

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

Lewis v. CoreCivic of Tennessee, LLC

Case No. 21-cv-01385-JAH-BGS (S.D. Cal. Mar. 15, 2023) · No. 21-cv-01385-JAH-BGS · Decided March 15,
2023

OPINION

1 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 SOUTHERN DISTRICT OF CALIFORNIA
8 9 Marva LEWIS, Case No.: 21-cv-01385-JAH-BGS 10 Plaintiff, ORDER ON JOINT
DISCOVERY 11 v. MOTION 12 CORECIVIC OF TENNESSEE, LLC, et [ECF 23] al., 13
Defendants. 14 15 I. INTRODUCTION 16 17 On February 14, 2023, the parties contacted the
Court with a discovery dispute 18 involving Plaintiff’s Notice of a Federal Rule of Civil
Procedure 30(b)(6)1 Deposition to 19 20 1 Rule 30(b)(6) provides: 21 In its notice or subpoena, a
party may name as the deponent a 22 public or private corporation, a partnership, an association, a
23 governmental agency, or other entity and must describe with reasonable particularity the
matters for examination.

The named 24 organization must then designate one or more officers, directors, 25 or managing
agents, or designate other persons who consent to testify on its behalf; and it may set out the
matters on which each 26 person designated will testify....

The persons designated must 27 testify about information known or reasonably available to the
organization.... 28 1 which Defendant had objected. (ECF 23 at 2.) Topic 14 of the Notice
requests a Rule 2 30(b)(6) witness on the issue of: “Any and all vacant or unassigned positions at
3 Defendant’s Boston Avenue, Oceanview, and OMDC facilities in 2019.” Following the 4
telephonic discovery conference, the Court ordered that the parties file a joint brief 5 addressing
the issue.

(ECF 22.) On February 21, 2023, Plaintiff and Defendant filed the 6 joint brief. (ECF 21.) 7 II.
PARTIES’ ARGUMENTS 8 Plaintiff argues the requested the discovery is necessary for her “to
establish claims 9 No. 5 (Failure to Provide Reasonable Accommodation in Violation of...
[California 10 Employment and Housing Authority (FEHA), Cal. Gov’t Code § 12940(m)] and
No. 6 11 (Failure to Engage in the Interactive Process in Violation of FEHA[, Cal. Gov’t Code §
12 12940(n)]])” in her Complaint.

(ECF 23 at 2.) Specifically, she argues that “[i]f there 13 were vacant or unassigned positions at
Defendant’s Boston Avenue, Oceanview, and 14 OMDC facilities in 2019, then Defendant was
obliged to evaluate them as part of the 15 reasonable accommodation/interactive process to
accommodate Plaintiff’s disability.” 16 (Id.) 17 Defendant counters that vacant positions with

Defendant during 2019 are 18 “irrelevant to Plaintiff’s claims,” “not proportional to the needs of the case,” and “grossly 19 overbroad” because “Plaintiff was on leave and unable to work from April 22, 2019 to 20 October 21, 2019 and was not terminated until November 4, 2019.” (ECF 23 at 3.)

21 Defendant argues that “Topic 14 is irrelevant because Plaintiff does not plead that she 22 ever told Defendant that she would be returning to work with or without a disability.” 23 (Id.) “Without informing Defendant she would return to work with a disability and/or 24 with work restrictions due to a disability, Defendant had no obligation to accommodate 25 26 27 Fed.

R. Civ. P. 30(b)(6). 2 The Court’s page citations are to the CM/ECF electronic pagination unless otherwise 28 1 nonetheless skip numerous steps of the accommodation process and go straight to looking 2 for other open positions.” (Id.) Defendant notes, “An employer’s obligation to provide 3 any accommodation is triggered when the employee makes the limitations of her 4 disability known to the employer.” (Id.)

Finally, Defendant notes that an employer “has 5 no duty to accommodate by way of reassignment to a different position if the 6 restructuring of her current job provided a reasonable accommodation.” (ECF 23 at 4.) 7 Defendant points out that Plaintiff does not plead that she could not perform the essential 8 functions of her position or that she could not have been accommodated in her position.

9 (Id.) 10 III. LEGAL STANDARDS 11 A. Discovery 12 Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any 13 nonprivileged matter that is relevant to any party’s claim or 14 defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in 15 controversy, the parties’ relative access to relevant information, 16 the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the 17 proposed discovery outweighs its likely benefit.

Information 18 within this scope of discovery need not be admissible in evidence to be discoverable. 19 20 Fed. R. Civ. P. 26(b)(1). 21 “District courts have broad discretion in controlling discovery” and “in 22 determining relevancy.” *Laub v. Horbaczewski*, 331 F.R.D. 516, 521 (C.D. Cal. 2019) 23 (citing *Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012)).

24 B. FEHA 25 “Under the FEHA it is an unlawful employment practice for an employer ‘to fail to 26 make reasonable accommodation for the known physical or mental disability of an 27 applicant or employee.’” *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376 (2000) 28 (quoting Cal. Gov’t Code § 12940(m)(1)). “The essential elements of a failure to 1 accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the 2 plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the 3 position); and (3) the

employer failed to reasonably accommodate the plaintiff's disability." *Cuiellette v. City of Los Angeles*, 194 Cal. App.

4th 757, 766 (2011). "An employer or other covered entity has an affirmative duty to make reasonable accommodation(s) for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship." Cal. Code Regs. tit.

2, § 11068(a). 10 "However, the employee does not bear the burden of initiating the interactive process 11 where the employer is aware of or recognizes the employee's need for accommodation, 12 or if the need for accommodation is obvious." *Stoll v. The Hartford*, No. 05CV1907 IEG 13 (LSP), 2006 WL 3955826, at *5 (S.D. Cal. 2006) (internal quotation marks omitted) 14 (citing *Humphrey v. Mem'l Hosps.*

Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001) 15 (awareness); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), rev'd on 16 other grounds sub nom. *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (recognition); 17 and *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1436 (1996) 18 (obviousness)). 19 "Once an employer becomes aware of the need for accommodation, that employer 20 has a mandatory obligation under the...

[FEHA] to engage in an interactive process with 21 the employee to identify and implement appropriate reasonable accommodations." *Ravel v. Hewlett-Packard Enter., Inc.*, 228 F. Supp. 3d 1086, 1097 (E.D. Cal. 2017). "'The 23 interactive process requires communication and good-faith exploration of possible 24 accommodations between employers and individual employees, and neither side can 25 delay or obstruct the process.'" *Id.* (quoting *Humphrey*, 239 F.3d at 1137). "Employers, 26 who fail to engage in the interactive process in good faith, face liability for the remedies 27 imposed by the statute if a reasonable accommodation would have been possible." *Id.* 28 (quoting *Humphrey*, 239 F.3d at 1137).

1 The interactive process imposes burdens on both the employer and employee. The 2 employee must initiate the process unless the disability and resulting limitations are 3 obvious. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001).

The 4 employee must communicate, "in a manner that would be understood by a reasonable 5 employer, that the employee has a disability that requires some sort of accommodation in 6 order for the employee to be able to perform [her] work duties." *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1437 (N.D. Cal. 1996), aff'd sub nom. *Norris v. Sysco Corp.*, 191 F.3d 1043 (9th Cir.

1999). The employee must "specifically identify 9 the disability and resulting limitations, and... suggest the reasonable accommodations." 10 *Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 165 (5th

Cir. 1996); see also *Scotch v. Art 11 Inst. of Cal.-Orange Cty., Inc.*, 173 Cal. App. 4th 986, 1013 (2009). 12 IV. DISCUSSION 13 A. Relevance 14 Turning to the fifth cause of action in Plaintiff's complaint, violation of the FEHA 15 for failure to provide reasonable accommodation in violation of California Government 16 Code § 12940(m) (ECF 1 at 15), Plaintiff alleges in relevant part, "At all times relevant 17 herein, Plaintiff was perceived and/or regarded by Defendant as having a disability as 18 defined under the FEHA" and "Defendant failed and refused to ascertain the availability 19 or feasibility of potential reasonable accommodations to Plaintiff as required by law, and 20 instead terminated Plaintiff's employment in violation of the FEHA." (Compl. ¶¶ 78, 80; 21 see also ECF 1 at 16.)

22 The Sixth Cause of Action in Plaintiff's complaint, a second violation of FEHA, 23 for failure to engage in the interactive process," alleges, "At all times relevant herein, 24 Plaintiff was perceived and/or regarded by Defendant as having a disability as defined 25 under the FEHA"; "Plaintiff gave notice to Defendant that she had a disability/medical 26 condition and required reasonable accommodations, including without limitation, taking 27 reasonable and finite time off work to receive treatments and to heal from the symptoms 28 associated with her disability"; "At no time did Defendant engage in a timely, good faith, 1 interactive process with Plaintiff to determine whether her disability would affect the 2 performance of the essential functions of her job or whether reasonable accommodations 3 would allow Plaintiff to perform the essential functions of her job in spite of her 4 disability" and that "Rather than engage in a good faith interactive process to ascertain 5 reasonable accommodations that would enable Plaintiff to return to work, Defendant 6 terminated her employment." (Compl. ¶¶ 91, 93, 94, & 96.)

7 Plaintiff's allegations, in short, allege that Defendant knew Plaintiff was disabled 8 and made no accommodation at all. Although Defendant would have no duty to 9 accommodate by way of reassignment to a different position if the restructuring of 10 Plaintiff's current job provided a reasonable accommodation, see *Spitzer*, 80 Cal. App. 11 4th at 1386, Plaintiff alleges that Defendant failed to make any reasonable 12 accommodation at all, even including restructuring her then-current position.

In 13 Plaintiff's complaint, at least two legal theories for this claim—failure to restructure 14 Plaintiff's then-current job and failure to assign to a different position—are on the table. 15 As a result, the vacant or unassigned positions at the three named facilities are relevant to 16 her fifth and sixth causes of action. 17 Further, "To prevail at trial on a claim for failure to engage in the interactive 18 process, an employee 'must identify a reasonable accommodation that would have been 19 available at the time the interactive process should have occurred—i.e., the 20 accommodation that the interactive process should have produced.'" *Carballo v. Barr*, 21 690 F. App'x 1006, 1008-09 (2017) (quoting *Scotch*, 173 Cal. App.

4th at 1018). 22 Plaintiff's "failure to engage claim," then, will require that she prove there would have 23 been a reasonable accommodation available at the time the interactive process should 24 have occurred that the interactive process would have produced. See *id.* Thus, the vacant 25 or unassigned positions at the three named facilities are relevant to Plaintiff proving her 26 sixth cause of action.

27 Defendant argues that "Topic 14 is irrelevant because Plaintiff does not plead that 28 she ever told Defendant that she would be returning to work with or without a disability." 1 (ECF 23 at 8.) "Without informing Defendant she would return to work with a disability 2 and/or with work restrictions due to a disability, Defendant had no obligation to 3 accommodate nonetheless skip numerous steps of the accommodation process and go 4 straight to looking for other open positions." (*Id.*)

Defendant notes, "An employer's 5 obligation to provide any accommodation is triggered when the employee makes the 6 limitations of her disability known to the employer." (*Id.*) 7 On April 23, 2019, Plaintiff's doctor recommended she take a leave of absence 8 until further notice. (Compl. ¶ 17; see also ECF 1 at 5.) Plaintiff had complained of 9 stress-induced psychological trauma.

(Compl. ¶ 13; see also ECF 1 at 4.) Defendant 10 granted her medical leave from April 22, 2019, to October 21, 2019. (Compl. ¶¶ 15, 24; 11 see also ECF 1 at 5, 6.) Plaintiff submitted paperwork which indicated she could return 12 to regular and customary work on October 21, 2019. 13 The issue presents as to whether Defendant was on notice of her disability to the 14 extent that the interactive process was triggered, and Defendant was obligated to 15 investigate vacant positions.

Plaintiff gave notice to Defendant that she had a 16 disability/medical condition and required reasonable accommodations, including without 17 limitation, taking reasonable and finite time off work to receive treatments and to heal 18 from the symptoms associated with her disability. (Compl. ¶ 93; see also ECF 1 at 5.) 19 Even where the employer believes it has reasonably accommodated the employee 20 by offering a period of disability leave, the employer is not exempt from investigating 21 other accommodations (including other job vacancies), although the employee has not 22 specifically requested those alternative accommodations.

Stoll v. The Hartford, No. 23 05CV1907 IEG (LSP), 2006 WL 3955826, at *7 (S.D. Cal. Nov. 7, 2006) (citing 24 *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 954 (1997)). More broadly, 25 whenever the employer knows of an employee's disability, the employer "has an 26 affirmative duty to make known to the employee other suitable job opportunities with the 27 employer and to determine whether the employee is interested in, and qualified for, those 28 1 positions[.]" *Stoll*, No. 2006 WL 3955826, at *9 (citing *Prilliman*, 53 Cal. App.

4th at 2 950-51). 3 The Court therefore finds that for purposes of discovery the interactive process was 4 triggered to the extent that Plaintiff is allowed discovery of job vacancies. Defendant's 5 objections are best suited for a motion for summary judgment. 6 Defendant also argues that Plaintiff has not pled or asserted the legal theory that 7 she could not perform the essential functions of her position or that she could not have 8 been accommodated in her position.

Respondent would have no duty to accommodate by 9 way of reassignment to a different position if the restructuring of her current job provided 10 a reasonable accommodation. Spitzer, 80 Cal. App. 4th at 1386. However, there is 11 nothing presented that Defendant offered to restructure her position such that it provided 12 a reasonable accommodation. And Plaintiff has alleged that Defendant made no 13 accommodation at all.

14 B. Proportionality 15 Defendant also argues that Plaintiffs request for "[a]ny and all vacant or 16 unassigned positions at Defendant's Boston Avenue, Oceanview, and OMDC facilities in 17 2019" is "not proportional to the needs of the case" and "grossly overbroad." (ECF 23 at 18 3.) Defendant argues that Plaintiff "was on leave and unable to work from April 22, 2019 19 to October 21, 2019 and was not terminated until November 4, 2019." (Id.)

20 Plaintiff has claimed Defendant failed to engage in the interactive process. 21 Searching for alternative reassignments is encompassed by the interactive process. For 22 discovery purposes the Court finds Topic 14 is relevant to this claim.

However, the 23 Court finds the date range of Topic 14 is overly broad. Defendant accommodated 24 Plaintiff with a leave of absence from April 22, 2019, to October 21, 2019. A finite leave 25 of absence is a reasonable accommodation under FEHA, "provided it is likely that at the 26 end of the leave, the employee would be able to perform his or her duties." Hanson v. 27 Lucky Stores, Inc., 74 Cal. App.

4th 215, 226 (Cal. Ct. App. 1999). Given this leave of 28 absence, the Court finds that to the extent Defendant had a duty to search for 1 ||reassignments, that duty began from August 21, 2019, to Plaintiff's termination on 2 || November 4, 2019. 3 CONCLUSION 4 Defendant shall produce a witness responsive to Topic 14 of Plaintiff's Notice of 5 || Deposition under Rule 30(b) (6).

6 7 IT IS SO ORDERED. g Dated: March 15, 2023 p / / 9 on. Bernard G. Skomal 10 United States Magistrate Judge 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28