IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LAVON HILL, JR,

Plaintiff,

v.

BAYER HEALTHCARE LLC and DOES 1-20,

Defendants.

/

No. C 09-00235 JSW

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now before the Court is the motion for summary judgment filed by Defendant Bayer Healthcare LLC ("Bayer"). Having carefully considered the parties' arguments, the relevant legal authority, the Court hereby GRANTS Defendant's motion for summary judgment.

BACKGROUND

Plaintiff brings suit against Bayer alleging disability discrimination, failure to provide reasonable accommodations and failure to engage in interactive process, all in violation of California's Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12940(a), *et. seq*. Plaintiff also alleges wrongful termination and/or failure to hire in violation of public policy.

The main pharmaceutical product manufactured at Bayer's Berkeley facility is Kogenate FS, a clotting agent principally used by hemophiliacs to help clot their blood. (*See* Declaration of David Willis ("Willis Decl.") at ¶ 2.) Bayer must follow rigorous internal operating procedures as well as follow the mandates of Federal Regulations designed to ensure the safe manufacture of its pharmaceutical products. (*See id.* at ¶ 3.) Because the product must be safe

for human use, the manufacturing process requires that certain production steps be conducted in "clean room" or aseptic environments which are regulated by ultra-strict parameters. (*See id*.)

Plaintiff was employed by Bayer as an Aseptic Processing Technician Filling Operator in Bayer's Berkeley facility beginning in February 2005. (*See* Declaration of Jerome Schreibstein ("Schreibstein Decl."), Ex. A (deposition of Lavon Hill, Jr.) at 11:8-14, Ex. 1.) Plaintiff worked in the Filling and Freeze Drying ("FFD") aseptic area in building 49A as a line worker. One of the requirements for this position is that the filling operator must "be able to qualify for plant aseptic gowning requirements ... be able to remove makeup, rings, watches and all other jewelry as required for entry in specific cleanliness classification[s]," and "be able to gown and work in a variety of clean room environments for long periods of time..." (*See* Declaration of John Mentz ("Mentz Decl."), at ¶ 2, Ex. A at 2; *see also* Schreibstein Decl., Ex. A at 17:14-19:16, Ex. 3 at 2.) In addition, the position required that the operator be able to perform (a) simple grasping with both hands, 2-4 hours a day, (b) power grasping with both hands, 1/2 to 2 hours per day, (c) pushing/pulling with both hands for 2-4 hours per day, (d) lifting 26 to 50 pounds, 1/2 to 2 hours per day, and (e) lifting 51-75 pounds for 1/2 to 2 hours per day. (*See* Mentz Decl. at ¶ 2, Ex. B at 2; *see also* Schreibstein Decl., Ex. A at 55:5-57:12, 61:25-62:14, 64:6-10, Ex. 7.)

In addition, all operators entering into any of the aseptic areas were subject to Bayer's extensive and documented Standard Operating Procedures ("SOPs") involving procedures for wearing protective equipment over all parts of the body, including wearing two sets of protective gloves, surgical scrubs and a body suit. (*See* Declaration of Christopher Burns ("Burns Decl."), at ¶ 2, Ex. A.) The SOPs, dictated by governing regulations for pharmaceutical production by the Food and Drug Administration ("FDA"), prohibited the wearing of any item on the hand or wrist area with the exception of a smooth wedding band. (*See id.* at ¶ 4, Exs. A-C; *see also* Schreibstein Decl., Ex. A at 22:23-23:25.) The reason that all items must be removed prior to entry into the production areas is that the items might trap or retain microbial contaminants, posing and incrementally greater risk to the product. (*See* Burns Decl. at ¶ 4.) In addition, items worn on the wrist or hands, such as jewelry, watches or other

devices may pose a risk of perforating the protective gloves or other parts of the workers' protective equipment. (*Id.*) From an aseptic processing standpoint, the areas in which Plaintiff spent the majority of his time working are the most highly regulated areas due to the concern of contamination of Bayer's final product. (*Id.* at ¶ 5; Willis Decl. at ¶ 5; Schreibstein Decl., Ex. A at 57:17-60:5.)

