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2 SUPERIOR COURT OF THE STATE OF CALIFORNIA

FILED (15)

3 IN AND FOR THE COUNTY OF KINGS

JAN 25 2011

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5 TODD H. BARTON, COURT EXECUTIVE OFFICER
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS

Rachelle Serrano
Rachelle Serrano DEPUTY

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7 CASE NO. 10C 0409

8 JAMES EUSTERMANN, M.D.,
Plaintiff

9 vs.

ORDER GRANTING PRELIMINARY
INJUNCTION UPON THE POSTING OF A
\$10,000 BOND;

10 HANFORD COMMUNITY MEDICAL
CENTER et. al.
11 Defendants

AFTER RESTORATION OF HOSPITAL
PRIVILEGES HAS BEEN
ACCOMPLISHED, THE BALANCE OF
THE RELIEF SOUGHT IN THE FIRST
AMENDED COMPLAINT IS STAYED

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15 Plaintiff's motion for preliminary injunction to restore his hospital privileges came on
16 for hearing on January 14, 2011. After review of the pleadings and argument of counsel, the
17 court grants the motion for issuance of a preliminary injunction under the terms discussed
18 below.

19 **Objections**

20 The court overrules the objection to the declaration of plaintiff filed with the reply.
21 No prejudice is apparent from the fact that the reply declaration was not received until January
22 11, 2011. The court finds that this supplemental declaration does not constitute new evidence.
23 The complaint and the initial declaration of plaintiff did not explicitly set forth the date on
24 which plaintiff submitted his reapplication to defendants. However, an inference arises from
25 paragraphs 19 and 21-22 in the complaint that the reapplication was submitted six months
26 before July of 2010. The supplemental declaration states that the reapplication was submitted in
27 December of 2009. The court considers the supplemental declaration to be a clarification of
28 facts already submitted in the moving papers and the complaint.

The court also overrules the objection to the statement by plaintiff that: 1) he submitted
a complete reapplication; 2) he was never informed his reapplication was incomplete. This

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1 statement is relevant, it is not vague or argumentative, and it is within the knowledge of the
2 plaintiff, given his declaration that he had submitted reapplications for hospital privileges every
3 two years for twenty years. (Dec. Pl Para. 3.)

4 With regard to the numerous objections made to the other declarations on file, the court
5 overrules all of the objections with the exception of objection #48 to paragraph 3 of the
6 declaration of attorney Hensleigh. This objection is sustained on the grounds that paragraph 3 is
7 argumentative and not relevant to the issues before the court.

8 **Issuance of preliminary injunction restoring plaintiff's hospital privileges**

9 Plaintiff's motion for a preliminary injunction to restore his hospital privileges is
10 granted. The court finds merit to plaintiff's assertion that defendants did not comply with the
11 Consolidated Medical Staff Bylaws in finding that plaintiff's hospital privileges expired and that
12 plaintiff had no administrative recourse to contest this finding. The request by the medical
13 executive committee (MEC) for a medical and a psychological exam and a brain MRI was made
14 under Bylaw 5.2. This bylaw provides that if the applicant does not meet his or her burden of
15 producing the requested information it "shall be grounds for denial of the application." If a
16 reapplication is denied, the applicant has the right to an administrative hearing on the issues
17 supporting the denial. (Bylaw 9.2 (c).)

18 Contrary to Bylaws 5.2 and 9.2 (c), the hospital took the position that plaintiff's hospital
19 privileges expired under Bylaw 5.6-5. However, this court does not find this position to be
20 supported by persuasive evidence. The supplemental declaration of plaintiff, which this court
21 finds credible and persuasive, states that plaintiff submitted a complete reapplication in
22 December of 2009. Plaintiff also stated that at no time was plaintiff told his reapplication was
23 not complete. Notification under Bylaw 5.5-3 would have been required had the reapplication
24 been found incomplete. The fact that the reapplication was processed through all the levels
25 described in the bylaws to the medical executive committee is further evidence in support of a
26 finding that plaintiff submitted a complete reapplication to the medical office staff and that
27 expiration of privileges did not occur under Bylaw 5.6-5.

