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

12 In re
13 PACIFIC GAS and ELECTRIC
COMPANY, a California corporation,
14 Debtor.

Case No. 01-30923 DM
Chapter 11 Case
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEBTOR'S MOTION FOR
VALUATION OF CLAIM FOR
FEASIBILITY PURPOSES (GERI
MARCHETTI, CLAIM NO. 3831)

18 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 Claimant Geri Marchetti ("Marchetti") has been employed by Debtor Pacific
3 Gas & Electric Company ("PG&E" or "Debtor") since 1979. Marchetti has a history of
4 disability leaves related to problems with her hands and upper extremities that limited her
5 ability to work on a computer keyboard. She has not worked and has been on workers'
6 compensation since September 2001 and has been receiving two-thirds salary and full
7 benefits under PG&E's Long Term Disability Plan since November 2001. Marchetti has
8 filed a Proof of Claim ("Marchetti Claim") in the amount of \$8,104,440.00 based upon
9 allegations of (1) disability discrimination and (2) retaliation for having previously filed
10 union grievances. Declaration of Maureen L. Fries Ex. A (Proof of Claim No. 3831, filed
11 August 16, 2001). Attached to the claim form is a two-page itemization of categories of
12 monetary damages, with no supporting documentation and requesting various categories of
13 additional relief, including \$2,025,958.00 in "Attorney's Fee's plus Taxes for Attorney." Id.

14 Marchetti's claims cannot succeed. First, at the time of the alleged disability
15 discrimination from October 1998 to September 1999, Marchetti's impairment merely
16 prevented her from doing more than four hours of keyboard work during an eight-hour work
17 day; as a matter of law, she was not disabled within the meaning of the Fair Employment
18 and Housing Act. Furthermore, even if her impairment were a protected disability, PG&E
19 did not refuse reasonable accommodation; at no time was Marchetti required to do more than
20 four hours of keyboarding in a work day. Part I, infra. Secondly, her claim that PG&E
21 retaliated against her for filing grievances through her union is preempted by the National
22 Labor Relations Act under the exclusive jurisdiction of the National Labor Relations Board
23 and is, in any event, time-barred. Part II, infra. Finally, even if Marchetti could overcome
24 these legal barriers to her claim, the damages she seeks are legally insupportable. She
25 cannot recover lost wages for discrimination for periods during which she has been
26 admittedly totally unable to work; her exclusive remedies for her disability is workers'
27 compensation and her contractual right to long term disability benefits, both of which she
28 has been receiving and continues to receive. Her claim that she was required to do more

1 than four hours of keyboarding per day during the four months of her intermittent
2 employment between March 1999 and September 1999, even if true, is insufficient
3 explanation of her deterioration from a four-hour-a-day keyboarding restriction to total
4 disability. In addition, her claim for twenty-eight years of lost wages (Fries Decl. Ex. A) is
5 based upon an unsupported assumption that in the absence of her impairment, she would be
6 continuously employed by PG&E for the next twenty-eight years. Moreover, any
7 compensatory damages are subject to offset by the benefits she has received and will
8 continue to receive. Finally, Marchetti has provided no support for her claimed millions of
9 dollars of damages in "pain and suffering, mental anguish" (*id.*), and her claim for attorney's
10 fees is legally baseless.

11 For these reasons, but in recognition of the theoretical risk that a court may find
12 that PG&E's increased job requirement was partially responsible for some portion of the
13 period of Marchetti's alleged current total disability, for the reasons set forth below, the
14 Marchetti Claim should be valued at no more than \$47,000.

15 16 FACTUAL AND PROCEDURAL BACKGROUND

17 Marchetti was hired by PG&E as a clerical employee in 1979. From 1996 to
18 November 2001, she was employed as an Associate Distribution Engineer ("ADE"), a
19 classification under PG&E's collective bargaining agreement with Local 20 of the Engineers
20 and Scientists of California. ADEs are required, *inter alia*, to prepare, review and direct the
21 preparation of engineering plans and cost estimates for work on gas distribution systems;
22 make field observations and measurements; prepare computer layouts and plans using
23 various manuals, computer software and drafting tools; and train, supervise and assign work
24 to employees in lower classifications. Fries Decl. Ex. C (PG&E Gas Associate Distribution
25 Engineer, Essential Job Functions).