On December 5, 2006, Plaintiff was issued a verbal warning for failure to follow strict procedures of the clean-room environment. (*See* Schreibstein Decl., Ex. A at 67:1-6:8, Ex. 12.) On January 8, 2007, Plaintiff was issued a written warning for violating gowning procedures and, having found fecal matter on his gowning, was disqualified from re-entering the highly aseptic areas at that time, effective until at least February 20, 2007. (*See id.* at 70:16-74:15, Ex. 15.)

In January 2007, Plaintiff claimed to suffer a workplace injury involving pain in his right hand and wrist. Although he had endured the pain for some time, he did not report believing it to be a temporary strain. (*See id.* at 75:22-77:24.) Plaintiff complained that the pain was caused by performing his job duties, such as pushing, pulling, and lifting, as well as pinching forceps. (*Id.* at 77:5-78:3.) Plaintiff complained of pain from flexing, grasping, pinching forceps, twisting clamps, pulling levers, and pushing and pulling carts on his own. (*Id.* at 79:5-80:14.) About the time he was disqualified from working in the highly restrictive areas, Plaintiff was prescribed the use of a wrist brace as a workplace medical restriction, and wore the brace although he never disclosed it to any of his supervisors. (*See id.* at 86:23-25.) Although he was provided modified work duties as an accommodation to Plaintiff, Plaintiff's supervisor was not aware that he was wearing a brace. (*See* Mentz Decl. at ¶ 5.)

In April 2007, after experiencing a flare up of the injury, Plaintiff was referred to a hand surgeon and complained that he was experiencing pain almost constantly at work. (*See* Schreibstein Decl., Ex. A at 98:6-99:5, 104:7-10.) In June 2007, Plaintiff's condition had worsened to the point where he was precluded from using his right hand at work. (*See id.* at 120:11-17.) Plaintiff's treating physician, Dr. Douglas Chin, concluded that as of July 2007, Plaintiff had suffered "significant trauma to the right wrist that would result in permanent

disability and deformity" and advised Plaintiff that "following injuries of this type, the injured adult is not likely to ever gain full sensibility, form or function and that some level of permanent deformity or disability should be anticipated." (*See* Schreibstein Decl., Ex. B (deposition of Dr. Chin), at 13:11-17:14, Ex. 1 at 42-50.)

On January 30, 2008, Dr. Chin examined Plaintiff and concluded that he was immediately and permanently restricted from:

a. repetitive or sustained pinching with the right thumb
b. frequent or sustained weightbearing upon the right hand
c. lifting greater than 10 pounds' weight with the unassisted right hand
d. lifting greater than 25 pounds' weight using both hands together

(*See* Declaration of James J. Achermann in support of opposition ("Achermann Decl."), Ex. G at 106.) At that same time, Dr. Chin concluded that "the physical demands of [Plaintiff's] usual and customary duties appear to fall within the scope of the prescribed work restrictions and preclusions." (*Id.* at 107.) The doctor also found that Plaintiff should wear a "right thumb CMC splint." (*Id.* at 108.) Plaintiff was aware of these permanent restrictions. (*See* Schreibstein Decl., Ex. B at 30:22-31:10, 32:3-33:3, Ex. 1 at 22-23.)

The permanent restrictions recommended by Plaintiff's treating physician, specifically requiring that Plaintiff wear a wrist brace, were facially violative of Bayer's SOP precluding the wearing of items on the hands or wrist, other than a smooth wedding band. (*See* Burns Decl. at ¶ 6.) The Bayer personnel determined that the wrist brace device required by Plaintiff's doctor would increase the risk of microbial contamination in the aseptic areas of the facility, and could pose significant compliance issues for the company. (*See id.*) In addition, Plaintiff's supervisor determined that the permanent orthopedic restrictions – against repetitive or sustained pinching with the right thumb, frequent or sustained weight bearing upon the right hand, lifting of greater than 10 pounds unassisted with the right hand, and lifting greater than 25 pounds using both hands together – could not be accommodated given the demands and essential functions of the filler position. (*See* Mentz Decl. at ¶ 7.) Plaintiff agreed that the restriction on repetitive or sustained pinching of the right thumb would preclude him from using forceps as part of the fill process, one of the essential functions of his filler position. (*See* Schreibstein Decl., Ex. A at 134:10-20.)

