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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 48394-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SHANTANU NERAVETLA, M.D.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH, MEDICAL
QUALITY ASSURANCE COMMISSION,

Respondent.

**ANSWER TO AMICUS CURIAE BRIEF OF THE LEGAL AID
SOCIETY - EMPLOYMENT LAW CENTER**

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I. INTRODUCTION

The Legal Aid Society – Employment Law Center of San Francisco has filed an Amicus Curiae Brief (Amicus Brief) in this matter, but most of the issues discussed in that brief have not been raised by Dr. Neravetla or the Medical Quality Assurance Commission (Commission), at this level or any level below. Pursuant to well-established precedent, the amicus discussion of those issues should be disregarded by this Court.

In any event, the facts of this case show that not only was there no discrimination of any type against Dr. Neravetla, but that extraordinary efforts were taken by Virginia Mason Medical Center (Virginia Mason), the Washington Physician's Health Program (WPHP), and the Commission to help Dr. Neravetla become a safe doctor. He alone is responsible for choosing to disregard all of the guidance and refusing virtually all of the help offered to him by numerous sources. Moreover, rather than bearing responsibility for his behaviors and choices, he instead attempts to portray himself as a victim of the Commission. Thus, the amicus brief does not provide any sound basis to support Dr. Neravetla's arguments.

II. ARGUMENT

A. The Court Should Not Consider New Issues Raised For The First Time In An Amicus Brief

1. **The issue of Dr. Neravetla being entitled to protection under the Americans with Disabilities Act or the Washington Law Against Discrimination is being raised for the first time in the Amicus Curiae Brief.**

The history of the Americans with Disabilities Act (ADA) and Washington Law Against Discrimination (WLAD) is irrelevant to this case. Dr. Neravetla has never asserted in this matter that he is a person with a disability or that he has a “perceived disability”. Further, there is nothing in his briefing at the Superior Court level, or in any of his briefing before this Court, that discusses the ADA or the WLAD, or whether Dr. Neravetla had a perceived disability.

Although Dr. Neravetla clearly did not raise those issues below, the Amicus Brief attempts to apply the ADA and WLAD to his case. A party cannot raise an issue for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3); *State v. Fenwick*, 164 Wn. App 392, 399-400, 264 P.3d 284 (2011); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). But even more to the point, the Court of Appeals does not consider new issues raised for

the first time in an amicus brief. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P.3d 914 (2013), citing to *Ruff v. King County*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995).

Because Dr. Neravetla failed to raise these issues at any time in this matter before this Amicus Brief was filed, they should be disregarded in their entirety.

2. Dr. Neravetla filed an Action in Federal Court against Virginia Mason Hospital regarding the ADA and WLAD, and it was dismissed with prejudice.

While Dr. Neravetla has not preserved or raised the issues discussed in the Amicus Brief in this, he did raise such issues in a federal lawsuit he filed against Virginia Mason and a number of the doctors at Virginia Mason alleging violations of his rights under the ADA, WLAD, and “other state-based contract and tort related rights...” AR 188-217; 241-268. He filed a copy of his “verified complaint” in the administrative action against his license in support of his motion for a stay of the licensing action until after his federal lawsuit was completed. AR 176-181 (Motion); AR 188-217 (Verified Complaint, filed as Exhibit C attached to Motion). But he did not seek to litigate his licensing action under any theory of a violation of the ADA.

Notably, Dr. Neravetla’s federal lawsuit was dismissed with prejudice on Virginia Mason’s Motion for Summary Judgment.

(See Exhibit A, attached). U. S. District Judge John C. Coughenour ruled as follows:

Plaintiff claims that Defendants improperly regarded him as disabled under the ADA and the WLAD. In order to establish a prima facie case, he must demonstrate: (1) that he has, or is regarded as having, a disability; (2) that is otherwise qualified for the employment in question; and (3) that he was excluded from the employment solely because of his disability. 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(1); see also RCW 49.60.040(7)(a)(iii).

