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JOHN S. KAO

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

JOHN S. KAO, Dr. Kao, vs. UNIVERSITY OF SAN FRANCISCO, an entity of unknown organization; MARTHA PEUGH-WADE; and DOE ONE through DOE TWENTY, inclusive. . Defendants. AND RELATED CROSS-ACTION	No.: CGC-09-489576 Case Filed: June 17, 2009 Trial Date: January 24, 2011 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR NEW TRIAL AND TO VACATE JUDGMENT OR DECREE** **CCP §§ 657, 663** Judge Wallace P. Douglass Dept. 318 Hearing Date To Be Set By Court

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiff JOHN S. KAO will move for a new trial in this matter pursuant to Code of Civil Procedure Section 657, at a date, time and location to be set by the court, on the grounds that the evidence is insufficient to justify the judgment, the judgment is against the law and the court committed an error in law during the trial. This motion is based on this Notice, the accompanying memorandum of points and authorities, the minutes, records and files in this action and such other evidence as may be presented and considered at the hearing of this motion.

PLEASE TAKE FURTHER NOTICE that Plaintiff JOHN S. KAO will move pursuant to Code of Civil Procedure Section 663 to set aside the judgment or decree in this matter and to have another and different judgment entered, at a date, time and location to be set by the court, on the grounds that the judgment or decree is based on an incorrect or erroneous legal basis for the decision and that the decision is not consistent with or supported by the facts. This motion is based on this Notice, the accompanying memorandum of points and authorities, the minutes, records and files in this action and such other evidence as may be presented and considered at the hearing of this motion.

Dated: April 18, 2012.

KATZENBACH AND KHTIKIAN

By_____
Christopher W. Katzenbach
Attorney for plaintiff/cross-defendant JOHN S. KAO

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I. INTRODUCTION TO MOTIONS.

Plaintiff JOHN S. KAO seeksa new trail or a new judgment or decree because of the following:

1. As to the judgment on the First Cause of Action (demand for psychological examination), plaintiff moves:

(a) For a New Trial on the grounds that the evidence is insufficient to justify the judgment and the judgment is against the law based on the evidence submitted at trial, because on the evidence submitted at trial plaintiff was discharged for his refusal to submit to a psychological examination, defendant did not establish a defense that the examination was job-related or required by business necessity, and the evidence showed that equally effective alternatives to a psychological examination existed.

(b) To Vacate the judgment, enter a new judgment on liability and direct a new trial on damages, because on the evidence submitted at trial plaintiff was entitled to a judgment in his favor that the demand for a psychological examination was unlawful under the Fair Employment and Housing Act.

2. As to the Fifth Cause of Action (Unruh Act), plaintiff moves:

(a) For a New Trial on the grounds that the evidence is insufficient to justify the judgment and the judgment is against the law based on the evidence submitted at trial, because on the evidence submitted at trial plaintiff was entitled to a judgment in his favor that he was banned from campus because the University of San Francisco ("USF") perceived plaintiff as disabled and the ban was therefore unlawful under the Unruh Civil Rights Act (Civil Code § 51).

(b) To Vacate the judgment, enter a new judgment on liability and direct a new trial on damages, because on the evidence submitted at trial plaintiff was entitled to a judgment in his favor that he was banned from campus because the University of San Francisco ("USF") perceived plaintiff as disabled and the ban was therefore unlawful under the Unruh Civil Rights Act (Civil Code § 51).

3. As to the Third Cause of Action (Confidentiality of Medical Information Act ("CMIA")), plaintiff moves:

(a) For a New Trial on the grounds that the evidence is insufficient to justify the judgment and the judgment is against the law based on the evidence submitted at trial, because on the evidence submitted at trial plaintiff was discharged for refusing to authorize release of medical information and defendant did not establish that his discharge was necessary in the absence of such an authorization.

(b) To Vacate the judgment, enter a new judgment on liability and direct a new trial on damages, because on the evidence submitted at trial plaintiff was discharged for refusing to authorize release of medical information and defendant did not establish that his discharge was necessary in the absence of such an authorization.

4. As to the Sixth Cause of Action (Defamation) plaintiff moves:

(a) For a New Trial on the grounds that the court erred in granting non-suit on the basis that the communications with Dr. Reynolds were privileged by the litigation privilege.

5. For a new trial, on the grounds that the court committed an error in law, to plaintiff's prejudice, by:

(a) Admitting the testimony of Hussein Borhani on damages, as this testimony was irrelevant to any issue of damages and prejudicial to plaintiff as it amounted to an attack on his character.

(b) Admitting the testimony of James Cawood and James Missett, as this testimony attempted to tell the jury how it should rule on the evidence presented in this case.

