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8
9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In re

Case No. 01-30923 DM

13 PACIFIC GAS and ELECTRIC
COMPANY, a California corporation,

Chapter 11 Case

14 Debtor.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEBTOR'S MOTION FOR
VALUATION OF CLAIM FOR
FEASIBILITY PURPOSES (DEANNE
CANNON, CLAIM NO. 4898)

15 Federal I.D. No. 94-0742640

Date: October 2, 2002
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

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1 INTRODUCTION AND SUMMARY OF CLAIM

2 Deanne L. Cannon (Cannon) alleges in her Proof of Claim (the "Claim") that
3 Pacific Gas & Electric Company ("PG&E" or the "Debtor") owes her \$10 million,
4 purportedly for "violation of civil rights." The only information provided by Cannon to
5 support the Claim is a partial copy of the complaint of discrimination she filed with the
6 California Department of Fair Employment and Housing ("DFEH"). In that charge, Cannon
7 alleges that PG&E denied her reinstatement after she was on disability leave in retaliation
8 for making a complaint of sexual harassment. She also alleges that she was discriminated
9 against on the grounds of disability.

10 Cannon's contentions are meritless as a matter of law. First, several of the events
11 Cannon complains of were isolated actions taken more than a year before she filed her
12 charge with the DFEH, and therefore her claim as to those actions is barred for two reasons:
13 it is untimely and she failed to exhaust her administrative remedies as to them. Second,
14 Cannon cannot prove that she was retaliated against for complaining of sexual harassment
15 because the decisions on reinstatement occurred years after the alleged harassment and were
16 undertaken by PG&E employees and supervisors who had no involvement in the alleged
17 harassment or any investigation into the harassment. Third, Cannon cannot prevail on her
18 disability discrimination complaint because PG&E was required under a collective
19 bargaining agreement to select other employees for the positions Cannon desired. In
20 addition, according to Cannon's own physician she was incapable of performing any work,
21 let alone any work for PG&E, and therefore was not entitled to protection under either state
22 or federal disability discrimination statutes. Finally, Cannon has been rehired by PG&E into
23 the position she requested, and her damages have therefore ceased.

24 For all of these reasons, Cannon's claim may appropriately be valued at zero for
25 feasibility purposes.

26
27 STATEMENT OF FACTS

28 Cannon filed the Claim on August 22, 2001. The basis for the Claim is "violation

1 of civil rights” and the amount claimed is \$10 million. The only documentation that
2 accompanies the Claim is a one-page partial copy of Cannon’s charge of discrimination and
3 retaliation filed with the DFEH. Declaration of Deborah S. Shefler (“Shefler Decl.”)
4 ¶¶2-3 & Exs. A, B.¹

5 Cannon worked for PG&E from 1977 to 1989, when she went on a long-term
6 disability leave. Shefler Decl. Ex. D ¶¶3, 4, 5. Her employment was governed by a
7 collective bargaining agreement (“CBA”) between PG&E and the International Brotherhood
8 of Electrical Workers, Local 1245 (“IBEW”). Id. Ex. E at 2, Ex. 1. The CBA provided that
9 assignments to open positions were to be based on an employee’s seniority. Id. (CBA §18.4
10 (pre-bid procedures) and §18.8 (seniority provision)). The CBA also provided that PG&E
11 could bypass the seniority bidding procedures if an employee who bid for a position lacked
12 the requisite knowledge, skill or physical ability to perform the job. Id. (CBA §18.11).

13 After going on leave, Cannon applied for four positions, one in 1994, two in 1999
14 and one in 2000.² Shefler Decl. Ex. C. Cannon was rejected for one position in 1999
15 because she lacked the requisite seniority. She was rejected for the second position in 1999
16 because she lacked the knowledge and skill to perform the job, which required certain
17 computer skills that Cannon simply did not have. Id. Ex. E.

18 Cannon did possess the necessary skills and seniority for the May 2000 job,
19 which was a meter reader position in Willits, California. Id. However, in December 1999,
20 Cannon’s physician certified that she was totally disabled from performing any work, that
21 her condition had worsened, and that no job modifications would enable Cannon to work.
22 Id. Ex. F. Thus, at the time the job opened in May 2000, Cannon was not qualified due to
23 her disability. In September 2000, this same doctor certified that Cannon could return to
24

25 ¹A complete copy of the charge is attached as Exhibit C to the Shefler Declaration.
26 Also attached to the Shefler Declaration as Exhibit D is a copy of a complaint filed by
27 Cannon in San Francisco Superior Court on December 11, 2001, in violation of the
28 automatic stay.

