

**COPY**

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PAUL KOHN,

Plaintiff and Appellant,

v.

GTE GOVERNMENT SYSTEMS,

Defendant and Appellant.

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H011991

(Santa Clara County  
Super.Ct.No. 715590)

Court of Appeal - Sixth App. Dist.

DEPUTY

**FILED**

JUN 2 - 1995

Plaintiff Paul Kohn sued his employer, defendant GTE Government Systems ("GTE"), for discrimination based on age and physical handicap after he was medically disqualified from working on a classified intelligence project for the United States government. During in limine proceedings, the trial court barred evidence pertaining to the details of the project or the medical standards on which the disqualification was based. After plaintiff's opening statement to the jury, GTE moved for nonsuit. The court found that plaintiff's evidence of discrimination could not be presented to the jury without violating the in limine rulings, and it granted GTE's motion. The court subsequently rejected GTE's request for attorney's fees.

On appeal, plaintiff contends (1) his discrimination case could have been presented without disclosing secret information about the project; and (2) his opening statement presented sufficient facts to establish a prima facie case of age and handicap discrimination, in violation of Government Code

sections 12941 and 12940.<sup>1</sup> The United States has filed an amicus brief pursuant to California Rules of Court, rule 14(b).

GTE cross-appeals, arguing that it was entitled to reasonable attorney's fees under section 12965. We will affirm the judgment in its entirety.

#### Background

GTE contracted with the federal government to provide intelligence activities in support of the national security of the United States. Under the contract, GTE supplied data collection and other services at covert facilities both within and outside the United States. The domestic portion of the program was known as "BLACKJACK," while the overseas portion was called "CRIMP." The location of these facilities and the government's mission were classified as "TOP SECRET," pursuant to an executive order by the President.

Any contractor employee participating in the project was required to obtain a security clearance issued by the sponsoring federal agency.<sup>2</sup> In addition, any employee who traveled in CRIMP was required to meet certain medical standards. These standards not only ensured that the employees had adequate physical stamina to perform their duties, but also minimized the risk of medical emergencies, which would threaten exposure of the entire program and jeopardize relations with the host country. The medical

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<sup>1</sup> All further statutory references are to the Government Code unless otherwise specified.

<sup>2</sup> The identity of the agency was classified as "SECRET."

standards included the following restriction: "Cannot be on a medication routine that requires physician monitoring, nor on medication that if not available for a two to three week period would cause serious illness or damage to the employee's health." In order to obtain medical clearance for travel abroad, each employee submitted to an annual physical examination conducted by a physician at the Sunnyvale Medical Clinic.

Plaintiff was employed by GTE as a Logistics Specialist on the government project. Of the 43 months he worked in the program, he spent 8.6 months traveling overseas. On January 29, 1991, plaintiff passed the annual physical examination in preparation for another overseas tour the following March. Shortly thereafter, however, Dr. Kanter of the Sunnyvale Medical Clinic disqualified him pursuant to the CRIMP medical standards because plaintiff suffered from hypertension requiring medication.

Pursuant to agency procedures, plaintiff requested a waiver from the medical standards. The agency denied the request. On May 6, 1991, GTE officials told plaintiff that because of his ineligibility for CRIMP, he could not continue working in the department. Plaintiff was presented with the options of finding another position within GTE or taking a "layoff with retirement."

Plaintiff complained that removing him from the department constituted employment discrimination, and he asked for review by the GTE lawyer. At the end of May, plaintiff inquired about the status of his complaint. He was advised to seek an opinion from his private physician regarding whether he could go without his

medication for three weeks. On June 6, 1991, plaintiff gave the project managers a copy of a letter by his physician, Dr. Kachulis, expressing the opinion that plaintiff could safely travel to remote areas with only a "minuscule" risk of a "major catastrophe." Nevertheless, Dr. Kanter determined that plaintiff would be "in serious condition" and at "increased risk" if he were without his medication for two to three weeks.

On June 18, 1991, plaintiff received a notice of termination effective June 26. The effective date was eventually extended to August 9, 1991. After plaintiff's discharge Dr. Kanter testified that he would have approved plaintiff for overseas travel if plaintiff had changed to a medication that was not a beta blocker.<sup>3</sup>

On October 10, 1991, plaintiff filed suit, alleging that the termination was based on his "age and/or his physical condition in requiring blood pressure medication." Plaintiff alleged that he was 58 years old and physically fit at the time he was terminated, and that he had worked for GTE for more than 27 years. After he was medically disqualified from CRIMP, plaintiff was replaced by a younger employee. GTE refused to give plaintiff other assignments, instead giving such work to younger employees. GTE thereby saved "hundreds of thousands of dollars"

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<sup>3</sup> According to the opening statement, plaintiff's personal physician had already offered to give him a prescription for a non-beta-blocker medication, which would have enabled him to tolerate being without medication for three weeks. Plaintiff decided not to switch medications at that time, however, since he had a large supply of his current medication available for overseas tours.

by terminating plaintiff before he reached retirement age. Such conduct, according to plaintiff, constituted discrimination based on age and physical handicap, in violation of the Fair Employment and Housing Act ("FEHA"), Government Code sections 12940 and 12941.