26 Marchetti's history of medical leaves. Marchetti alleges that in or about 1994,
27 she began experiencing pain in her hand as the result of an industrial injury and that over
28 time, the condition worsened and spread to her neck, head and upper extremities. Fries

1 Decl. Ex. B (First Amended Complaint) ¶7. In June 1998, Marchetti complained to her
2 supervisor that she was experiencing pain, was barely able to write and was having trouble
3 keyboarding; she also informed her supervisor for the first time that she was restricted from
4 working at the computer for more than two hours a day. Fries Decl. Ex. J (Response to
5 EEOC charge) at 2, 8-12. On June 24, 1998, Marchetti signed a memorandum confirming
6 that "her extremities are inflamed and [she] cannot perform any pc entry, as part of her ADE
7 duties." Fries Decl. Ex. J at 8. Marchetti and her supervisor discussed alternative jobs, but
8 they were unable to identify any positions that did not violate what she claimed to be her
9 restrictions or compromise her physical well-being (*id.*); in addition, Marchetti was
10 unwilling to switch to light duty work. Fries Decl. Ex. J at 3. Marchetti was placed on
11 medical leave and she was put on PG&E's workers' compensation payroll.

12 During her disability leave, PG&E referred Marchetti for medical evaluation.
13 The reviewing physician, Lefkos Aftonomos, advised Marchetti to do no more than two
14 hours of keyboard work (with appropriate break intervals) during any four-hour work period.
15 Fries Decl. Ex. G (Letter from Lefkos Aftonomos, M.D., to Jeanne Mar, dated July 9, 1998).
16 After a follow-up examination in August 1998, Dr. Aftonomos stated his belief that
17 Marchetti had a chronic pain condition of unknown etiology; that she was permanent and
18 stationary and needed no further medical work-up or therapy for her condition; and that she
19 was released to return to work with the restrictions earlier prescribed, i.e., no more than four
20 hours of keyboard work (with appropriate breaks) in an eight-hour work day. Fries Decl.
21 Ex. F (Letter from Lefkos Aftonomos, M.D., to Jeanne Mar, dated August 3, 1998).

22 Following PG&E's review of Aftonomos's findings and recommendations and
23 PG&E's implementation of new computerized devices for ADEs, Marchetti was returned to
24 work in October 1998 under the prescribed restrictions. Marchetti claims that in March
25 1999, she was told to increase her computer time and that this additional requirement forced
26 her to work beyond her restrictions. Fries Decl. Ex. B (First Amended Complaint) ¶12.
27 PG&E disputes that Marchetti was ever required to exceed four hours of keyboard work per
28 day. Although all ADEs were instructed to increase their estimating hours, estimating work

1 involves tasks other than and in addition to keyboarding; in addition, Marchetti oversaw the
2 work of others and was free to delegate a portion of the keyboard work as appropriate.

3 Marchetti's problems with keyboarding recurred and she again went out on
4 workers' compensation from May 1999 to July 1999. Fries Decl. Ex. K (Payroll Change
5 form, dated 11/27/01). When Marchetti returned to work in July, PG&E made requested
6 ergonomic work station adjustments (Fries Decl. Attachment to Ex. A (letter from Edward
7 Katz, M.D., dated November 9, 2000) at 1); however, her symptoms worsened and she again
8 went out on disability in September 1999 and has not worked since September 24, 1999.
9 Fries Decl. Ex. K (Payroll Change form, dated 11/27/01).