²As explained below, Cannon’s complaint about PG&E’s failure to reinstate her to the
position in 1994 is untimely as a matter of law.

1 work without restrictions. Id. Ex. G. After sending Cannon for a fitness for duty
2 examination, PG&E ultimately hired Cannon for the meter reader position. Id. Ex. I. She
3 remains a full-time employee of PG&E today.

4 On October 20, 2000, Cannon filed a charge with the DFEH alleging that she had
5 been sexually assaulted by a PG&E supervisor eleven years earlier, in 1989. Id. Ex. C. She
6 also alleges that she was not reinstated because she complained of the sexual assault and
7 because she was disabled. Id. PG&E has no record of Cannon filing a charge mentioning
8 the alleged sexual assault prior to 2000. Id. Ex. E at 4. In December 2001, Cannon filed a
9 lawsuit against PG&E alleging retaliation under Title VII for reporting sexual harassment,
10 and disability discrimination under the California Fair Employment and Housing Act
11 (“FEHA”). Id. Ex. D.

13 ARGUMENT

14 I.

15 CANNON CANNOT SUSTAIN A CLAIM FOR DISABILITY 16 DISCRIMINATION UNDER FEHA WITH RESPECT TO CLAIMS 17 FOR WHICH SHE FAILED TIMELY TO EXHAUST HER ADMINISTRATIVE REMEDIES.

18 Before a plaintiff can bring a complaint for alleged violations of FEHA, he or she
19 must first file a charge with the California Department of Fair Employment and Housing
20 within one year of the alleged discriminatory or harassing conduct. Cal. Gov’t Code
21 §12960. Exhaustion of remedies under FEHA is a jurisdictional prerequisite to filing suit.
22 Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 214 (1982); Martin v.
23 Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1724 (1994). While in some cases
24 an employee may include earlier discriminatory events under a continuing violation theory,
25 there must be a showing that there was a continuing pattern and practice of discriminatory
26 conduct; isolated incidents will not suffice. Morgan v. Regents of the Univ. of Cal., 88 Cal.
27 App. 4th 52, 64-67 (2000) (no continuing violation when employee was turned down for
28 rehire despite making over thirty applications in a two-year period).

1 Here, Cannon's charge with the DFEH was not timely as to all the employment
2 actions of which she complains. Cannon applied for four positions, one in 1994, one in
3 August 1999, one in November 1999 and one in May 2000.³ These were separate, isolated
4 employment decisions, and therefore Cannon had to exhaust her administrative remedies as
5 to each. She failed to do so with respect to the 1994 and August 1999 positions, and
6 therefore PG&E cannot be liable for any failure to reinstate Cannon to those positions.

7
8 II.

9 CANNON CANNOT SUPPORT HER CLAIM FOR DISABILITY
10 DISCRIMINATION BECAUSE PG&E WAS REQUIRED UNDER
11 THE TERMS OF THE CBA TO HIRE OTHER EMPLOYEES FOR
12 THE POSITIONS CANNON SOUGHT, AND BECAUSE CANNON
13 WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY.

14 A. The CBA Precluded PG&E From Hiring Cannon For The Positions She Sought.

15 An employer is not required to override a bona fide seniority system in order to
16 accommodate a disabled employee with reassignment to a position for which the disabled
17 employee otherwise lacks sufficient seniority. Willis v. Pacific Maritime Ass'n, 244 F.3d
18 675, 679-80 (9th Cir. 2001); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir.
19 1999); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998).

20 Here, Cannon was a union member subject to the CBA. That agreement provided
21 that employees with more seniority were contractually entitled to priority when seeking
22 reassignment to an open position. The agreement also provided that PG&E could reassign
23 an employee to an open position in its discretion if the employee had more relevant skills
24 and experience. Cannon lacked sufficient seniority for the position open in August 1999,
25 and she lacked sufficient skills and experience for the position open in November 1999.
26 Cannon had the necessary skills and seniority for the May 2000 meter reader position, but at
27 the time the position opened her doctor stated that she was unable to work in any position.

28 ³As explained below, Cannon had sufficient seniority only for the May 2000 position,
the job she was ultimately given.

