted that the Rosenberg
2 Report is retrospective in that it relies on written material from encounters that occurred prior to
3 2014, and that the author, Dr. Rosenberg, never examined Plaintiff directly. It should also be
4 noted that the Rosenberg Report is dated January 20, 2015.
5

6 Pertinent to this discussion, the Rosenberg Report expresses a total of three “Opinions;”
7 each supported by a number of observations based on the afore-mentioned sets of documents.
8 The first of these opinions, which is the most germane to Plaintiff’s argument, is that
9 notwithstanding the apparent concern of Plaintiff with Honohan’s management style, “[t]here is
10 no significant evidence from a psychiatric standpoint that [Plaintiff] experienced an emotional
11 injury or psychiatric disorder while working for Kaplan as a result of the allegations in this
12 matter.” Doc. # 36-1 at 25. Among the observations supporting this opinion is the following:

13 However, despite the various Kaiser chart entries, as above, that document
14 [Plaintiff’s] subjective complaints about her work experiences at Kaplan,
15 the available sources of information instead clearly indicate that her
16 primary diagnosis has been the Borderline Personality Disorder with
17 chronic preexisting impairments in major-life functions, unresolved major
18 developmental life traumas, other significant unresolved preexisting
19 emotional issues, unstable mood, unstable self-esteem, unstable
20 relationships with paranoid thinking about how other people treat her,
21 eating disorder symptoms, and other emotional difficulties unrelated to
22 defendants.

23 The available sources of information demonstrate that [Plaintiff’s]
24 anxiety, depressive and other emotional problems were chronic and
25 preexisting, that her subjective work claims were in fact by-products of
26 her Borderline Personality Disorder in which she misinterpreted
27 appropriate work situations as personal attacks on her, and that, even if
28 her subjective work-related allegations were accepted at face value to be
true, they would not collectively constituted a substantial factor in the
onset or course of her chronic emotional problems.

Doc. # 36-1 at 26.

24 The second “Opinion” set forth in the Rosenberg Report is that “[t]here is no significant
25 evidence from a psychiatric standpoint that [P]laintiff experienced an emotional injury or
26 psychiatric disorder as a result of her termination from Kaplan.” Doc. # 36-1 at 29 (italics
27 added). The court notes that this Opinion is to a significant extent based on the same
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1 observations as the first Opinion and is consistent with it in the sense that it attributes any
2 emotional difficulty Plaintiff may have had when her employment was terminated to a pre-
3 existing mental disorder – Borderline Personality Disorder – and not to the termination itself.
4 The court notes that this Opinion undercuts Plaintiff’s prior allegation that, but for her
5 termination and the emotional trauma caused by it, she believed that she was ready to return to
6 work even though her physician had extended her return to work date.
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8 The third, and for purposes of this analysis final, Opinion set forth in the Rosenberg
9 Report reinforces the meme of preexisting and continuing mental illness as follows:
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11 Plaintiff has qualified as disabled from a psychiatric perspective with
12 regards to her ability to work at Kaplan, as a result of mental health
13 factors unrelated to this case, from at least early 2013, through her
14 termination, and continuing into the foreseeable future. To further clarify,
15 from the time of her termination, she has been disabled from a psychiatric
16 standpoint, has not been capable of returning to work in any position at
17 Kaplan since then, and will not be able to work in any position at Kaplan
18 into the foreseeable future.

19 Doc.# 36-1 at 29.

20 As the May 5 Order pointed out, to establish a claim for discrimination under FEHA (or
21 under the Americans with Disabilities Act, the complainant has the burden to show that she was
22 (1) a member of a protected class, (2) that she was qualified for the position she held, (3) that she
23 suffered an adverse employment action, and (4) that some circumstance suggests a
24 discriminatory motive. Guz v. Bechtel Nat’l, Inc., 24 Cal.4th 317, 354 (2000). The Rosenberg
25 Report is represents Plaintiff’s effort to show that Plaintiff was a member of a protected class in
26 light of the court’s provisional conclusion that Plaintiff had failed to allege facts to show that she
27 suffered from a disability within the meaning of FEHA. The report is offered to contradict the
28 court’s observation that Plaintiff failed to allege she suffers from an articulable mental disorder
which presumably could have been diagnosed independently of the symptoms that arose in the
context of Honohan’s interactions with Plaintiff.

1 The court finds that Plaintiff’s response to the court’s May 5 Order raises two issues.
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3 The first is whether Plaintiff’s evidence giving a diagnostic origin for Plaintiff’s disabling
4 symptoms and establishing that the diagnosis both preexisted and caused Plaintiff’s depression,
5 anxiety and other symptoms brings her reaction to Honohan’s leadership within the protected
6 class of persons with disability. The second issue is whether the Rosenberg Report serves to
7 otherwise undermine Plaintiff’s disability discrimination claims by establishing that Plaintiff was
8 and will remain for the foreseeable future not qualified for the position she held. The court will
9 consider each in turn.