10 Marchetti's union grievances. Marchetti filed two grievances through her union
11 in January 1999 (soon after her October 1998 return from the initial leave of absence). The
12 first grievance charged that notwithstanding her authorized return-to-work release date of
13 August 10, 1999, PG&E did not allow her to return to work until October 21, 1998, and
14 therefore she lost pay for that period. Fries Decl. Ex. I.¹ In her second grievance, Marchetti
15 alleged that, upon her return to work in October 1998, she was not permitted to take time off
16 during the work day to attend swim therapy sessions, purportedly in violation of the terms of
17 the collective bargaining agreement. Id. Ex. H.²

18 Marchetti's current status. Marchetti remains a PG&E employee and has been on
19 PG&E's workers' compensation payroll since September 1999; she has also been receiving
20 two-thirds salary—approximately \$4,000 monthly—and all applicable employment benefits
21 under PG&E's Long Term Disability Plan since November 2001. Fries Decl. Exs. D

22
23 ¹This grievance was ultimately settled, and PG&E paid Marchetti a differential
sufficient to make her whole for the two month period at issue.

24 ²The second grievance is still pending and, at the request of the union, has been put on
25 hold by the grievance committee. As to this grievance, PG&E contends that it has no
26 obligation to give employees time off from work for swim therapy on a long-term
27 maintenance basis when the treatment is available during non-work hours. This issue was
28 the subject of a grievance brought by another employee for a sister union (IBEW), and the
Review Committee on that grievance determined that "it may be appropriate to deny the
employee time off for [swim therapy as on-going maintenance, rather than temporary,
therapy] when it is available outside of regularly scheduled work hours." Fries Decl. Ex. J at
12 (Review Committee Decision, dated August 30, 1990).

1 (PG&E Sick Leave and Disability policy), K (Payroll Change form, dated 11/27/01). Those
2 benefits will continue until Marchetti is sixty-five, so long as she remains eligible. Fries
3 Decl. Ex. D.

4 Procedural history. Following exhaustion of her administrative remedy and
5 receipt of a Right to Sue Notice, Marchetti filed a complaint in San Francisco Superior
6 Court, alleging discrimination based upon her disability and in retaliation for filing
7 grievances. Fries Decl. Ex. B (First Amended Complaint, filed 12/11/00). No discovery
8 was conducted before the filing of PG&E's bankruptcy petition, and there has been no grant
9 of relief from stay.³ Marchetti recently informed PG&E that she is now proceeding with her
10 action in pro per. Fries Decl. Ex. L (notice to bankruptcy court of withdrawal of counsel);
11 id. Ex. M (Substitution of Attorney, filed 1/22/02).

12
13 ARGUMENT

14 I.

15 AT THE TIME OF THE ALLEGED DISABILITY
16 DISCRIMINATION BY PG&E, MARCHETTI WAS NOT
17 DISABLED WITHIN THE MEANING OF FEHA.

18 The disability discrimination of which Marchetti complains is PG&E's alleged
19 refusal to permit her post-disability return to work, from August 10, 1998 to October 21,
20 1998 (Fries Decl. Ex. A (DFEH Charge of Discrimination, dated 1/23/99)) and its alleged
21 failure to provide reasonable accommodation to her keyboarding restrictions from March
22 1999 until she went on permanent disability in September 1999, by imposing a requirement
23 of additional estimating time that forced Marchetti to work beyond her four-hour-per-day
24 keyboarding restriction. Fries Decl. Ex. B (First Amended Complaint ("FAC") filed
25 12/11/00) ¶¶9-10, 12. In fact, the evidence is clear that at the time of the alleged
26 discriminatory conduct, Marchetti was not disabled within the meaning of FEHA.

27 ³Marchetti is separately pursuing a workers' compensation claim against PG&E, which
28 has not been stayed; that litigation is ongoing.

1 In order to state a cause of action for disability discrimination, Marchetti must
2 establish that she was disabled at the time of the alleged discriminatory acts. See Toyota
3 Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 688 (2002) (issue in
4 claim for failure to provide reasonable accommodation is whether plaintiff was disabled “at
5 the time she sought an accommodation” from employer); Durley v. APAC, Inc., 236 F.3d
6 651, 657 (11th Cir. 2000) (although plaintiff became totally disabled, she was unable to
7 establish that she was disabled within the meaning of the statute at the time of the alleged
8 discriminatory failure to promote; affirming summary judgment for employer on ADA
9 claim).