Over the course of nearly seven months, Plaintiff received negative performance evaluations from thirteen attending physicians and senior residents. Some of these evaluators indicated that Plaintiff's performance posed a potential risk to patients' health and safety. Plaintiff offers no admissible evidence to suggest that the nondiscriminatory reasons put forward by VM to explain the referral to WPHP or the subsequent decision to terminate his residency are pretextual. Consequently, no reasonable jury could find that Plaintiff was excluded from his employment "solely" because of his disability. Because he cannot establish the third prong of the prima facie case, there is no need to consider whether Plaintiff's claims meet the requirements for the first and second prongs.

Order Granting Motion for Summary Judgment, Case No. C13-1501-JCC, pp. 3-4 (attached as Exhibit A).

Dr. Neravetla raised this issue in his federal lawsuit, and it was dismissed by the federal court. Had he raised it in this case, the respondents would have been able to defend on the same grounds that defeated the claim in federal court, as well as on issue preclusion and claim preclusion grounds.

Given these circumstances, it is particularly unjust for Amicus to insert this issue into this case for the first time on appeal. Accordingly, the briefing by the Amici on this issue should be disregarded.

B. Dr. Neravetla's Behaviors, Classified Later As The Mental Condition Of "Disruptive Physician Behavior," Rendered Him Unable To Practice With Reasonable Skill And Safety

1. Dr. Neravetla's behaviors and mental condition rose to the level of professional incompetence.

The Amicus Brief argues that "the focus of the MQAC's inquiry should be whether the physician is competent to practice medicine with reasonable skill and safety." Amicus Brief at p. 14. This is precisely what the Commission did. Dr. Neravetla was a doctor in training. He was in a Transitional Year Residency where he was getting hands on experience in patient care. AR 1603, 1922-26. The fact that he was repeatedly tardy and absent without excuse or permission, that he was unable to accept feedback from the doctors who were training him, that he was unwilling to be coached by a psychologist hired to help him, and that he was unwilling to discuss patient care with other members of the patient care team, all point to a student who is not yet ready to become a doctor. Final Order at AR 1610-11.

The Amicus Brief appears to contend that this Court should order the Commission to allow Dr. Neravetla to become licensed, despite

behaviors that demonstrated he was not yet ready for such licensure. Moreover, the Amicus ignores how he was unable to complete his training program.

The Commission is comprised of doctors who understand that the ability to communicate and accept feedback is an essential skill for every doctor. The Amicus Brief cites the term “professional competence” as if it was a term with which the Commission was unfamiliar and did not consider. Amicus Brief at pp. 14-16. On the contrary, the Commission found that

“The Commission concurs with the experts who found that the Respondent was suffering from an occupational problem, and that this occupational problem was disruptive to his internship; that it did interfere with his ability to communicate and work with others; and, that if it persists, it would impede his ability to practice with reasonable skill and safety. Today’s physicians work in a team environment and the ability to communicate and cooperate with other members of the health care team is crucial to the delivery of good health care.”

Finding of Fact 1.10(b) at AR 1610.

There is ample evidence in the record and reflected in the Commission’s Final Order that shows that doctors who do not believe they need to follow the rules and/or communicate and work with others pose a significant risk to patients. Commission Policy at AR 1478-80 and 1830-33, Final Order at 1610-11. The Commission is tasked by the Legislature with ensuring the competence and safety of medical professionals:

It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts.

RCW 18.130.010.

The Commission is comprised primarily of physicians, and is thus in the best position to determine whether a doctor is safe to practice. The sole issue considered by the hearing panel in this case was whether Dr. Neravetla possessed the ability to practice with reasonable skill and safety. Finding of Fact 1.10(a) at AR 1609; Statement of Charges at AR 3-6. Virginia Mason went to extraordinary lengths to get Dr. Neravetla to change his behaviors and succeed in their program. *See* testimony of Dr. Dipboye at AR 1939-70; testimony of Dr. O'Connell at AR 2061-91; Exhibits 2-6 at AR 1783-97. However, despite Virginia Mason's efforts, Dr. Neravetla failed to make those changes. The Commission was then faced with determining whether to allow him to retain a medical license. Given the findings and evidence supporting those findings, the Commission properly concluded that he was not able to safely practice. Final Order 1.10(b), 2.4 at AR 1610-11.