1 Once she was medically cleared to work, Cannon was assigned to that position.

2 To the extent Cannon is alleging that PG&E violated the terms of the CBA, her
3 claim is preempted by the Labor Management Relations Act and she has failed timely to
4 exhaust her contractual administrative remedies. 29 U.S.C. §185 (governing claims that
5 require interpretation of collective bargaining agreements); Vaca v. Sipes, 386 U.S. 171
6 (1967); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 163, 172 (1983) (after
7 exhausting administrative remedies claimant must seek review of determination within six
8 months).

9
10 B. Cannon Could Not Perform The Essential Functions Of The Job, With Or
11 Without Reasonable Accommodation.

12 Under California law, an employer is not required to hire a person with a
13 disability who is unable to perform the essential functions of the job. Cal. Gov't Code
14 §12940(a)(1)-(2). In December 1999, Cannon's doctor stated that she was unable to work at
15 any job, even with job modifications, and that she would never be able to return to work.
16 Shefler Decl. ¶7 & Ex. F. Thus, when Cannon sought reinstatement to a meter reader
17 position that opened in May 2000, she was not qualified for that position due to her
18 disability and, according to the plain language of the statute, PG&E was not required to hire
19 her.

20 After Cannon applied for the position, she visited her doctor again, who suddenly
21 changed course and stated that Cannon could return to work, without any modification of her
22 job duties. Shefler Decl. ¶8 & Ex. G. Understandably, PG&E was confused as to how,
23 within the space of a few months, Cannon could have gone from being completely and
24 permanently disabled to being able to work without restrictions. PG&E sought appropriate
25 medical confirmation that Cannon was able to return to work. Cal. Gov't Code §12940(f)(2)
26 (employer may require medical examination of existing employee if job-related and
27 consistent with business necessity); Yin v. California, 95 F.3d 864, 868 (9th Cir. 1996)
28 (under the Americans with Disabilities Act, medical examination to ensure an employee's

1 fitness for duty is job-related test and consistent with business necessity). Cannon's union
2 agreed that PG&E could bypass her for the open position until it received sufficient medical
3 evidence that Cannon could return to work. Shefler Decl. ¶9 & Ex. H. As soon as that
4 confirmation was received, PG&E hired her for the meter reader position that opened in May
5 2000. Id. ¶10 & Ex. I.

6
7 III.

8 CANNON CANNOT SUSTAIN HER CLAIM FOR RETALIATION
9 FOR REPORTING SEXUAL HARASSMENT, BECAUSE SHE
10 CANNOT ESTABLISH THE REQUISITE CAUSATION TO
11 PROVE HER CLAIM.

12 A plaintiff suing for retaliation must establish: (1) that he or she engaged in a
13 protected activity; (2) the employer subjected the employee to an adverse employment
14 action; and (3) a causal link between the protected activity and the employer's action.
15 Iwekaogwu v. City of Los Angeles, 75 Cal. App. 4th 803, 814 (1999); Flait v. North Am.
16 Watch Corp., 3 Cal. App. 4th 467, 476 (1992). Once an employee establishes a prima facie
17 case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse
18 employment action. Morgan v. Regents of the Univ. of Cal., 88 Cal. App. 4th 52, 68 (2000).
19 If the employer produces a legitimate reason for the adverse employment action, the
20 presumption of retaliation "drops out of the picture," and the burden shifts back to the
21 employee to prove intentional retaliation. Id.

22 Putting aside for the moment whether or not Cannon ever engaged in protected
23 activity,⁴ Cannon cannot prove that the decisions not to assign her to certain positions were
24 retaliatory. First, the alleged harassing incident occurred, if at all, in 1989, years before any
25 of the decisions were made about work assignments. Second, the PG&E employees who
26 made the assignment decisions were not aware of any complaint of sexual harassment, much

27 ⁴As noted above, PG&E's records do not reflect any administrative complaint by
28 Cannon regarding the alleged sexual assault prior to 2000.

1 less parties to that alleged incident. Shefler Decl. ¶6 & Ex. E at 4. Finally, PG&E has
2 provided a legitimate reason for not assigning Cannon to the positions she sought, namely
3 the constraints in the CBA that controlled the terms and conditions of Cannon's
4 employment. For all of these reasons, the retaliation complaint is meritless.

5
6 CONCLUSION

7 As described above, Cannon's claims are vulnerable to several dispositive
8 defenses as a matter of law. Therefore, it is appropriate for the Court to value the Cannon
9 claim at zero for feasibility purposes.

10
11 DATED: August 20, 2002.

12 Respectfully,

13 JEFFREY L. SCHAFFER
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