10 Marchetti alleges that she suffers from numerous conditions, including
11 degenerative disc disease, degenerative osteophytes, chronic cervical pain (Fries Decl. Ex. B
12 (FAC) ¶17), and maximum capacity to sit for only five to ten minutes at a time, walk for
13 only five to ten minutes and stand for only ten minutes (Fries Decl. Ex. A (Letter from
14 Edward Katz, M.D. to Geri Marchetti, dated November 9, 2000 at 2)). However, the
15 evidence is that at the time of the alleged discriminatory conduct by PG&E (those
16 intermittent periods from August 1998 to September 1999 when she was not on leave),
17 Marchetti’s only functional limitation was the restriction that she do no more than four hours
18 of keyboard work (with appropriate intervening breaks) per day. Moreover, Marchetti’s
19 medical diagnosis—then or now—is insufficient to establish that she was disabled within the
20 meaning of the law. Rather, the issue is whether and to what extent she was functionally
21 limited in one or more major life activities. See Toyota Motor Mfg., 122 S. Ct. at 691-92 (in
22 determining whether plaintiff is disabled under ADA, relevant issue is not medical
23 diagnosis, which included carpal tunnel syndrome, myotendinitis and thoracic outlet
24 compression, but whether those impairments substantially limited a major life activity).

25 At the time of her initial medical leave, Marchetti’s examining physician
26 reviewed the job description and list of essential functions and physical requirements for the
27 Associate Distribution Engineer position and opined that “[there is] no activity which the
28 patient is unable to perform at the frequency indicated” (Fries Decl. Ex. G (Letter from

1 Lefkos Aftonomos to Jeanne Mar, dated July 9, 1998) (emphasis added)) and Dr. Aftonomos
2 released Marchetti to return to work with the single restriction/accommodation that she do
3 no more than four hours of keyboard work (with appropriate breaks) in an eight-hour day.
4 Fries Decl. Ex. F (Aftonomos letter, dated August 3, 1998). In fact, Marchetti acknowledges
5 that during her employment, her purported disability “did not inhibit her ability to perform
6 the duties of the position in a satisfactory manner, with reasonable accommodation” and she
7 “was willing and able to perform the duties and functions of her position if such reasonable
8 accommodation [i.e., restricting her keyboard work to no more than four hours per day, with
9 appropriate intervals] had been made.” Fries Decl. Ex. B (First Amended Complaint) ¶¶18,
10 19. Even if Marchetti is currently completely disabled and unable to sit, stand or walk for
11 more than ten minutes at a time, this was not her condition during the period of alleged
12 discriminatory conduct by PG&E, i.e., March-September 1999.

13 Secondly, Marchetti cannot establish that her condition at the time of the alleged
14 discriminatory conduct constituted a disability within the meaning of FEHA as the statute
15 existed at the time of the alleged violation, i.e., as of 1999. At all times complained of,
16 FEHA and, specifically, its definition of physical disability, was routinely interpreted in
17 accordance with the ADA, as well as state regulations promulgated in connection with the
18 definition of “handicapped individual.” Thus, state courts consistently held that

19 “[u]nder California Government Code section 12926, subdivision (k),
20 as well as the federal statute and the Americans with Disabilities Act
21 (ADA), a qualifying disability is defined as: ‘(a) a physical or mental
22 impairment that substantially limits one or more of the major life
23 activities of such individual; (B) a record of such impairment; or
24 (C) being regarded as having such an impairment.’” (Hobson v.
Raychem Corp., 73 Cal. App. 4th 614, 627 (1999) (emphasis added)
(alterations in original omitted))

24 See also Cassista v. Community Foods, Inc., 5 Cal. 4th 1050, 1060 (1993) (“disability”
25 under FEHA to be interpreted in harmony with interpretation of “handicap” in California
26 Code of Regulations and requires actual or perceived condition that, inter alia, “substantially
27 limit[s] one or more major life activities”) (citing Cal. Code Regs. tit. 2, §7293.6); Diffey v.
28 Riverside County Sheriff’s Dep’t, 84 Cal. App. 4th 1031, 1035-36 (2000) (both ADA and