28 The court finds that plaintiff's hospital privileges did not expire as set forth in Bylaw
5.6-5 and that restoration of plaintiff's hospital privileges is needed to restore the status quo that
existed before the hospital declared plaintiff's hospital privileges had expired. This preliminary
injunction is not intended to enjoin an immediate suspension of plaintiff's hospital privileges
under Business and Professions Code section 809.5 [Notwithstanding Sections 809 to 809.4,
inclusive, a peer review body may immediately suspend or restrict clinical privileges of a

1 licentiate where the failure to take that action may result in an imminent danger to the health of
2 any individual, provided that the licentiate is subsequently provided with the notice and hearing
3 rights set forth in Sections 809.1 to 809.4, inclusive, or, with respect to organizations specified
4 in Section 809.7, with the rights specified in that section.] The court considered, but decided
5 against, specifying the manner in which a summary suspension could be ordered. The court
6 finds this to be a decision to be made in the context of peer review, as set forth in the bylaws
7 and the statutes in this state, which set forth the requirements for peer review.

8 **Restoration of Status Quo**

9 The parties are restored to their positions before the October 5, 2010 letter was sent to
10 plaintiff. (Ex 26.) There is a legitimate dispute as to the number, type and scope of examinations
11 that may be required under Bylaw 5.2. It is preferable that each party reexamine their positions
12 and that plaintiff be given the opportunity to comply, or choose not to comply, to the medical or
13 psychological exams deemed appropriate by the medical executive committee.

14 The court is particularly concerned about the MEC requirement that plaintiff submit to
15 brain imaging studies. (Ex 9; Dec. Dolgoff para. 10) The declarations submitted by plaintiff
16 have taken the position that a brain MIR is not indicated after consideration of plaintiff's
17 medical history, physical condition, medications, reflexes and neuropsychiatric testing and
18 evaluation. (Dec Pl para 22; Perry Dec para 12; Dec. Evans para 7, Ex 31.) Bylaw 5.2 provides
19 that "to the extent consistent with law" the applicant may be required to submit to a medical or
20 psychological exam to resolve any doubts the medical executive committee may have as to the
21 applicant's suitability for clinical privileges. Despite diligent research, this court has been
22 unable to find authority to support a requirement that an applicant submit to a brain MRI in
23 connection with a fitness for duty examination. Dr. Dolgoff stated in paragraph 10 of his
24 declaration that in all probability, an MRI of plaintiff's brain and other unspecified diagnostic
25 tests would be required. However, no factual or legal justification for such a requirement was set
26 forth in this declaration, or in any pleading submitted by defendant in opposition to the
27 preliminary injunction. The court notes that parties pursuing a personal injury claim are not
28 required to submit to any diagnostic test or procedure that is painful, protracted or intrusive.
(Code Civ. Proc. §2032.220 (a) (1).) Moreover, in such actions, a trial court has discretion to
grant a protective order limiting the scope of discovery where the burden, expense or
intrusiveness of that discovery clearly outweighs the likelihood that the information sought will
lead to the discovery of admissible evidence. (Code Civ. Proc., §2017.020, subd. (a).)

1 Under the adage that no person should submit to an x-ray or MRI unless there is a compelling
2 medical need, absent specific legal and factual foundation for a brain MRI, the court finds that
3 this diagnostic test may not be required in connection with a fitness for duty exam.

4 The court finds that restoration of the parties to a status quo that existed before
5 defendants improperly found that plaintiff's hospital privileges had expired is additionally
6 required because the letter of October 5, 2010, did not address or discuss the medical
7 examinations plaintiff submitted to the MEC for consideration. In a letter dated August 4, 2010
8 (Ex 13) from the Medical Executive Committee, and in a letter dated August 16, 2010 from
9 Glenda Zeismer, Director Medical Staff Services (Ex 19), plaintiff was given permission to
10 submit his own independent evaluation, which by a vote of the MEC, plaintiff was told would
11 be considered in the MEC review of the reapplication. Plaintiff submitted a third evaluation by
12 Sean Evans, M.D., with his moving papers, which plaintiff presumably would also ask the MEC
13 to consider.