10 **A. Occult Emotional Illness Does Not Qualify for Protection Under FEHA**

11 As discussed in the court’s May 5 Order, a generalized inability to get along with a
12 supervisor is not sufficient, by itself, to show a disability under FEHA. See Doc. # 35 at 9
13 (citing Gliha v. Butte-Glenn Comm. College Dist., 2013 WL 3013660 (E.D. Cal. 2003) at *5 for
14 discussion of cases collected illustrating the proposition). Thus, according to the weight of state
15 authority as recognized by this court, an employer who does not provide protected leave or
16 otherwise provide accommodation under FMLA in response to an employee’s inability to cope
17 with a supervisor’s abrasive albeit lawful management style does not violate FEHA. There is no
18 indication that Defendant (or even Plaintiff) was aware at the time Plaintiff was terminated from
19 employment that Plaintiff’s disabling symptoms were a result of a preexisting emotional
20 disorder. The question therefore becomes whether a defendant can become liable under FEHA
21 when information provided post hoc indicates that the employee’s inability to cope with the
22 particular manager was the result of a preexisting emotional disorder? The answer is clearly
23 “no.”
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27 “An adverse employment decision cannot be made ‘because of’ a
28 disability, when the disability is not known to the employer. Thus, in
order to prove [a discrimination] claim, a plaintiff must prove the

1 employer had knowledge of the employee's disability when the adverse
2 employment decision was made. [Citations.] While knowledge of the
3 disability can be inferred from the circumstances, knowledge will only be
4 imputed to the employer when the fact of disability is the only reasonable
5 interpretation of the known facts.

6 Scotch v. Art Inst. Of California – Orange County, Inc., 173 Cal.App.4th 986, 1008 (4th Dist.
7 2009) (quoting Brundage v. Hahn, 57 Cal.App.4th 228, 236-237 (1997)).

8 Plaintiff's complaint and all of the documents referenced therein pertain to the problems
9 Plaintiff had in working under the supervision of Honohan. There is no hint of any preexisting
10 diagnosis nor of any impairment of performance during the years of Plaintiff's employment prior
11 to Honohan's arrival. Similarly, there is no hint that the anxiety and depression Plaintiff suffered
12 were anything other than a reaction to Honohan's managerial style. Assuming for the sake of
13 this discussion that the diagnosis of Borderline Personality Disorder can be considered a
14 disability for purposes of FMLA, Defendant had no basis whatsoever to infer that Plaintiff
15 carried that diagnosis at any time prior to Plaintiff's receipt of the Rosenberg Report, which was
16 not available until long after all of the acts complained of had transpired. Because it is not
17 possible to impute the knowledge of Plaintiff's Borderline Personality Disorder to Defendants
18 prior to the time the alleged adverse employment action or actions were taken, it cannot be
19 alleged that the adverse employment actions are evidence of discrimination against persons with
20 Borderline Personality Disorder.
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22 The court finds that late-produced evidence that Plaintiff suffers from a preexisting
23 mental or emotional disorder that may have been triggered, but not caused, by Plaintiff's
24 interactions with Honohan does not change the court's previously-expressed conclusion that
25 Plaintiff was not known to be a member of a protected class due to disability for FEHA purposes
26 at the time of any adverse employment actions alleged in the complaint. Defendants are
27 therefore entitled to summary judgment as to Plaintiff's remaining claims for discrimination or
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1 failure to accommodate or to engage in the interactive process under FEHA.

2 **B. Diagnostic Opinions in the Rosenberg Report Undercut Discrimination Claims**

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4 The Rosenberg Report paints a rather bleak picture with regard to Plaintiff's ability to
5 perform the tasks of her job irrespective of who happens to be Plaintiff's immediate supervisor.
6 In particular, Dr. Rosenberg's third Opinion expresses his conclusion that Plaintiff "has not been
7 capable of returning to work in any position at Kaplan since then, and will not be able to work in
8 any position at Kaplan into the foreseeable future." While it is difficult to square Dr.
9 Rosenberg's Opinion with the undisputed fact that Plaintiff successfully performed the
10 requirements of her job for several years prior to Honohan's arrival; the Opinion lends
11 considerable weight to Defendant's contention that Plaintiff was never able to demonstrate that
12 she was able to return to work at any time relevant to this action. As the May 5 Order noted, a
13 plaintiff alleging facts to show a prima facie case of discrimination is obliged to allege facts to
14 show that she was, inter alia, qualified for the position she held. Guz, 24 Cal.4th at 354. The
15 court observes that Dr. Rosenberg's opinion undercuts any allegation by Plaintiff that she was,
16 or could become qualified for the position she held and bolsters Defendant's contention that
17 Plaintiff was unable to ever provide a firm date for her return to work.
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20 It remains the court's determination that Plaintiff has failed to show cause why summary
21 judgment should not be granted in favor of Defendant as to the remainder of Plaintiff's claims.

22 THEREFORE, for the reasons discussed, it is hereby ORDERED that Defendant's
23 motion for summary judgment is GRANTED as to all claims alleged in Plaintiff's Complaint.
24 The Clerk of the Court shall CLOSE the CASE.

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26 IT IS SO ORDERED.

27 Dated: June 10, 2015

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SENIOR DISTRICT JUDGE