By March 2008, Plaintiff, who was temporarily held off work, was subject to termination under the terms and conditions of his Collective Bargaining Agreement ("CBA") governing Bayer's union employees. (*See id.* at 12:7-14:15, Ex. 2, Art. VI, Section 8(i) at 15.)

On January 21, 2009, Dr. Chin wrote a letter regarding Plaintiff's status indicating that, in apparent contradiction to his earlier assessment, he determined that Plaintiff could return to regular unrestricted duties and perform the usual and customary duties of his employment. (*See id.* at 147:1-11, Ex. 26.) Dr. Chin's letter also stated, however, that "Employee and Employer are requested to exercise prudence and caution during this transition for full and unrestricted duties. [Plaintiff] may work without a wrist splint *at his discretion*." (*See id.*, Ex. 26 (emphasis added).) Dr. Chin concluded that if Plaintiff "experience[s] any difficulties or discomfort performing these duties, of should [Plaintiff] pose any risk of injury to herself [sic] or to others, [Plaintiff] should be taken off of work immediately an[d] referred to Employee Health for evaluation." (*See id.*)

Bayer reviewed Dr. Chin's revised opinion ostensibly removing Plaintiff's permanent restrictions and determined that it could not accommodate a restriction in the regulatory framework forbidding the use of a wrist brace at Plaintiff's own discretion. (*See* Willis Decl. at ¶ 6.) Bayer determined that it could not accommodate an employee who could, at his discretion, effectively excuse himself from performing the majority of his job functions. (*See id.*) Instead, although past the point at which Bayer could have terminated Plaintiff from employment under the CBA, Bayer offered and Plaintiff accepted a position as a General Worker, earning the same pay level, and guaranteeing him full-time work and benefits. (*See* Declaration of Bob Russey at ¶ 4.)

The Court will address the additional specific facts as required in the analysis.

ANALYSIS

A. Standards Applicable to Motions for Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own evidence, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact must take care adequately to point a court to the evidence precluding summary judgment because a court is "'not required to comb the record to find some reason to deny a motion for summary judgment.'" *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Claim for Disability Discrimination.

Under the FEHA, it is unlawful employment practice for an employer to discharge an individual from employment because of a physical disability. Cal. Gov't Code § 12940(a). Disability discrimination claims under the FEHA are evaluated using a "shifting burden" analysis. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 356 (2000). First, the plaintiff must establish a prima facie case of discrimination. If the plaintiff cannot establish a prima facie case, summary judgment for the employer is warranted. If the plaintiff does establish a prima facie case, the burden shift to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Once the defendant does so, the plaintiff may "attack the employer's proffered reasons as pretexts for discriminatory motive." *Id.*

To establish a prima facie case of disability discrimination under the FEHA, a plaintiff must show that: (1) he suffers from a disability; (2) with or without reasonable accommodation, he could perform the essential functions of the employment position held or desired; (3) he was subjected to an adverse employment action; (4) the adverse employment action occurred under circumstances raising an inference of discrimination. *Id.* at 355.

At summary judgment, the degree of proof necessary to establish a prima facie case is "minimal and does not even need to rise to the level of a preponderance of the evidence." *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir.2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)); *see also Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 197 (1996) (holding that a plaintiff's evidentiary burden to establish a prima facie case is "minimal").

Under the FEHA, an employer is not prohibited from refusing to hire or discharge an employee with a physical or mental disability who 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 of the health or safety of others even with the reasonable accommodation." Cal. Gov't Code § 12940(a)(1). In "disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff

can show he or she was able to do the job with or without reasonable accommodation." *Green v. State of California*, 42 Cal. 4th 254, 265 (2007).