1 FEHA require that “impairment, real or perceived, must substantially limit a major life
2 activity in order to qualify as a disability”) (citing Raychem); Maloney v. ANR Freight Sys.,
3 Inc., 16 Cal. App. 4th 1284, 1287 (1993) (interpreting FEHA consistent with California
4 definition of “handicapped individual” as one who has a physical handicap that
5 “substantially limits one or more major life activities”).⁴

6 Marchetti’s condition at the time of her active employment with PG&E—a
7 restriction to no more than four hours of keyboard work in an eight-hour day, with no
8 evidence of any other functional limitations on her ability to perform her job or engage in
9 any other major life activity—was not a “substantial limitation on one or more major life
10 activities,” or, indeed, a limitation at all. See Toyota Motor Mfg., 122 S. Ct. at 686, 693
11 (plaintiff diagnosed with carpal tunnel syndrome and bilateral tendinitis and placed on
12 permanent work restrictions against lifting more than twenty pounds, frequent lifting or
13 carrying of up to ten pounds, repetitive flexion or extension of wrists or elbows and
14 performing overhead work or pneumatic tools was not substantially limited in performing
15 manual tasks under ADA); Thornton v. McClatchy Newspapers, Inc., 292 F.3d 1045, 1046
16 (9th Cir. 2002) (reporter restricted to one-and-a-half hours of keyboard work per day not
17 disabled).

18 In McClatchy, a plaintiff with far more severe keyboarding restrictions than
19 Marchetti’s was held not to be disabled under the ADA. Plaintiff Thornton was a reporter
20 who spent approximately a third of her time at a computer keyboard. Following industrial
21 injuries to her arm, shoulder and wrist, she was diagnosed with myofascial pain syndrome,
22

23 ⁴In September 2000, the Legislature amended FEHA, enacting a new section 12926.1
24 defining “physical disability” to require “a ‘limitation’ upon a major life activity, but . . .
25 not . . . a ‘substantial limitation’” and providing that the distinction between “limitation” and
26 “substantial limitation” “is intended to result in broader coverage under the law of this state
27 than under th[e] federal act.” Gov’t Code §12926.1(c). The retroactivity of the amendment
28 has not been decided and the issue is currently before the California Supreme Court on
review of Colmenares v. Braemar County Club, Inc., 89 Cal. App. 4th 778 (2001)
(amendment not retroactive) (review granted Aug. 22, 2001, No. S098895) and Wittkopf v.
County of Los Angeles, 90 Cal. App. 4th 1205 (2001) (amendment retroactive) (review
granted Oct. 10, 2001, No. S100251).

1 took an extended leave of absence to undergo intensive physical therapy, and returned to
2 work with restrictions limiting continuous keyboard use to thirty minutes per day,
3 intermittent keyboard use to sixty minutes per day, continuous handwriting to five minutes
4 per day, and intermittent handwriting to sixty minutes per day. Following Toyota Motor
5 Mfg., the Ninth Circuit upheld the district court's grant of summary judgment for the
6 employer, finding that Thornton was not disabled and that, although Thornton had
7 "moderate difficulties, they did not rise to the level of 'substantial limitations' required by
8 the ADA." Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 794 (9th Cir. 2001).

9 At most, Marchetti's disability is an industrial injury for which her exclusive
10 remedy is workers' compensation (she has been on PG&E's workers' compensation payroll
11 since September 1999). In addition, Marchetti is currently receiving two-thirds salary and
12 all applicable employment benefits under PG&E's Long Term Disability Plan and will
13 continue to receive those payments and benefits until age sixty-five, or so long as she
14 remains eligible.

15
16 II.

17 MARCHETTI'S RETALIATION CLAIM IS PREEMPTED AS AN
18 UNFAIR LABOR PRACTICE CLAIM UNDER THE NLRA AND IS
19 IN ANY EVENT TIME-BARRED.