2. Dr. Neravetla was not discriminated against. In stark contrast, he was given guidance, feedback, coaching, and offered treatment to help him overcome his problematic condition and behaviors.

The Amicus Brief attempts to paint a picture of a doctor who was singled out and discriminated against for a perceived disability. In addition to this argument being inappropriately raised on appeal, it completely lacks merit or support in the findings or record.

Dr. Neravetla was accepted into a medical residency program to complete his training as a doctor. When he started having problems, his faculty supervisor, Dr. Dipboye, met with him to ascertain what might be going on with Dr. Neravetla. AR 1933-35. When the problems persisted, Dr. Dipboye consulted his own supervisor, and they both met with Dr. Neravetla to try to ascertain what might be causing Dr. Neravetla's poor performance and apparent poor attitude and to try to get him back on track. AR 1941-43. Dr. Neravetla was offered resources to help him. *Id.*

When problems persisted, Dr. Neravetla was placed on probation and provided one-on-one coaching by Dr. Dan O'Connell, paid for by Virginia Mason. AR 1955-56. Dr. Neravetla was not receptive to the coaching. AR 2071-77, Final Order at AR 1604. Finally, when it reached the point that a Patient Safety Alert was issued, the Transitional Year Education Committee of Virginia Mason met and decided to send

Dr. Neravetla to the Washington Physician's Health Program. Despite all of the issues and problems with him over the preceding six or seven months, Virginia Mason still did not terminate him. Instead, Virginia Mason sought help for him via WPHP. AR 1794-97, 1966-71.

The Washington Physician's Health Program also tried to help Dr. Neravetla. The WPHP, however, also found him completely unreceptive to help, describing him as defensive and angry. Final Order at AR 1604. When Dr. Neravetla left their office, WPHP had no indication from him that he was planning to follow through on any of the referrals they gave him. AR 2130-33.

Finally, the Commission received the referral from WPHP and had to determine what to do with Dr. Neravetla. The Commission decided not to charge him with unprofessional conduct for his bad behavior under the Uniform Disciplinary Act, RCW 18.130.180. Rather, he was charged under the statute that applied to doctors who are currently unable to practice with reasonable skill and safety, RCW 18.130.170. He was not suspended or fined. He was not even ordered to follow through with the recommendation made by Pine Grove in their assessment of him. Instead, the only thing the Commission required in their Final Order was that "[I]n the event that the Respondent seeks licensure in the state of Washington for a health care credential, the Respondent shall undergo a psychological

evaluation by a WPHP approved evaluator and follow whatever recommendations are contained in that evaluation.” Final Order at AR 1612. Therefore, the Amicus Brief’s contention that Dr. Neravetla was discriminated against because of a perceived disability is belied by the record and the Commission’s Final Order.

In the face of these substantiated findings, the Amicus asks this Court to overturn the Commission’s decision and rescind Dr. Neravetla’s sanctions. Amicus Brief at 17. But Amicus misapprehends the case, because there are no sanctions to rescind. There is only the requirement that before Washington State will admit Dr. Neravetla, he must have an evaluation by an evaluator approved by the Washington Physician’s Health Program. This requirement is entirely directed to ensuring the safety of Washington patients. AR 1612.

In short, the Amicus’s attempt to portray Dr. Neravetla as a victim of discrimination is not supported by the record. Even if that issue were before this Court, it should be rejected.

III. CONCLUSION

The actions taken by the Commission in Dr. Neravetla's case were lawful and appropriate. Amicus shows no error. The Commission's Order should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of September, 2016.

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A handwritten signature in black ink, appearing to read "Tracy L. Bahm", with a long horizontal flourish extending to the right.

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EXHIBIT A

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHANTANU NERAVETLA, M.D.,

Plaintiff,

v.

VIRGINIA MASON MEDICAL
CENTER, et al.,

Defendants.