II. ARGUMENTS IN SUPPORT OF MOTIONS.

A. THE EVIDENCE AT TRIAL DID NOT ESTABLISH A "BUSINESS NECESSITY" DEFENSE AS A MATTER OF LAW.

1. USF's "Business Necessity" defense rests on a claim that it can treat employees with perceived mental disabilities differently than non-disabled employees.

USF demanded a mental examination of Dr. Kao because several faculty members perceived Dr. Kao as suffering from a mental disability that they believed made him dangerous. USF justified the demand for a mental examination as a "business necessity" because this was a way of determining if Dr. Kao suffered from some mental disability that made him dangerous.

The fundamental flaw in USF's position is that it seeks to treat disabled and non-disable employees differently based on a subjective impression that an employee suffers from some mental disability. But for this perception of a mental disability, nothing that Dr. Kao is accused of doing rises above the kind of workplace behavior that—at most—would have been subject to disciplinary action under USF's established policies applicable to non-disabled employees, including the collective bargaining agreement (Exh. 8), its policy against harassment (Exh. 6) or its violence prevention policy (Exh. 91).

To put it simply, USF's "business necessity" argument asserts that an employer is justified in treating disabled and non-disabled employees differently whenever an employer perceives that a workplace problem is a product of a disability rather than mere misconduct or poor job performance. This is discrimination on the basis of disability, not "business necessity."

The law, however, requires equal treatment. *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). Where an employee cannot do the job, either because of job-performance issues or workplace misconduct, the employee is subject to discharge, whether disabled or not disabled. Accordingly, if USF believed that Dr. Kao could not do his job because he was engaged in conduct that frightened people, USF had to apply to Dr. Kao the same disciplinary standards it would have applied to non-disabled employees. USF had no "business necessity" for a mental examination where it could readily apply to Dr. Kao the same workplace standards it applies to all other employees, disabled or not disabled.

The possibility of a medical or mental examination would arise only if the employee sought to avoid the natural consequences of an inability to perform the job and asked for a reasonable accommodation. In that situation, as part of the interactive process that begins when an employee asks for an accommodation, the employer might ultimately request limited medical information directly bearing on the reasonableness of a particular accommodation the employee sought. *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578, 1598. However, it is up to the employee to request an accommodation when they are faced with problems meeting the employer's job requirements. *Milan v. City of*

Holtville (2010) 186 Cal.App.4th 1028, 1035-1036. The employer, when faced with issues of job performance, may ask if an employee needs an accommodation, but it is up to the employee to ask for one. *Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384-1385. If the employee asks for an accommodation, that would trigger the interactive process and, only then, would the employer have the possible right to seek limited medical information if necessary to determine if a particular accommodation were reasonable. *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n*, supra, 121 Cal.App.4th at 1598.

2. The evidence is that USF's demand for a mental examination rests on the perception that Dr. Kao had a disability that made him dangerous.

Prior to January 2008 and the events of that semester, Dean Turpin and a few faculty members believed Dr. Kao was dangerous. Dean Turpin believed that Dr. Kao was dangerous at the Fall 2007 convocation; Associate Dean Brown reported on January 9, 2008 that three faculty members had previously stated their belief the Dr. Kao "may be capable of some sort of great violence." Exh. 118 (emails) at pp. 1, 2. USF offered no evidence of any kind, however, that Dr. Kao had done *anything* at all to justify such a perception as of that early January time frame.[1] All the "incidents" with Dr. Kao occurred afterwards.

Similarly, the evidence is replete with references to USF's perception that Dr. Kao was suffering from a mental disability. For example, the evidence shows that people thought Dr. Kao might be "psychotic" and paranoid, delusional or having hallucinations (Exh. 49, pp. 1, 2, 3; Exh. 75, p. 1; Exh. 76), or suffering from a "mental or emotional condition" that made him dangerous (Exh. 50, pp. 1, 2). USF referred to Dr. Kao's history of depression (Exh. 55, p. 1). Indeed, a demand for a mental examination makes little sense other than because of USF's perception the Dr. Kao had a mental disability.

[1] The incident in Dr. Zeitz' office on January 3, however viewed, could not support a belief in dangerousness at the Fall 2007 convocation or the statements of the two other faculty members Dean Brown referenced in his email.

3. USF's demand for a mental examination, rather than applying its normal disciplinary rules, discriminated against Dr. Kao because of a perceived disability by treating him differently than non-disabled employees.