20 An employee's grievance activity pursuant to a labor contract and undertaken
21 with the assistance of a union is protected by Sections 7 and 8 of the National Labor
22 Relations Act, and a claim of employer retaliation against an employee for pursuing such a
23 grievance is an unfair labor practice.⁵ Further, when a plaintiff challenges an action

24 ⁵NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 836, 840-41 (1984) (individual
25 employee's action to enforce terms of collective bargaining agreement is "concerted
26 activity" protected by Section 7 of the Act and preempted); Temp-Rite Air Conditioning
27 Corp. v. Zafar, 322 N.L.R.B. 767, 767 (1996) (employee's objection to cut in pay was
28 protected concerted activity); NLRB v. Searle Auto Glass, Inc., 762 F.2d 769, 774 n.6 (9th
Cir. 1985) (employee's filing of wage claim is protected, concerted activity within the
meaning of Sections 7 and 8 of Act); Southern Cal. Edison Co. v. IBEW Local 47, 307
N.L.R.B. 1426, 1427 (1992) (employer violated Section 8 of Act when it ceased upgrading
employee to acting foreperson after employee filed grievance challenging demotion from
(continued . . .)

1 arguably subject to Sections 7 and 8 of the NLRA, “[that] challenge is within the primary
2 jurisdiction of the NLRB.”⁶

3 Here, it is undisputed that Marchetti did not file a charge with the NLRB alleging
4 that PG&E retaliated against her for her having filed two grievances by increasing her
5 computer time in March 1999 and otherwise refusing to provide her with reasonable
6 accommodation for her disability. Nor has Marchetti filed a federal claim under Section 301
7 of the National Labor Relations Act challenging the grievance decisions in conjunction with
8 a claim against her union for breach of its duty of fair representation. See Hines v. Anchor
9 Motor Freight, Inc., 424 U.S. 554, 562-65 (1975) (where collective bargaining agreement
10 contains procedures for final settlement of disputes, courts cannot undertake review of
11 merits of final determination except when joined with a claim of breach of duty of fair
12 representation against union). Moreover, the six-month statute of limitations on any such
13 claims has long since run. 29 U.S.C. §160(b). As a matter of law, Marchetti cannot prevail
14 on her claim of retaliation based upon her conduct in filing grievances against her employer.

15
16
17
18
19
20 (. . . continued)
21 full-time foreman).

22 ⁶Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 49 (1998) (federal courts have
23 jurisdiction to resolve claims under Sections 7 and 8 only where they are collateral to a claim
24 against union for breach of duty of fair representation); see also San Diego Building Trades
25 Council v. Garmon, 359 U.S. 236, 245 (1959) (where challenged conduct is arguably subject
26 to Section 7 or 8 of the NLRA, “the States as well as the federal courts must defer to the
27 exclusive competence of the National Labor Relations Board if the danger of state
28 interference with national policy is to be averted”); Sears, Roebuck & Co. v. San Diego
County Dist. Council of Carpenters, 436 U.S. 180, 199 (1978) (Garmon completely pre-
empts state court jurisdiction unless and until the NLRB determined that disputed conduct is
neither protected nor prohibited by the Act; noting “constitutional objection to state-court
interference with conduct . . . protected by the Act”); Buscemi v. McDonnell Douglas Corp.,
736 F.2d 1348, 1350 (9th Cir. 1984) (complaint of retaliatory discharge for engaging in
protected concerted activity is within exclusive jurisdiction of National Labor Relations
Board).

1 III.

2 MARCHETTI'S DAMAGES CLAIM IS UNSUPPORTED,
3 INSUPPORTABLE AND SUBJECT TO OFFSET.

4 Even if Marchetti were able to prove that she was disabled within the meaning of
5 FEHA at the time of her return to work in 1998 until she finally left in September 1999, and
6 even if she were able to establish that PG&E required her to work beyond her keyboarding
7 restrictions during the four months at issue, her \$8,104,440 claim for damages is sheerest
8 fantasy. Neither her claim nor its attachments provide any justification for the claimed
9 amount.

