

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 39

22STCV19481

**JAMES WAHL, et al. vs AMERICAN BROADCASTING
COMPANIES, INC., A DELAWARE CORPORATION**

February 20, 2024

2:02 PM

Judge: Honorable Stephen I. Goorvitch
Judicial Assistant: R. Mendoza
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter: Motion for Summary Judgment

The Court, having taken the matter under submission on 02/14/2024 for Hearing on Motion for Summary Judgment, now rules as follows:

INTRODUCTION

Plaintiffs James Wahl (“James”) and his son, Timothy Wahl (“Timothy”) (collectively, “Plaintiffs”), filed this action against American Broadcasting Companies, Inc. (“ABC” or “Defendant”). Plaintiffs ran the construction shop and special effects department for the ABC-produced soap opera “General Hospital.” After ABC instituted a requirement that its employees get vaccinated against COVID-19, Plaintiffs requested religious exemptions, which were denied. Plaintiffs filed this action for violations of the California Constitution and the Fair Employment and Housing Act (“FEHA”) asserting the following causes of action:

1. Violation of Article 1, section 1 of the California Constitution
2. Religious discrimination/failure to accommodate under FEHA
3. Disability discrimination under FEHA
4. Retaliation under FEHA
5. Wrongful termination in violation of public policy

On October 26, 2023, Plaintiff filed a request to dismiss the third, fourth, and fifth causes of action with prejudice. Now, Defendant moves for summary judgment or, in the alternative, summary adjudication based upon seven issues. Following the hearing, the Court took the motion under submission. Now, the Court grants summary adjudication of the first cause of action and denies summary adjudication of the second cause of action.

PROCEDURAL HISTORY

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Plaintiffs filed this action on June 15, 2022, and the Court accepted this case as related to Ingo Rademacher v. American Broadcasting Companies, Inc., Case Number 21STCV45383. In that case, the Court granted summary judgment and incorporates its order of June 5, 2023, by reference. Now, Defendant moves for summary adjudication of seven issues: (1) The invasion of privacy claim fails because Plaintiffs' union agreed to the vaccination policy; (2) The invasion of privacy claim fails because Plaintiffs had no legally protected privacy interest in continued employment at ABC; (3) The invasion of privacy claim fails because Plaintiffs did not act consistently with an expectation of privacy; (4) The invasion of privacy claim fails because Defendant gave Plaintiffs ample notice of the policy and sufficient time to comply; (5) The invasion of privacy claim fails because Defendant had a compelling interest; (6) The religious discrimination claim fails because Plaintiffs' objections were not sufficiently religious in nature; and (7) The religious discrimination claim fails because Defendant could not have accommodated Plaintiffs.

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. Article 1, section 1 of the California Constitution

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The Court grants summary adjudication of the first cause of action for the same reasons it granted summary adjudication of this claim in *Ingo Rademacher v. American Broadcasting Companies, Inc.*, Case Number 21STCV45383. The Court incorporates its order of June 5, 2023, by reference.

B. Religious Discrimination/Failure to Accommodate under FEHA

Plaintiffs' second cause of action alleges that Defendant discriminated against them on the basis of religion and failed to reasonably accommodate their religious beliefs in 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.) In their reply brief, Defendant argues that the Court should grant the motion because Plaintiffs did not provide a separate statement. The Court has discretion to excuse the lack of a separate statement. (See, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315-316.) The Court does so in this case because the issues are sufficiently clear and discrete that the Court was able to decide the motion without a separate statement from Plaintiffs. Reaching the merits, Defendant moves for summary adjudication based upon two issues. First, Defendant argues that Plaintiffs did not have genuine religious beliefs. Second, Defendant argues that it could not have accommodated Plaintiffs without undue hardship. The Court will examine each issue separately.

1. Whether Plaintiffs had genuine religious beliefs

Defendant moves for summary adjudication of Issue #6: Whether Plaintiffs' objections to the vaccine policy are sufficiently religious in nature to warrant protection under FEHA. The Court granted summary adjudication of this issue in *Ingo Rademacher v. American Broadcasting Companies, Inc.*, Case Number 21STCV45383 because the plaintiff refused to cooperate with the interactive process. By contrast, Plaintiffs cooperated with the interactive process, so the Court reaches the merits of the issue.

A bona fide religious belief is one that is sincerely held. (*Welsh v. United States*, 398 U.S. 333, 339 (1970).) Because this necessarily involves a credibility determination, it is difficult to grant

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summary adjudication of this issue. While Defendant’s counsel identifies seeming inconsistencies, Plaintiffs raise sufficient facts to give rise to a triable issue, viz., their explanations of their religious beliefs. The jury, not the judge, should determine whether Plaintiffs were genuine in their beliefs, given the disputed facts and the necessity of making credibility determinations. In addition, the deposition of Dominick Nuzzi does not benefit Defendant’s motion. Nuzzi testified that he would have been involved in the accommodation process once a request was accepted, and he became involved in the decision whether to accommodate one of the plaintiffs. (See Declaration of Scott J. Street, Exh. I, pp. 11-13.) This testimony suggests that Defendant may have initially believed one of the plaintiffs, which supports both cases: Plaintiffs are father and son, and there is sufficient evidence in the record that they share the same belief system.