USF's assertion of "business necessity" for a mental examination rests on nothing more than a stereotype that persons with a perceived mental disability are more dangerous than others, and therefore should be treated differently and outside the normal disciplinary or violence-prevention policies. The law is designed to prevent employers from acting on stereotypes about persons with disabilities to treat them differently. See *Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1037 ("[T]he purpose of the `regarded-as' prong is to protect individuals rejected from a job because of the `myths, fears and stereotypes' associated with disabilities"), disapproved on another point by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6. Such discriminatory stereotypes cannot meet the "business necessity" standard for a mental examination. It is as if USF was denying employment to Muslims simply because some faculty feared that Muslims were more likely to be terrorists or commit terrorist acts.

Instead, disable persons—like other persons—are entitled to be judged by what they do, not by what others may perceive about their disability based on myths, fears or stereotypes. The trial evidence showed that USF treated Dr. Kao differently than non-disabled persons by jumping to the demand for a mental examination before, and in place of, its normal policies for disciplinary action or violence prevention, and then firing Dr. Kao for not going to this examination rather than because of any misconduct by him.

This last point bears emphasis. No employee has to go to a mental examination merely to satisfy the fears or stereotypes of the employer or other employees. The employer must be able to show the employee has a present inability to do the job safely. "The law clearly was designed to prevent employers from acting arbitrarily against physical condition that, whether actually or potentially handicapping, may present no current job disability or job-related health risk." *American National Ins. Co.* v. *Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 610,

citing *Sterling Transit Co.* v. *Fair Employment Practice Com.* (1981) 121 Cal.App.3d 791, 794, 796.

4. A "business necessity" for a limited and narrowly-tailored examination could arise only if after an employee requested an accommodation and the employer needed such information to assess a possible accommodation for a disability, a situation that never arose in this case.

If USF believed that Dr. Kao's misconduct was a product of a disability (or if Dr. Kao asserted that his misconduct was disability-related), *and* if an accommodation for the disability was possible, then USF was obligated to engage in an interactive process to discuss the situation with Dr. Kao in a desire to find an effective way of accommodating the disability. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54-62. "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). In the context of the interactive process, the need for medical information may arise if necessary to determine if an accommodation is possible. See *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578, 1598. But this need is not the right to an unlimited inquiry, but only to a limited inquiry into information necessary to determine if accommodation is possible. Rather (*Taylor v. Phoenixville School District* (3d Cir. 1999) 184 F.3d 296, 315, cited and quoted in *Auburn Woods*, supra, 121 Cal.App.4th at 1598):

> Disabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal unnecessarily every detail of their medical records because much of the information may be irrelevant to identifying and justifying accommodations, could be embarrassing, and might actually exacerbate workplace prejudice. An employer does not need to know the intimate details of a bipolar employee's marital life, for example, in order to identify or justify an accommodation such as a temporary transfer to a less demanding position.

Accord: *Conroy v. New York State Dept. of Correctional Serv.* (2 Cir. 2003) 333 F.3d 88, 98 (the employer must show that "the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary.").

But in Dr. Kao's case, USF never sought to engage in an interactive process regarding disability accommodation. USF therefore cannot show a "business necessity" in the context of a need for medical information to facilitate the interactive process. Indeed, USF never indicated to Dr. Kao that it was concerned about a disability at all. USF's June 18 and June 24 letters (Exhs. 30, 34) referred to frightening "conduct" by Dr. Kao that suggested "unfeigned anger," deliberate efforts to "cause people to believe you will suddenly run into them," bumping "in a manner that suggests intent to do so" and other conduct "that conveys the message you are doing so to frighten" people. When Dr. Kao asked for more information about these allegations, USF refused to provide any more information (Exh. 31, 32, 33) and demanded a comprehensive—not narrowly-tailored—mental examination (Exhs. 34, 36) without any indication that this demand was subject to any discussion or change (Exh. 43).

5. USF presented no evidence that Dr. Kao had a mental condition that posed a risk of health or safety.

Finally, the evidence USF presented did not establish a defense based on a risk of health or safety.

While health and safety risks may be asserted as an affirmative defense to a claim of disability discrimination (*Sterling Transit Co.* v. *Fair Employment Practice Com.*, supra, 121 Cal.App.3d at 795, 798), USF did not raise such a defense in its answer and USF offered no jury instructions on that defense. Accordingly, USF has waived any such defense in this case.

Assuming for sake of argument, however, that a health-or-safety defense might be incorporated into the "business necessity" defense, USF's evidence did not establish such a defense. The employer has the burden of proving the defense of the threat to the health and safety of other workers by a preponderance of the evidence. *Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252.