10 No basis for claim to lost wages for periods of total inability to work. Marchetti
11 is seeking \$5,000,000 in damages for lost wages and benefits to age sixty-five; lost stock;
12 and pain and suffering. Fries Decl. Ex. A (attachment to Proof of Claim). However, even if
13 PG&E were liable to Marchetti for failure to accommodate under FEHA, the company's
14 liability is limited to the period during which Marchetti was physically able to perform her
15 job, with or without accommodation. She now purports to be totally disabled and "unable to
16 work again." Fries Decl. Ex. A (attachment to Proof of Claim). There can be no continuing
17 liability for failure to accommodate for periods when the employee is completely unable to
18 work, since she is no long "qualified" within the meaning of FEHA. Jensen v. Wells Fargo
19 Bank, 85 Cal. App. 4th 245, 254 (2000) (plaintiffs must establish that they suffer from a
20 disability covered by FEHA and that they are qualified individuals, i.e., able to perform the
21 essential functions of the position with or without accommodation); Ackerman v. Western
22 Elec. Co., Inc., 643 F. Supp. 836, 848 (N.D. Cal. 1986) (employee's inability to perform job
23 is affirmative defense to disability discrimination claim); Nowak v. St. Rita High School,
24 142 F.3d 999, 1003-04 (7th Cir. 1998) (employee on leave for more than eighteen months
25 not "qualified" under ADA; employer is not required to accommodate employees who suffer
26 from prolonged disability by giving indefinite leave of absence).

27 No basis for attributing Marchetti's present total disability to alleged four-month
28 period of increased keyboarding requirements. Marchetti claims that PG&E's failure to

1 accommodate her "exacerbated" her physical disability. Fries Decl. Ex. B (Complaint) ¶14.⁷
2 PG&E expects discovery to confirm that the brief, intermittent period of alleged increased
3 keyboarding requirements (four months over a six-month period) cannot reasonably be
4 found to have been the cause of Marchetti's deterioration from a four-hour-per-day
5 keyboarding restriction to her current state of alleged total and permanent disability. Thus,
6 assuming Marchetti was completely unable to work as of November 2001 (when she began
7 receiving long term disability benefits), any claim for lost wages should be cut off as of that
8 date, i.e., limited to two years' wages (with offset for workers' compensation and disability
9 benefits). Marchetti's exclusive remedy for her alleged total disability is worker's
10 compensation and her contractual right to long term disability benefits under PG&E's plan,
11 which remedies she has received and is continuing to receive.

12 Secondly, Marchetti claims lost wages of \$917,486 based on twenty-eight years
13 of foregone future employment, including a 3% annual increase. Fries Decl. Ex. A
14 (attachment to Proof of Claim). No basis is provided for the assumption that, in the absence
15 of her impairment, Marchetti would be continuously employed by PG&E and therefore is
16 entitled to front pay for the next twenty-eight years. Damages claims based upon
17 unsupported speculation should be disallowed. Auerbach v. Great Western Bank, 74 Cal.
18 App. 4th 1172, 1191-92 (1999); see also Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App.
19 3d 91, 97 (1976) (affirming award of four years' front pay on successful claim for wrongful
20 termination). Further, even if PG&E failed to accommodate Marchetti's alleged disability in
21 1999, it is clear that her condition deteriorated drastically over the following two years, even
22 though she presumably did not engage in any keyboarding during that time. Thus, even in
23 the absence of PG&E's alleged discriminatory acts, Marchetti would be totally disabled at
24 this time. At a maximum, she is entitled to two years' lost wages, less benefits received
25

26 ⁷Taking into account the two-month medical leave Marchetti took within the period
27 from the time of the alleged failure to accommodate in March 1999 and her last day of active
28 employment in September 1999, the maximum amount of time she could have worked under
the alleged violative keyboarding requirement is four months.

1 during that period (including her two-thirds salary benefit under the long term disability
2 policy), which would amount to no more than \$47,000.

3 Damages subject to offset. As noted, Marchetti's lost compensation damages are
4 subject to offset by the amounts of the benefits she has and will continue to receive since she
5 went out on disability. Since November 2001, Marchetti has been receiving two-thirds of
6 her salary and all benefits under PG&E's Long Term Disability Plan, and she will continue
7 to receive those benefits until she reaches age sixty-five, so long as she remains eligible.
8 Although Marchetti has offset her claim for lost wages by the amount of her long term
9 disability benefits (Fries Decl. Ex. A (attachment to Proof of Claim)), the claim for lost
10 benefits is further subject to offset for her ongoing receipt of full benefits under PG&E's
11 Long Term Disability Policy. See Mayer v. Multistate Legal Studies, Inc., 52 Cal. App. 4th
12 1428, 1433-34, 1436 n.3 (1997) (lost wages damages awarded to prevailing plaintiff in
13 wrongful termination case subject to offset in the amount of disability benefits award).

14 No basis for purported loss of stock. Marchetti also claims damages for loss of
15 "stock" and "stock options" in the amount of \$160,996 (Fries Decl. Ex. A (attachment to
16 Proof of Claim)), presumably a reference to PG&E stock, in which employees' 401(k) plan
17 assets are invested. However, Marchetti continues to be eligible for 401(k) benefits—both
18 to contribute to her plan and to receive specified matching contributions from the
19 company—during the entire period of her long term disability coverage. As a matter of law,
20 she cannot recover damages for an employment benefit in which she has apparently decided
21 not to participate.

22 No allegations or basis for damages for pain and suffering. Marchetti provides no
23 support for her claimed damages (as an unspecified portion of the aggregated \$5,000,000
24 damage claim) for "pain and suffering, mental anguish." She does not explain how her
25 alleged distress is the result of PG&E's alleged refusal to accommodate as distinguished
26 from the apparent degeneration of her physical condition in the two years since she last
27 worked for the company. She does not allege that she has even consulted a mental health
28 practitioner, nor provided reports or documentation of consultations to support her claim.

1 There is no basis for Marchetti's claim as to the fact, causation or amount of purported
2 damages for pain and suffering.

3 Claim for attorney's fees insupportable as matter of law. Finally, Marchetti's
4 claim for \$2,025,958.00 for "Attorney's Fee's plus Taxes for Attorney of 33 1/3%" is
5 insupportable. Under FEHA, courts may award a prevailing plaintiff reasonable attorney's
6 fees. However, such awards are made pursuant to a lodestar formula based on the number of
7 hours reasonably expended in pursuing the litigation multiplied by a reasonable hourly rate
8 (Serrano v. Priest, 20 Cal. 3d 25, 48-49 (1977)), not based upon a percentage of recovery.
9 More important, even if Marchetti were to prevail on her FEHA claim and be awarded
10 statutory attorney's fees, it appears that she was represented by counsel for, at most, the
11 period sometime at or after the filing of her DFEH charge in December 1999 and the time
12 her counsel withdrew in January 2002, and Marchetti has provided no information
13 concerning the attorney's fees she incurred during that period or whether her former counsel
14 has filed a lien against possible future recovery of damages. Marchetti is now pursuing her
15 claim in pro per (Fries Decl. Exs. L, M), and it is settled law that plaintiffs representing
16 themselves are not entitled to award of attorney's fees. Trope v. Katz, 11 Cal. 4th 274, 279-
17 80 (1995) ("reasonable attorney's fees" are fees actually incurred by party to litigation).

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HOWARD
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1 CONCLUSION

2 For the above reasons, PG&E contends that Marchetti's claims alleging disability
3 discrimination and retaliation for filing union grievances must fail, and that the estimated
4 value of the Marchetti Claim is no more than \$100,000.

5
6 DATED: August 30, 2002.

7 Respectfully,

8 JEFFREY L. SCHAFFER
9 ETHAN P. SCHULMAN
10 LINDA Q. FOY
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