14 Medical and psychological examinations of a current employee/ independent contractor
15 are permitted when they are job related and when there is a business necessity for such an exam.
16 (Gov. Code section 12940, subdivision (f) (2); 42 USC 12112 (d)(4)(A).) There also exists some
17 authority that an employer may select the fitness for duty examiner. (*Sullivan v River Valley*
18 *School Dist* (6th Cir. 1999) 197 Fed 3d 804, 809 fn 2; Chin et. al., Cal. Practice Guide:
19 Employment Litigation (The Rutter Group 2010) ¶ 9:946, p. 9-84 et. seq.) Research shows that
20 employers have taken various approaches with regard to the selection of the examiner. (See for
21 example Education Code section 44942 that provides for the selection of a panel of three
22 examiners in a manner that has some similarity to the prior bylaw. (Bylaw 4.2 Ex 2.))
23 In this case, the MEC has discretion, consistent with Bylaw 5.2 and legal authority describing
24 the parameters of such exams, to define the time, place, manner, conditions, scope and nature of
25 the examination, as well as the identity and the specialty of the doctor who will perform the
26 examination.

27 **Stay of lawsuit**


28 The court does not find this case to be analogous to *Smith v Adventist Health System/*
West (2010) 182 Cal. App.4th 729. In that case, the evidence supported a finding that the
doctor's reapplication was screened out and did not enter into a peer review process. (*Id.* at 750
fn. 14.) In this case, the reapplication was processed from its submission with the medical staff
office, to the department, then the credentials committee and finally to the Medical Executive
Committee. (Bylaw 5.5-3 to 5.5-6.) The Medical Executive Committee has the responsibility of

1 fairly reviewing the medical or psychological examination results submitted on the question of
2 the physician's fitness for duty. The determinations made are a part of peer review and should
3 the reapplication not receive a favorable recommendation, this result would allow the applicant
4 to be entitled to the procedural rights as provided in Article IX. (Bylaw 5.5-7.) Under those
5 circumstances, this court would not have jurisdiction of the issues raised in the first amended
6 complaint until plaintiff's administrative remedies were exhausted. (*Sahlolbei v Providence*
7 *Healthcare, Inc.* (2003) 112 Cal. App.4th 1137, 1146 [A doctor who is challenging the propriety
8 of a hospital's denial or withdrawal of staff privileges must pursue the internal remedies
9 afforded by that hospital to a final decision on the merits before resorting to the courts for
10 relief].) The court further finds that the second cause of action cannot go forward because age
11 discrimination is not covered by the Unruh Civil Rights Act. See Civil Code section 51,
12 subdivision (b).

13 **Bond**

14 A bond of \$10,000 is ordered to be posted by plaintiff. The court believes this bond
15 amount is adequate given the fact that defendants failed to present compelling evidence or
16 argument as to what damage would be incurred should it later be determined that plaintiff was
17 not entitled to the preliminary injunction. (Code Civ. Proc., §529.)

18 Dated: January 25, 2011

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20 Thomas DeSantos, Judge
21 Kings County Superior Court
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PROOF OF SERVICE BY MAIL

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Superior Court of the State of California } Case Number: 10 C 0409
County of Kings } ss.

I hereby declare under penalty of perjury that I am employed by the Kings County Superior Court, over the age of eighteen (18) years, and not a party to the within action.

That on January 25, 2011, I served the ORDER GRANTING PRELIMINARY INJUNCTION UPON THE POSTING OF A \$10,000 BOND; AFTER RESTORATION OF HOSPITAL PRIVILEGES HAS BEEN ACCOMPLISHED, THE BALANCE OF THE RELIEF SOUGHT IN THE FIRST AMENDED COMPLAINT IS STAYED, by mailing a true copy thereof, from my place of business (Kings County Superior Court, 1426 South Drive, Hanford, CA 93230), following our ordinary business practices with which I am readily familiar, addressed as follows:

Barbara Hensleigh ANDREWS & HENSLEIGH, LLP. 350 South Figueroa Street, Suite 580 Los Angeles, CA 90071 <i>(Attorney for Plaintiff James Eusterman, M.D.) (Mailing)</i>	Nossaman LLP Robert J. Sullivan Michael G. Thornton Mary Powers Antoine 915 L Street, Suite 1000 Sacramento, CA 95814 <i>(Attorney for defendant Central Valley General Hospital, consolidated medical staff of Central Valley General Hospital, Hanford Community Medical Center & Selma Community Hospital) (Mailing)</i>
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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.
January 25 2011 at Hanford, California.

TODD H. BARTON, Court Executive
Officer and Clerk of the Court

By Rachelle Serrano
Rachelle Serrano, Deputy Clerk