USF offered no evidence that Dr. Kao posed any such threat. Dr. Kao offered the testimony of his treating psychiatrist (Dr. Terr) that he posed no such threat. Without evidence the Dr. Kao posed a threat to health or safety, USF could not establish a heath-or-safety defense, either alone or as incorporated into a "business necessity" defense. *Ibid.* ("There was, in fact, no

medical evidence to support Raytheon's defense of protecting the health and safety of others."). Speculation or conjecture is not enough. *Sterling Transit Co.* v. *Fair Employment Practice Com.*, supra, 121 Cal.App.3d at 799 ("Sterling's evidence, at best, shows a *possibility* Bustamante might endanger his health sometime in the future. In the light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person.").

USF's asserted need to provide a safe workplace does not allow it to discriminate against persons with perceived disabilities. USF had a violence-prevention policy (Exh. 91) in place it could use to ensure a safe workplace. Indeed, its violence-prevention policy was designed to achieve exactly that goal. To ignore that policy whenever USF perceives someone as suffering from a mental disability is, again, to countenance discrimination against the disabled. Discrimination is not, and cannot be, a "business necessity" justifying a mental examination.

B. THE EVIDENCE AT TRIAL SHOWED THAT DR. KAO WAS BANNED FROM THE CAMPUS BECAUSE USF PERCEIVED HIM TO BE DISABLED.

Labor Relations Director David Philpott acknowledged that Dr. Kao's ban from campus was because of a perception of Dr. Kao's mental state. He testified (Rough Transcript of Testimony, David Philpott, p. 175:6-11):

> Q. . . . In other words mental instability was a factor in continuing the ban from campus?
>
> 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.

USF offered no evidence of any reason for the ban other than safety concerns arising from its perception of Dr. Kao as mentally disabled or unstable. Linking the ban to Dr. Kao's refusal to attend a psychological examination, on its face, demonstrates that the ban arose from a perception that Dr. Kao suffered from some mental disability that made him unusually dangerous.

Banning Dr. Kao from campus because of a perceived "mental instability" is discrimination on the basis of disability and a violation of the Unruh Act. See *Munson v. Del*

Taco, Inc. (2009) 46 Cal.4th 661, 665, 673. There is no contrary evidence in the record that would justify Dr. Kao's ban other than a perception of a mental disability.

C. DR. KAO WAS FIRED FOR REFUSING THE DEMAND FOR A MENTAL EXAMINATION THAT REQUIRED DR. KAO TO EXECUTE A RELEASE FOR MEDICAL RECORDS. USF DID NOT PRESENT EVIDENCE THAT DR. KAO'S DISCHARGE WAS JUSTIFIED INDEPENDENTLY OF HIS REFUSAL TO RELEASE HIS MEDICAL RECORDS.

The CMIA prohibits an employer from discriminating against employees who refuse to authorize release of medical information. Civil Code § 56.20(b). "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* (see Civ. Code, § 56.11)". *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861.

USF's demand that Dr. Kao authorize disclosure of all his medical information to Dr. Reynolds (Exh. 34) violated the prohibition requiring disclosure of an employee's medical information "to the employer or others" (*Loder*, supra at 861). While the CMIA allows a medical provider already in possession of medical information to disclose limited "fitness-for-duty" information to the employer **(**Civil Code § 56.10(c)(8)(B)), that does not mean that the disclosure of medical information *to the medical provider itself* can be compelled without an authorization from the employee. The disclosure of medical information to the "fitness-for-duty" examiner still requires an authorization under Civil Code § 56.10(a).

When the employee refuses to give an authorization, the CMIA permits an employer to take "such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part." Civil Code § 56.20(b). *Loder*, supra, at 861.

USF offered no evidence why it was necessary to fire Dr. Kao when he would not release his medical information to Dr. Reynolds. USF did not assert that it fired Dr. Kao for any reason *other than* his refusal to release this medical information for a mental examination. USF did not show that Dr. Kao had committed any misconduct that would justify his discharge independently of his refusal to undergo a mental examination. USF did not present any evidence that Dr. Kao was actually dangerous to anyone such that his discharge was necessary on that theory. Rather,

in firing Dr. Kao for "insubordination" in not releasing records for the mental examination, USF is simply seeking an end-run around the statute's prohibition of penalizing employees for refusing to release medical information.

D. THE COURT ERRED IN GRANTING NON-SUIT ON THE DEFAMATION CAUSE OF ACTION BASED ON THE LITIGATION PRIVILEGE.

The Court erred in granting non-suit on the defamation cause of action based on application of the litigation privilege to USF's communications with Dr. Reynolds.

The Litigation Privilege protects a pre-litigation communication—such as the communications sent Dr. Reynolds—"only when it relates to litigation that is contemplated in good faith and under serious consideration." *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251. This means that "at the time the communications were made, litigation was not a mere possibility on the horizon, but was actually proposed, seriously and in good faith, as a means of resolving the dispute." *Edwards v. Centrex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 37. "Whether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact." *Action Apartment Assn., Inc. v. City of Santa Monica*, supra, 41 Cal.4th at 1251-1252.

In this regard, it is not enough that litigation might be the outcome if the dispute were not resolved. In *Edwards v. Centrex Real Estate Corp.*, supra, 53 Cal.App.4th at 36, the appellate court held:

> The critical point of each of these four elements is that the mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future is insufficient to invoke the litigation privilege. (Rest.2d Torts, §§ 586-588, com. e, pp. 247-251.) In every case, the privileged communication must have some relation to an imminent lawsuit or judicial proceeding which is actually contemplated seriously and in good faith to resolve a dispute, and not simply as a tactical ploy to negotiate a bargain.

Accordingly, "[i]t is not the mere *threat* of litigation that brings the privilege into play, but rather the actual good faith contemplation of an imminent, impending resort to the judicial system for the purposes of resolving a dispute." *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1380.

USF's communications with Dr. Reynolds were in support of its demand for a mental examination. That was a business purpose unrelated to contemplated litigation. To apply the litigation purpose in this context would mean that an employer could lie with impunity to any doctor hired to conduct a medical or mental examination of an employee with the illegitimate object of prejudicing the examination against the employee. The litigation privilege does not go so far in protecting business communications that are unrelated to any seriously-contemplated litigation.

E. THE COURT ERRED IN ADMITTING THE EXPERT TESTIMONY OF BORHANI AND CAWOOD.

1. Borhani's testimony was inadmissible on the issue of mitigation of damages and prejudicial character testimony.

USF's economic expert, Hussein Borhani, testified that Dr. Kao should have been able to get another job in various mathematically-related positions. He also testified to average length of unemployment. This testimony was entirely inadmissible.

The rule on mitigation is that it is defendants' burden to show the existence of comparable jobs: "However, before 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; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." *Parker v. Twentieth Century-Fox Film Corp* (1970) 3 Cal.3d 176, 182.

Dr. Kao was a tenured university professor at a four-year college. The only comparable or substantially similar job is a tenured faculty position at a university or four-year college similar to USF. A non-teaching job in government or the private sector is not comparable or substantially similar to the job of a university professor. *Gonzales* v. *Internat. Assn. of Machinists* (1963) 213 Cal.App.2d 817, 822-823 (union employee not required to accept job in mitigation that "did not have the protective cloak of respondent's union."), cited with approval in *Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 Cal.3d at 182 fn. 5 for the principle that the "plaintiff could not be required to accept different employment or a nonunion job."

Allowing Borhani's expert testimony allowed USF to present plaintiff as greedy in seeing full damages for loss of his tenured position at USF. USF attacked plaintiff's economic expert on exactly that point.

This amounted to an improper attack on plaintiff's character in not seeking or obtaining other dissimilar employment and in seeking the full amount of damages where the evidence did not show *any* comparable employment was available. Allowing Borhani's testimony necessarily prejudiced the jury against him, effectively put the burden on plaintiff to justify why he did not seek non-university employment and confused the jury because his testimony was at such variance with the jury instruction on mitigation that required proof of comparable jobs. The jury could only have assumed from the admission of Borhani's testimony that the standard for mitigation was as Borhani asserted and that plaintiff was rightly faulted as "greedy" for seeking damages for his full losses.

2. Cawood's and Missett's testimony was improper expert testimony as to how the jury should decide the case.

Cawood testified that USF acted properly in demanding a mental examination and in accord with "best practices" based on the evidence it had. Dr. Missett also testified that the demand for a mental examination was justified based on the evidence USF had. These witnesses testified that USF had a legal duty to act because of its obligation to provide a safe workplace.

Expert (or lay) witnesses may not give opinions as to parties' legal obligations or give opinions as to a parties' liability. *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1185; See *People v. Torres* (1995) 33 Cal. App.4th 37, 45-47. Cawood's and Missett's testimony crossed this line, by telling the jury that USF acted properly under the law and under its legal obligations to provide a safe workplace.

This testimony was prejudicial, as it told the jury how to decide the case with the imprimatur of an expert opinion.

III. CONCLUSION.

The Court should, (a) Grant a new trial for the reasons stated in this motion, and/or (b) correct the decree and/or judgment as stated in this motion.

Dated: April 18, 2012.

KATZENBACH AND KHTIKIAN

By_____
Christopher W. Katzenbach
Attorney for plaintiff/cross-defendant JOHN S. KAO