At the hearing, Defendants’ counsel argued that his client is entitled to summary adjudication of the second cause of action because Plaintiffs were untruthful in the interactive process of requesting accommodation. Plaintiffs object to the Court considering this argument because it was not clearly raised in the motion for summary adjudication or the memorandum of points and authorities. The Court agrees with Plaintiffs’ counsel that this issue was not raised sufficiently in the motion or memorandum of points and authorities to constitute a basis for relief. While the motion argued that Plaintiffs were untruthful in requesting an accommodation, the argument was made in the context of arguing that Plaintiffs do not hold genuine religious beliefs, not that the alleged lies themselves entitle Defendant to summary adjudication for a procedural reason. Putting aside the due process considerations, the Court does not have a sufficient record to resolve the issue whether Plaintiffs were untruthful during the interactive process. Moreover, the Court is hesitant to adopt Defendant’s counsel’s argument without clear authority. The Court granted summary adjudication on this basis in *Ingo Rademacher v. American Broadcasting Companies, Inc.*, Case Number 21STCV45383 because he refused to cooperate. Whether Plaintiffs were untruthful during the interactive process is more fact intensive and, at heart, is just another way of arguing they did not have genuine religious beliefs. Therefore, the Court denies summary adjudication of the issue whether Plaintiffs had genuine religious beliefs.

2. Whether Plaintiffs could be accommodated

Defendant moves for summary adjudication of Issue #7: Whether Defendant could have reasonably accommodated Plaintiffs without an undue hardship. Defendant focuses on Plaintiffs’ visits to the closed stage of the television show “General Hospital,” not their work in the shop or their occasional work on other shows. Whether a disability or religious belief could be accommodated is a fact-based inquiry. “Ordinarily, the reasonableness of an accommodation is

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an issue for the jury.” (Prilliman v. United Airlines, Inc. (1997) 53 Cal.App.4th 935, 953.) The term “undue hardship” means “an action requiring significant difficulty or expense” based upon the following factors: (1) The nature and cost of the accommodation, (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact of those accommodations upon the operation of the facility; (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees and the number, type, and location of its facilities; (4) The type of operations, including the composition, structure, and functions of the workforce of the entity; and (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities. (See Gov. Code, § 12940(m)(1).)

The Court granted summary adjudication of this issue in Ingo Rademacher v. American Broadcasting Companies, Inc., Case Number 21STCV45383 because the plaintiff was an actor and he conceded the following facts: (1) The plaintiff interacts with other actors on stage when performing the story line; (2) Acting requires the plaintiff to “get very close to other actors;” (3) ABC did not write masking into the storyline of “General Hospital;” (4) The plaintiff could not have acted on “General Hospital” while wearing a mask; and (5) The plaintiff would be in close proximity to others between the ages of 12 and 65 while acting on “General Hospital.” This decision is consistent with other cases in which courts have found that actors cannot be accommodated with pre-vaccine protocols because the nature of their work requires close, unmasked contact with other performers. (See, e.g., Bordeaux v. Lions Gate Entertainment, Inc., --- F.Supp.3d ---, 2023 WL 8108655 (C.D. Cal. Nov. 21, 2023) (Wilson, J.).)

By contrast, Plaintiffs performed different roles than Ingo Rademacher. Plaintiff James Wahl “used to work behind the scenes” and “ran the construction/special effects shop for the show.” (Declaration of James Wahl, ¶ 2.) Plaintiff Timothy James Wahl “worked in the construction/special effects shop for the show.” (Declaration of Timothy James Wahl, ¶ 2.) Plaintiffs’ job duties included “building new sets, setting up and repairing existing sets, assembling and repairing props, and executing special effects on sets, including during filming.” (See Defendant’s Separate Statement, ¶ 60.)

Plaintiffs spent “most of [their] time” in the special effects shop and went to the set only “periodically.” (Declaration of James Wahl, ¶ 4; Declaration of Timothy James Wahl, ¶ 4.) During “a typical week,” Plaintiff James Wahl was on the stage “once a day.” (See Declaration of Steven A. Marenberg, Exh. #1, p. 59:11-13.) Plaintiff Timothy Wahl also was on the stage once a day, but he was on stage with the cast and crew only every other day:

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Q: And, basically, it's fair to say that you were probably [on the set] daily?

A: Yes, because I had to go and check the -- the schedule for the day, in the morning, before the crew was there.

Q: All right. And you were -- if not daily, you were [on the set] when crew was there -- actors or the crew -- what, every other day? Most days a week, would you say?

A: Every other day probably would be a fair assessment.