Here, Plaintiff is unable to establish a prima facie case of disability discrimination because he cannot demonstrate that he is able to perform the essential duties of his position without endangering himself or others.[1] Even assuming, in the light most favorable to Plaintiff, that the second assessment dated January 21, 2009 from Dr. Chin would allow him to perform the functions of his job without a wrist brace, the recommendation is that he use his discretion when electing whether or not to use a brace. (*See* Schreibstein Decl., Ex. A, Ex. 26.) According to the explicit SOPs under which all Bayer employees must function, the use of a wrist brace poses a risk to the aseptic environment and an incremental risk to the patients using Bayer's pharmaceutical products. (*See, e.g.*, Willis Decl. at ¶ 6.) Because the use of brace would be at Plaintiff's discretion, Plaintiff cannot establish based on the evidence submitted that he can function without the use of a wrist brace in the aseptic areas.

In this regard, Plaintiff contends that it is, or can be, safe to use a wrist brace in the clean room environment. However, Plaintiff's proffered expert's opinion that a wrist brace could be used in the aseptic areas without posing a risk is inconsequential.[2] In *Quinn v. City of Los Angeles*, 84 Cal. App. 4th 472, 482-83 (2000), the court found that requiring that a police officer pass a medical examination, including a hearing test, was within the discretion of the employer. The court found that the setting the parameters of an employee's qualifications is "solely to be determined by the [employer] itself." *Id.* at 482. Likewise, in this matter, Bayer has the authority, following the regulations governing the pharmaceutical industry, to set the minimal requirements for its employees. The Court finds here it is entirely within Bayer's

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[1] Notwithstanding Plaintiff's attempt to create disputed fact about the precise parameters of his former job's essential functions, there is no dispute, according to his own testimony, that the position required the repetitive use of both hands for pushing, pulling, lifting, and pinching forceps. (*See* Schreibstein Decl., Ex. A at 77:5-78:3.) Plaintiff testified that the pain he felt in his right wrist and thumb were the result of flexing, grasping, pinching forceps, twisting clamps, pulling levers, and pushing and pulling carts on his own. (*Id*. at 79:5-80:14.)

[2] The Court will not rule on the admissibility of the expert report as it is entirely irrelevant.

discretion to forbid the use of any wrist brace within the aseptic area in order to minimize the possibility of contamination of their pharmaceutical product.

Without the use of a wrist brace at his discretion, Plaintiff is not able to demonstrate that he could perform the essential functions of his employment position. *See Guz, Inc.*, 24 Cal. 4th at 355. Accordingly, Plaintiff cannot make out a prima facie case for employment discrimination on the basis of disability.

C. Claim for Failure to Provide Reasonable Accommodations.

Plaintiff's second claim for relief asserts that Bayer failed to reasonably accommodate Plaintiff's physical disability. Under the FEHA, it is an unlawful employment practice for an employer to "fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." Cal. Gov't Code § 12940(m). A "reasonable accommodation" includes "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other accommodation for individuals with disabilities." Cal. Gov't Code § 12926(n)(2).

An employer is not required to choose the best accommodation or the specific accommodation that a disabled employee seeks. *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 228 (1999). The FEHA only requires that the accommodation chosen be "reasonable." Cal. Gov't Code § 12940(a), (m). The obligation to reassign an employee who cannot otherwise be accommodated "does not require creating a new job, moving another employee, or violating another employee's rights under a collective bargaining agreement." *Hastings v. Dept. of Corrections*, 110 Cal. App. 4th 963, 972 (2003) (citation omitted). Furthermore, the FEHA does not require that the employer create a new position for an employee, or a temporary light-duty assignment where no such position existed previously. *Watkins v. Ameripride Servs.*, 375 F.3d 821, 828-29 (9th Cir. 2004); *see also Raine v. City of Burbank*, 1135 Cal. App. 4th 1215, 1227 (2006). Finally, an employer is not required to eliminate "essential functions" of a job, or reallocate them to other employees. *Wilmarth v. City of Santa Rosa*, 945 F. Supp. 1271,

1278 (N.D. Cal. 1996). What is required is "the duty to reassign a disabled employee if an already funded, vacant position at the same level exists." *Hastings*, 110 Cal. App. 4th at 972-73 (citations omitted).