CASE NO. C13-1501-JCC

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendants' motion for summary judgment. (Dkt. No. 54.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

The alleged facts in this matter have been discussed in the Court's previous order granting in part Defendants' first motion to dismiss. (*See* Dkt. No. 25.) The Court will not repeat them. In brief, Plaintiff claims that Defendants, Virginia Mason Medical Center ("VM") and certain of its employees, wrongfully terminated him from his position as a first-year medical resident. Several of Plaintiff's claims have been dismissed. (Dkt. Nos. 25, 35.) Defendants now move to dismiss Plaintiff's remaining claims. (Dkt. No. 54.) Plaintiff withdraws his claims for failure to provide "reasonable accommodation" in violation of the Americans with Disabilities

1 ACT (“ADA,” 42 U.S.C. §13113(b)(5)), failure to “reasonably accommodate” in violation of the
2 Washington Law Against Discrimination (“WLAD,” Rev. Code of Wash. §49.60.010. *et seq.*),
3 and fraudulent inducement. (Dkt. No. 69 at 27.)

4 **II. DISCUSSION**

5 **A. Summary Judgment Standard**

6 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, “[t]he court shall grant
7 summary judgment if the movant shows that there is no genuine dispute as to any material fact
8 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In making such
9 a determination, the Court must view the facts and justifiable inferences to be drawn there from
10 in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
11 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the
12 opposing party “must come forward with ‘specific facts showing that there is a *genuine issue for*
13 *trial.*” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting
14 Fed. R. Civ. P. 56(e)). Material facts are those that may affect the outcome of the case, and a
15 dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to
16 return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248–49. Conclusory, non-
17 specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.”
18 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990). Ultimately, summary
19 judgment is appropriate against a party who “fails to make a showing sufficient to establish the
20 existence of an element essential to that party’s case, and on which that party will bear the
21 burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

22 **B. Plaintiff’s Claims Against Individual Defendants**

23 Plaintiff concedes that he cannot “identify genuine disputes of material fact with respect
24 to the claims he asserts against the individual Defendants, Dr. Michael Glenn and Dr. Gary
25 Kaplan.” (Dkt. No. 69 at 27 n.8.) Summary judgment regarding these claims is therefore
26 warranted. As discussed below, the Court finds summary judgment warranted for each of

1 Plaintiff's remaining claims. This includes claims against individual Defendant Dr. L. Keith
2 Dipboye.

3 **C. Plaintiff's Claim of Improper Testing Under the ADA**

4 Plaintiff claims that Defendant VM violated the ADA's prohibition on improper "medical
5 testing" by referring him to the Washington Physicians Health Program ("WPHP"). Defendants
6 have argued that the referral "may not be deemed a referral for a 'medical test' because it did not
7 involve any medical tests, because no one at VM knew why plaintiff's performance was erratic,
8 and because some of the potential explanations [for plaintiff's performance] did not involve
9 diagnosable or treatable conditions." (Dkt. No. 70 at 9.) Plaintiff has failed to address this
10 argument in his opposition. Because the Court finds the argument persuasive, there is no need to
11 consider whether the referral was justified as a job-related "business necessity," expressly
12 allowed for under the ADA. 42 U.S.C. § 12112(d)(4)(A).

13 **D. Plaintiff's "Regarded As" and "Perceived As" Claims**

14 Plaintiff claims that Defendants improperly regarded him as disabled under the ADA and
15 the WLAD. In order to establish a prima facie case, he must demonstrate: (1) that he has, or is
16 regarded as having, a disability; (2) that he is otherwise qualified for the employment in
17 question; and (3) that he was excluded from the employment solely because of his disability. 42
18 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(1); *see also* RCW 49.60.040 (7)(a)(iii).

19 Over the course of nearly seven months, Plaintiff received negative performance
20 evaluations from thirteen attending physicians and senior residents. Some of these evaluators
21 indicated that Plaintiff's performance posed a potential risk to patients' health and safety.
22 Plaintiff offers no admissible evidence to suggest that the nondiscriminatory reasons put forward
23 by VM to explain the referral to WPHP or the subsequent decision to terminate his residency are
24 pretextual. Consequently, no reasonable jury could find that Plaintiff was excluded from his
25 employment "solely" because of his disability. Because he cannot establish the third prong of the
26 prima facie case, there is no need to consider whether Plaintiff's claims meet the requirements

1 for the first and second prongs.

2 **E. Plaintiff's Claim for Interference with a Business Expectancy Interest**

3 Plaintiff claims that Defendants were aware that he had been conditionally accepted into
4 an ophthalmology residency program, and that they interfered with his business relationship by
5 terminating him from VM's Transitional Year Residency program ("TY program"). Plaintiff
6 must show: "(1) the existence of a valid contractual relationship or business expectancy; (2) the
7 defendant's knowledge of that relationship; (3) an intentional interference inducing or causing a
8 breach or termination of the relationship or expectancy; (4) the defendant's interference for an
9 improper purpose or by improper means; and (5) resulting damage. *Koch v. Mutual of Enumclaw*
10 *Ins. Co.*, 108 Wn. App. 500, 506, 31 P.3d 698 (2001).

11 The Court finds no evidence in the record indicating that Defendants intentionally
12 interfered with the ophthalmology residency program, or that they did so for an improper
13 purpose. Consequently, Plaintiff cannot meet the required elements of the claim.

14 **F. Plaintiff's Claims for Breach of Contract and Promissory Estoppel**

15 Plaintiff claims Defendants breached Section B(2)(a) of his Residency Appointment
16 Agreement by failing to provide a suitable education experience. Plaintiff has not identified any
17 way in which his residency program violated relevant accreditation standards. Nor has he
18 provided evidence that he suffered any contractual damages. There is, therefore, no genuine issue
19 of material fact regarding his claims for breach of contract and promissory estoppel.

20 **G. Plaintiff's Defamation Claim**

21 In order to prove defamation, Plaintiff must identify a false statement of fact, made
22 without privilege, and with the requisite level of fault. *See Mohr v. Grant*, 153 Wn.2d 812, 822,
23 108 P.3d 768 (2005); *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). Plaintiff
24 has failed to offer evidence of any such statement, so the claim must fail.

25 **H. Plaintiff's Claim for Intentional Infliction of Emotional Distress**

26 To state a claim for intentional infliction of emotional distress, Plaintiff must allege

1 conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible
2 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
3 community." *Reid v. Pierce Cnty*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (emphasis, citation,
4 and internal quotation marks omitted). The Court finds no evidence on the record that would
5 enable a reasonable jury to find that Defendants engaged in such conduct. There is, therefore, no
6 genuine issue of material fact as to this claim.

7 **I. Plaintiff's Request for Injunctive Relief**

8 The Court finds no basis for equitable relief ordering VM to accept plaintiff back into its
9 residency program.

10 **J. Plaintiff's Request to add Dr. Daniel O'Connell as a Party Defendant**

11 Plaintiff "renews his request to add Dr. Daniel O'Connell as a party defendant to a claim
12 of common-law conspiracy . . . previously denied by the Court." (Dkt. No. 69 at 27 n.8; *see also*
13 Dkt. No. 45.) The Court declines the invitation to revisit this issue.

14 **III. CONCLUSION**

15 For the foregoing reasons, Defendants' motion for summary judgment is GRANTED in
16 its entirety. All of Plaintiff's remaining claims are hereby DISMISSED WITH PREJUDICE.

17 DATED this 27th day of February 2015.

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23
24 John C. Coughenour
UNITED STATES DISTRICT JUDGE

NO. 48394-7

**COURT OF APPEALS, DIVISION II
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SHANTANU NERAVETLA, M.D.,

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CERTIFICATE OF SERVICE

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BY _____
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I declare under penalty of perjury under the laws of the state of Washington that on September 16, 2016, I served a true and correct copy of the *Answer to Amicus Curiae Brief of The Legal Aid Society - Employment Law Center* and this *Certificate of Service* by e-mail and by placing same in the U.S. mail via state Consolidated Mail Service to:

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DATED this 16th day of September, 2016, at Olympia,
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