(Id., Exh. #1, p. 50:5-15.)

Plaintiffs performed their job duties while wearing masks, and they tested for COVID-19 regularly. (Declaration of James Wahl, ¶¶ 3-5; Declaration of Timothy James Wahl, ¶¶ 3-5.) Plaintiff James Wahl sometimes had to get close to unmasked actors:

Q: Okay. And is it accurate to say that although -- when the actors were rehearsing scenes, they were generally masked, and when they were generally shooting the scenes, they were not?

A: That is true.

Q: And you were proximate to them when they were shooting scenes. Correct?

A: Not in close proximity. But, yes, I was near them.

Q: And, really, the proximity could vary depending on what you were doing and what they were doing at the time. Correct?

A: That is true, yes.

Q: All right. So there were times that you might be very close to them, depending on what the scene called for. Correct?

A: That is correct.

...

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Q: [D]escribe the occasions where you would be close to actors on “General Hospital.”

A: If we were doing a gun effect, if we were doing a blood effect, things like that.

Q: Okay. You would have to get pretty close to that?

A: Yes.

(Declaration of Steven A. Marenberg, Exh. #1, pp. 58:14-59:5, 63:2-12.) Plaintiff Timothy Wahl testified that he wore a mask and would try to socially distance while on the set but that was not always possible:

Q: Generally speaking, you would try to distance yourself from the unmasked actors [on the set], correct?

A: Yes.

Q: But there were times when that wasn’t possible, where they were moving in a certain place in the set that they needed to be proximate to you?

A: Yeah. . . . I tried to minimize any contact with unmasked. Usually then they were [un]masked was when the cameras were on. And I was nowhere around when the cameras were on, usually.

(Declaration of Steven A. Marenberg, Exh. #1, p. 51:17-52:12.) According to Dominick Nuzzi, Plaintiffs “would, by necessity, be in close proximity to unmasked actors, sometimes closer than three feet away. The close proximity would last at least thirty seconds and up to several minutes, depending on the social effect needed.” (Declaration of Dominick Nuzzi, ¶ 9.)

Plaintiffs wanted to follow the pre-vaccine protocols that had been in effect from July 2020 through the fall of 2021. Plaintiffs state in their declarations that there were no known problems with these protocols, i.e., production did not have to close due to an outbreak of COVID-19. (See Declaration of James Wahl, ¶¶ 4-5; Declaration of Timothy J. Wahl, ¶¶ 4-5.) Defendants advance no evidence that it had to stop production during this time period due to an outbreak of COVID-19.

Interpreting these facts in the light most favorable to Plaintiffs, as the Court is required to do on

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summary judgment, the record is as follows: (1) On average, Plaintiffs visited the closed set when the cast and crew were present once a day or once every other day; (2) Plaintiffs wore masks when they were on stage and did their best to socially distance from the cast and crew; (3) Everyone else on set was vaccinated due to Defendant's vaccine policy; (4) Usually, Plaintiffs were not in close proximity to actors when the actors were unmasked because the actors were unmasked when filming; (5) Sometimes, Plaintiffs would get closer than three feet to the cast and crew for somewhere between 30 seconds and several minutes; (6) Plaintiffs tested regularly; (7) The relevant time period for consideration of reasonable accommodation was after November 20, 2021, when Plaintiffs were required to get vaccinated; and (8) The measures Plaintiffs wished to follow had been effective from July 2020 through the fall of 2021, without having to stop production due to a COVID-19 outbreak. Based upon this record, the Court's "hands are tied," as they say. There are enough disputed facts that the jury, not the judge, must decide whether Plaintiffs could have been accommodated without an undue hardship to Defendant.

The Court has considered Defendant's remaining arguments. Defendant argues that Plaintiffs could not have been accommodated because they could not maintain a distance of six feet from others. Interpreting the record in the light most favorable to Plaintiffs, however, they were only in close proximity to others for between 30 seconds to several minutes while Plaintiffs were masked and testing regularly and the people with whom they had contact were vaccinated. Defendant's own evidence suggests that vaccines were highly effective. This gives rise to a triable issue whether Plaintiffs posed an undue risk under these circumstances. Similarly, Defendant argues that "the highly contagious Delta variant of the virus was prevalent" during the fall of 2021, but again, whether Plaintiffs' measures and the cast/crew's vaccinations were sufficient is a triable issue. Defendant's arguments must be made to the jury.

CONCLUSION AND ORDER

Based upon the foregoing, the Court grants summary adjudication of the first cause of action. The Court denies summary adjudication of the second cause of action. Based upon this record, the jury, not the judge, must resolve whether Plaintiffs had genuine religious beliefs and whether Defendant could have reasonably accommodated Plaintiffs without posing an undue hardship. The Court's clerk shall provide notice.

The Motion for Summary Judgment filed by American Broadcasting Companies, Inc., a Delaware corporation on 11/20/2023 is Granted in Part.

Certificate of Mailing is attached.

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Deadline