For the same reasons the Court has already found that Plaintiff cannot establish a disability discrimination claim, he cannot prevail on a failure to provide reasonable accommodation. The Court has already found that Plaintiff was not able to demonstrate that he could perform the essential functions of his former position and the SOPs, which was within the discretion of Bayer, would not allow for the wearing of a supportive brace in the aseptic areas of Plaintiff's former position. The issue remains whether the less strenuous position at comparable pay and benefits where his restrictions could be accommodated, constitutes a reasonable accommodation.

There is no question of fact that Plaintiff was offered, and accepted, a position as a General Worker, which requires fewer repetitive fine hand manipulations and is conducted in non-aseptic areas. In addition, although the new position is usually offered at a lower salary, Bayer offered Plaintiff the position with the same pay rate as his former position and offered full-time work and benefits after Plaintiff was eligible for termination per the maximum leave provisions of the CBA.[3] Bayer returned Plaintiff to a position entailing less risk of injury to him, less risk of violation of the company's SOPs, and less risk to the patient community from possible contamination of its pharmaceutical products. The Court finds, under these undisputed facts, that the offer constitutes a reasonable accommodation under the FEHA. *See Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 227 (1999) (holding that FEHA lists as reasonable accommodations reassignment to a vacant and part-time or modified work schedule, even where pay is less than 50 % of former pay without benefits).

D. Claim for Failure to Engage in Interactive Process.

Under the FEHA, it is unlawful for an employer to "fail to engage in a timely, good faith interactive process" with a disabled employee to determine effective reasonable accommodations. *See* Cal. Gov't Code § 12940(n). In order to prevail on such a claim, the

[3] Plaintiff's arguments about the timing of the offer of employment is unavailing.

employee must demonstrate that the employer had, but did not provide, a reasonable accommodation that would have allowed the employee to perform the essential functions of his position. *See Scotch v. Art Institute of California*, 173 Cal. App. 4th 986, 1019 (2009) (holding that there can be no liability for failure to engage in the interactive process in an effort to identify a reasonable accommodation when a reasonable accommodation was, in fact, provided because in those circumstances a remedial injury was not suffered). There is no dispute of evidence that Plaintiff was offered, and accepted, a position that constitutes a reasonable accommodation. There is also no dispute of evidence that, according to Plaintiff's own testimony and the findings of his treating physician, he was no longer qualified for his former position. The record is replete with evidence of Bayer engaging in a sufficient process to determine the extent of Plaintiff's disability and the recourse for a reasonable accommodation once the determination of disability had been made. The Court finds there is no dispute of fact tending to support a claim of failure to engage in interactive process.

E. Claim for Wrongful Termination in Violation of Public Policy.

Plaintiff's fourth claim for relief alleges that Bayer wrongfully terminated him in violation of public policy. Under California law, an employee may maintain a cause of action against his employer where the employer's discharge of the employer contravenes fundamental public policy. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 666 (1988). A claim for wrongful termination must be based on the policy established by a constitutional or statutory provision. *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1095 (1992). Here, Plaintiff's wrongful termination claim is derivative of his FEHA claim for discrimination.

However, claims for wrongful termination in violation of public policy do not encompass other adverse employment actions shy of termination. Plaintiff may not base a wrongful termination in violation of public policy claim on discrimination alone. *See Hall v. Apartment Investment and Management Co.*, __ F. Supp. 2d __, 2008 WL 4415053, *4 (N.D. Cal. Sept. 26, 2008).

In addition, at the hearing on this motion, Plaintiff agreed to abandon this claim altogether.

F. Claim for Punitive Damages.

As the Court has found that Plaintiff was not discriminated against or deprived reasonable accommodation or a sufficient interactive process, the Court finds that Plaintiff cannot prevail on a claim for punitive damages. A jury may award punitive damages only "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 713-14 (2009). There is neither evidence of the underlying claims of discrimination, nor evidence of any malicious intent to discriminate.

CONCLUSION

For the foregoing reasons, Defendant Bayer's motion for summary judgment is GRANTED in full. A separate judgment shall follow. The Clerk is instructed to close the file.

IT IS SO ORDERED.

Dated: September 7, 2010

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE