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Judge: Stephen I. Goorvitch, Case: 21STCV45383, Date: 2023-04-05 Tentative Ruling

Case Number: 21STCV45383 **Hearing Date:** April 5, 2023 **Dept:** 39

Ingo Rademacher v. American Broadcasting Companies, Inc.

Case No. 21STCV45383

Motions for Summary Judgment

NOTICE: Due to a docket error, one motion was set for hearing at 8:30 a.m., and one motion was set for hearing at 9:30 a.m. The Court will hear both motions at 9:30 a.m.

BACKGROUND

Plaintiff Ingo Rademacher (“Plaintiff”) filed this action against the American Broadcasting Companies, Inc. (“ABC” or “Defendant”). Plaintiff alleges as follows: Plaintiff is an actor who has been on the soap opera “General Hospital” for 25 years. (Second Amended Complaint, ¶ 5.) Defendant had a policy requiring employees working on television shows to receive a COVID-19 vaccination absent a valid medical or religious exemption. (Id., ¶¶ 4-5.) Plaintiff requested a religious exemption to Defendant’s mandate that employees must be vaccinated. (Ibid.) Defendant represented that it would grant exemptions for “sincerely held religious objections to Covid-19 shots,” but “it refused to accept Plaintiff’s request.” (Ibid.) “[Defendant] subjected [Plaintiff] to half an hour of cross-examination about his religious beliefs and then denied his exemption request, without explanation.” (Ibid.) Based upon the foregoing, Plaintiff asserts the following causes of action in the operative second amended complaint:

1. Violation of the right to privacy under the California Constitution
2. Religious discrimination under the Fair Employment and Housing Act (“FEHA”)

3. Medical condition discrimination under FEHA
4. Retaliation under FEHA
5. Wrongful termination under FEHA
6. Breach of an employment contract

Now, Defendant moves for summary judgment or, in the alternative, summary adjudication, which Plaintiff opposes.

LEGAL STANDARD

“[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law[.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

“[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*)

“A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.” (Code Civ. Proc., § 437c, subd. (f)(1).)

DISCUSSION

A. First Cause of Action

Plaintiff’s first cause of action alleges that Defendant violated his right to privacy under

the California Constitution and seeks a judicial determination that Defendant's policy is unconstitutional both facially and as applied to Plaintiff. "[A]rticle I, section 1 of the California Constitution protects Californians against invasions of privacy by nongovernmental as well as governmental parties." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 227.) Plaintiff must establish three elements. First, Plaintiff must establish "a legally protected privacy interest." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) Second, Plaintiff must establish a reasonable expectation of privacy under the circumstances. (*Id.*, p. 40.) Specifically, Plaintiff must show Defendant "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff." (*Shulman, supra*, 18 Cal.4th at p. 232.) Third, Plaintiff must establish "conduct by defendant constituting a serious invasion of privacy." (*Hill, supra*, 7 Cal.4th at p. 40.) Specifically, Plaintiff must demonstrate that Defendant's actions were conducted "in a manner highly offensive to a reasonable person." (*Schulman, supra*, 18 Cal.4th at p. 231.)

Plaintiff predicates his claim upon "a legally protected privacy interest in his bodily integrity and private medical information." (Second Amended Complaint, ¶ 48.) This case is not about compulsory medical treatment. Rather, Plaintiff's claim is predicated upon having been forced to disclose his vaccination status. This claim fails for two independent reasons. First, Plaintiff had no reasonable expectation of privacy in his vaccination status. The undisputed evidence in this case demonstrates that Plaintiff voluntarily and repeatedly disclosed his vaccination status and his opposition to vaccines before requesting an accommodation. Moreover, Plaintiff's union agreed to Defendant's policy, including the right to request proof of vaccination status. (Declaration of Sean Quinn, ¶ 7 & Exh. A.) This defeats Plaintiff's claim as a matter of law. "[T]he plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed highly offensive to a reasonable person so as to justify tort liability." (*Hill, supra*, 7 Cal.4th at p. 26, citations and internal quotations omitted.) Second, in the alternative, Defendant had a sufficient interest to compel vaccinations, viz., the need to protect the health and safety of Defendant's workers during the pandemic when masks and social distancing were not an option. (See Plaintiff's Response to Defendant's Separate Statement, ¶¶ 30, 33-37, 92-94.)

The Court has considered Plaintiff's arguments and finds none to be persuasive. Therefore, the Court grants summary adjudication of the first cause of action.

B. Second Cause of Action

Plaintiff's second cause of action alleges that Defendant discriminated against him on the basis of religion, which is a violation of FEHA. The elements of this cause of action are as follows: (1) Plaintiff had a bona fide religious belief; (2) The employer was aware of that belief;

and (3) The belief conflicted with an employment requirement. (See *Friedman v. Southern Cal. Permanente Medical Group* (2002) 102 Cal.App.4th 39, 45.) Once the employee establishes a prima facie case, the burden shifts to the employer to establish that “it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship.” (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.)

The Court need not resolve the issue whether Plaintiff had a bona fide religious belief. Even if so, Defendant establishes that it could not reasonably accommodate Plaintiff’s status as an unvaccinated actor on “General Hospital.” Plaintiff concedes the following facts: (1) Plaintiff interacts with other actors in stage when performing the story line; (2) Acting requires Plaintiff to “get very close to other actors;” (3) ABC did not write masking into the storyline of General Hospital; (4) Plaintiff could not have acted on General Hospital while wearing a mask; and (5) Plaintiff would be in close proximity to others between the ages of 12 and 65 while acting on General Hospital. (Plaintiff’s Response to Defendant’s Separate Statement, ¶ 92.) This is consistent with Defendant’s evidence that “masking was not possible for actors.” (Declaration of Rachel Hutter, ¶ 14(b).) Plaintiff proposed no accommodations himself other than to permit him to continue working without a vaccination. (Plaintiff’s Response to Defendant’s Separate Statement, ¶ 94.) Defendant advances sufficient evidence that permitting unvaccinated workers under these conditions threatened the health and safety of others. (*Id.*, ¶¶ 30, 33-37, 92-94.) Based upon the foregoing, the Court finds that Plaintiff’s request for accommodation could not have been accommodated, given his working conditions, which prevented social distancing and masking.

Plaintiff argues that Defendant did not consider “reasonable alternative options” for accommodating his beliefs. As discussed, Defendant proffers sufficient evidence that other options were not available, because Plaintiff could not wear a mask or maintain social distancing while performing his role on General Hospital. Plaintiff concedes that he did not propose any alternative to vaccination. Even now, Plaintiff argues that Defendant should have considered reasonable alternatives, but he proposes none.

Plaintiff argues that Defendant could have reasonably accommodated him because “ABC/Disney accommodated some people who expressed religious objections to the Covid vaccine policy.” (Plaintiff’s Memorandum of Points & Authorities in Opposition to Defendant’s Motion for Summary Judgment, p. 18:1-2.) Plaintiff cites the deposition of Erin Nguyen, in which she testified that Disney had granted between 100 and 150 exemptions for religious reasons in total. (Plaintiff’s Appendix of Evidence, pp. 1028-1029.) However, Plaintiff advances no evidence demonstrating that those employees had similar working environments or job duties, i.e., Plaintiff advances no evidence that Defendant was able to accommodate another actor on a television show. Nor does Plaintiff advance evidence that those who received exemptions were not required to follow other Covid-19 protocols, which he could not have followed, e.g., masking and social distancing.

Plaintiff argues that he was terminated based upon his political beliefs, having disclosed on social media that he voted for Donald Trump and thought President Trump had done a good job. Plaintiff also suggests that he was terminated for making public statements opposing vaccine mandates. FEHA prohibits termination of employment based upon “race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, generic information, martial status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status” (Gov. Code, § 12940(a).) FEHA does not extend to political beliefs.

The Court has considered Plaintiff’s remaining arguments and finds none to be persuasive. Therefore, the Court grants summary adjudication of the second cause of action.

C. Third Cause of Action

Plaintiff’s third cause of action is medical condition discrimination under FEHA. It is unlawful under FEHA to terminate a person’s employment based upon a “physical disability, mental disability, [or] medical condition,” among others. (Gov. Code, § 12940.) The term “medical condition” is narrowly defined as follows: (1) “Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer,” or (2) “Genetic characteristics.” (Gov. Code, § 12926(i).) Plaintiff predicates his claim upon having “a physical/medical condition” that is “being unvaccinated.” (Plaintiff’s Response to Defendant’s Separate Statement, ¶ 95; see also Second Amended Complaint, ¶ 64.) This is not a “medical condition” under FEHA.

Plaintiff attempts to characterize his status of “being unvaccinated” as a disability, arguing that a disability is defined as a “physical or mental impairment,” which includes “an immune condition.” (See Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion for Summary Judgment, p. 19:6-7.) Plaintiff is incorrect. In fact, a physical disability is a “physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that . . . [a]ffects one or more . . . body systems . . . [and] [l]imits a major life activity.” (Gov. Code, § 12926(m)(1).) Plaintiff’s decision not to receive a COVID-19 vaccination does not satisfy this definition.

Plaintiff also argues that he was perceived as having a disability and was terminated as a result of this perception. The Court rejects Defendant’s argument that Plaintiff did not raise this issue in his complaint to the Department of Fair Employment and Housing (“DFEH”), which is a prerequisite to filing a civil action. In fact, Plaintiff alleges that he experienced discrimination “based on a perceived disability, the perception that [he] [has] an inferior immune system to COVID-19.” (Plaintiff’s Appendix of Exhibits, p. 668.) There is insufficient evidence that Defendant perceived Plaintiff as having an autoimmune disorder.

The Court has considered Plaintiff's remaining arguments and finds that none is persuasive. Therefore, the Court grants summary adjudication of the third cause of action.

D. Fourth Cause of Action

Plaintiff's fourth cause of action is for retaliation in violation of FEHA. This cause of action is derivative of the second cause of action. The Court grants summary adjudication for the same reasons.

E. Fifth Cause of Action

Plaintiff's fifth cause of action is for wrongful termination in violation of public policy. Plaintiff alleges that Defendant terminated him for "asserting his constitutional rights, including his right to religious freedom and bodily integrity/autonomy, and his statutory rights, including rights protected by the FEHA." (Second Amended Complaint, ¶ 74.) This theory is derivative of the second cause of action. Code of Civil Procedure section 437c(f) precludes the Court from granting summary adjudication unless it resolves an entire cause of action. However, where separate causes of action are comingled into one, the court may grant summary adjudication of the individual claims. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 727, citing *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855.) Therefore, the Court grants summary adjudication of the fifth cause of action to the extent it relies on alleged violations of FEHA.

Plaintiff alleges that "ABC also fired [him] for expressing political and social views that it disagreed with and that it wanted to discourage its employees from taking." (Id., ¶ 74.) Plaintiff predicates this theory on having disclosed on social media that he voted for Donald Trump and thought President Trump had done a good job, and having made public statements opposing vaccine mandates. The elements of a claim for wrongful termination in violation of public policy are as follows: (1) There was an employer-employee relationship; (2) The employer terminated the plaintiff's employment; (3) The termination was substantially motivated by a violation of public policy; and (4) The discharge caused the plaintiff harm. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641.)

In order to assert a cause of action for wrongful termination in violation of public policy, Plaintiff must identify a violation of "constitutional, statutory, or regulatory provisions." (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821, citations omitted). Plaintiff

predicates this cause of action upon alleged violations of Labor Code sections 1101 and 1102. Labor Code section 1101 prohibits employers from making, adopting, or enforcing any “rule, regulation, or policy” that prohibits or prevents employees from engaging or participating in political activity, or controlling or directing employees’ political activities or affiliations. (Lab. Code, § 1101.) There is no evidence that Defendant implemented its Covid-19 policy in order to curtail employees’ political activities, and Plaintiff identifies no other rule, regulation, or policy.

Plaintiff also predicates this claim on an alleged violation of Labor Code section 1102. Labor Code section 1102 prohibits an employer from coercing or influencing employee’s political activities through threat of discharge or loss of employment. (Lab. Code, § 1102.) In evaluating claims for termination in violation of public policy, the Court follows the burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (See *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108-1109.) First, Plaintiff must show that he engaged in protected activity; Defendant terminated him; and there was a causal link between the protected activity and the employer’s action. (*Id.*, p. 1109.) Then, the burden shifts to Defendant to provide evidence that there was “a legitimate, nonretaliatory reason” for the termination. (*Ibid.*) Then, Plaintiff must provide “substantial responsive evidence” that Defendant’s reasons were untrue or pretextual. (*Ibid.*)

Plaintiff argues that he was terminated based upon his political beliefs, having disclosed on social media that he voted for Donald Trump and thought President Trump had done a good job. Plaintiff also suggests that he was terminated for making public statements opposing vaccine mandates.

Plaintiff relies on an email chain in September 2021, suggesting that Defendant was planning to terminate him independent of his refusal to get a Covid-19 vaccination. A senior production manager sent an email on September 2, 2021, discussing the assumptions for the Fiscal Year 2022 budget. (See Plaintiff’s Appendix of Evidence, p. 761.) The email states that Plaintiff’s contract ended on June 19, 2021 (which appears to have been a typographical error by typing 2021 instead of 2022). (*Ibid.*) The sender states that Plaintiff “is not being picked up” in 2022, after his contract expires. (*Ibid.*) Someone responded that “we have a notice date of 11/5/21 for [Plaintiff] and inquired “Why can’t we drop him then? He may not be able to work if he refuses to get fully vaccinated any way.” (See Plaintiff’s Appendix of Exhibits, p. 761.) The senior production manager responded: “I worry with the #fireIngo we might be sued if we drop him in November but that was my initial intention -to let him go in November.” (*Ibid.*)

This email chain does not give rise to a triable issue. The email makes clear that Defendant planned to maintain Plaintiff’s employment until June 2022, until he refused to get a Covid-19 vaccination. The email makes clear that Defendant had considered

terminating Plaintiff's employment in November 2022. Defendant had the right to do so under the contract. The parties' contract was for a three-year term, commencing on March 25, 2019, and was divided into six cycles of 26 weeks each. (Second Amended Complaint, Exh. B, ¶ 2.) The contract states that ABC may terminate Plaintiff's services "at the end of any twenty-six (26) week cycle upon not less than six (6) weeks prior notice." (Id., Exh. B, ¶ 3.) This email chain merely establishes that Defendant had considered terminating Plaintiff at the end of the fifth cycle per the contract but decided not to do so in order to avoid a lawsuit. The statement that General Hospital may "drop" Plaintiff in November if he refuses the vaccination is merely a reflection that others knew about his public opposition to vaccinations and were predicting that he may be terminated under the policy.

Nevertheless, the Court has no tentative order on this cause of action, given other evidence in this case. Plaintiff relies on a text message among two executives in which one sent a text message of an image shared by "Ingo" of a "No Vaccine Passport Rally." (See Plaintiff's Appendix of Evidence, p. 840.) The recipient texted: "Ready for a recast!" (Ibid.) The sender then texted: "Yup." (Ibid.) The date of this text was August 21, 2021, after the vaccination policy had been implemented. Plaintiff also relies on texts in which Defendant's executives called him an "ignorant racist" and "nuts." (Plaintiff's Appendix of Exhibits, pp. 855, 875.) One of Defendant's executives also called him "an idiot." (See Second Amended Complaint, Exh. C.) The parties should be prepared to discuss this evidence, as well as additional evidence on which Plaintiff relies.

F. Sixth Cause of Action

Plaintiff's sixth cause of action is for breach of contract. Plaintiff's contract required him to comply with "all policies of ABC," and "operating and corporate policies now in effect and hereafter promulgated or amended" and the "then-current policies and procedures." (Plaintiff's Response to Defendant's Separate Statement, ¶ 127.) There is no dispute that Plaintiff failed to comply with ABC's Covid-19 policy. Plaintiff argues that there is evidence Defendant violated the implied covenant of good faith and fair dealing. The Court rejects the argument for the reasons discussed above.

However, to the extent this cause of action is derivative of the fifth cause of action, the Court has no tentative.

CONCLUSION AND ORDER

Based upon the foregoing, the Court orders as follows:

1. The Court grants Defendant's motion for summary judgment.
2. The Court advances and vacates all dates.
3. Defendant may lodge a proposed judgment if necessary.
4. The Court denies Plaintiff's motion for summary adjudication as moot.
5. Defendant's counsel shall provide notice and file proof of such with the Court.

Dated: _____, 2023

/s/ Stephen I. Goorvitch

Stephen I. Goorvitch

Superior Court Judge