GTE answered the complaint on December 5, 1991. In May 1992 the United States Department of Justice filed a statement of interest, asserting the necessity that it participate in the proceedings to protect the country's national security interests. The United States argued that plaintiff's claim was without merit because (1) the FEHA exempted conduct pursuant to security regulations established by the federal or state government, and (2) even if no such exemption existed, application of state law would violate the Supremacy Clause of the United States Constitution.

On November 13, 1992, the trial court denied a summary judgment motion brought by GTE, finding material issues of fact as to whether the stated reasons for discharge were pretextual and whether GTE violated any of its layoff policies. Included in this order, however, was a ruling that GTE's application of the CRIMP medical standards was "not a basis of plaintiff's claim for wrongful employment discrimination."

Prior to trial, the United States moved for an order in limine excluding any evidence of the details of the government's contract with GTE, except the information supplied in a declaration by director of the sponsoring agency. In support of the motion, the government noted that the agency had formally

asserted the state secrets privilege to prevent intentional or inadvertent disclosure of classified information, which could cause "exceptionally grave damage to the national security." The claim of privilege encompassed "any details about GTE's contract with the United States Government, including the identity of the government agency involved, the nature and purpose of the contract, the location of the overseas covert facilities where the contract is performed, and the bases and rationale for the imposition of the medical standards . . . ."

The trial court ruled on the government's motion as follows: (1) plaintiff would not be allowed to challenge the medical requirements imposed by the federal government pursuant to its contract with GTE; (2) plaintiff could not challenge the government's determination that he was not qualified to work on the CRIMP project; and (3) no details about the contract could be introduced other than those contained in the public record, including evidence of the identity of the sponsoring agency, the nature of the service provided, location of the facilities, or the rationale for the imposition of the medical standards. The court reiterated the previous summary judgment ruling that "in accordance with the federal Supremacy Clause, G.T.E.'s compliance with the federal medical standards cannot as a matter of law be a basis for a claim of unlawful discrimination." The court also found, based on the federal government's assertion of the state secrets privilege, that both the medical requirements of CRIMP and the government's refusal of a waiver were "beyond the scrutiny of the state court." Nevertheless, the court stated,

plaintiff was still entitled to show that his termination was based in part on his age and that GTE violated the FEHA by failing to adhere to its own policies regarding relocation of employees within GTE.

Plaintiff's counsel delivered her opening statement before the jury on July 28, 1993. GTE then moved for nonsuit, claiming the opening statement consisted of only "conjecture and speculation" about GTE's pretextual motives for terminating him. GTE pointed out that after the elimination of contentions related to plaintiff's disqualification from CRIMP, plaintiff was "left with trying to show that there was a violation of some type of reassignment or recall policy. Plaintiff did not in any way identify any such position or any other facts as part of the opening argument [sic] that would suggest there was a violation if such policies even existed, and because of that [dearth] of facts, at this particular time the court should grant a nonsuit."

Although the court appeared to agree that plaintiff had not offered facts related to any violation of company personnel policy, it "wanted to give the plaintiff a full opportunity to present all of the facts that he expects to prove." Accordingly, the court allowed plaintiff to augment the opening statement outside the presence of the jury. At the conclusion of this presentation, however, the court ruled that plaintiff's case had been "emasculated" by the in limine rulings.

The trial court provided a thoughtful, detailed explanation of this determination. First, it observed, plaintiff was barred from contesting the government's determination that he was not

qualified to work on the CRIMP project. The court noted that the accommodations suggested in plaintiff's complaint all pertained to measures that would have permitted plaintiff to continue working in the program. These arguments, however, again related to plaintiff's qualification to work on CRIMP and therefore were within the scope of the court's exclusionary ruling. Likewise, to the extent that plaintiff could be compared to other employees with medical problems who were permitted to continue working in CRIMP, any testimony regarding such accommodation would have required disclosure of information encompassed by the in limine ruling. As for plaintiff's contention that GTE purposefully sought to eliminate older people from its work force, the court found only a few "conclusionary" suggestions that any such design existed. Moreover, in order to fully examine these alleged motives, it would be necessary to know more about the job, the nature of the travel, and activities in the department that did not involve travel. Since these areas were protected by the in limine ruling, they could not be litigated.

Based on these findings, the court granted GTE's motion for nonsuit. After an unsuccessful motion for a new trial, plaintiff filed this appeal.

### Discussion

#### 1. Scope of Review

Code of Civil Procedure section 581c, subdivision (a), specifically authorizes a defendant to move for nonsuit after the plaintiff's opening statement. The motion may be granted "where it appears that counsel for the plaintiff has stated all the



facts that he expects to prove and that these would not make a prima facie case." (John Norton Farms, Inc. v. Todayco (1981) 124 Cal.App.3d 149, 160; Damesghi v. Texaco Refining & Marketing, Inc. (1992) 3 Cal.App.4th 1262, 1286.) The court must assume the plaintiff can prove the facts alleged in the opening statement. (Loral Corp. v. Moyes (1985) 174 Cal.App.3d 268, 272.) Evidence that raises only speculation or conjecture will not be sufficient to overcome a nonsuit motion. (Hilliard v. A.H. Robins Co. (1983) 148 Cal.App.3d 374, 415.) Nevertheless, the trial court should grant the motion only if, after giving the plaintiff's evidence all the value to which it is legally entitled, and after indulging in every legitimate inference in the plaintiff's favor, the court concludes there is no evidence of sufficient substantiality to support a verdict for the plaintiff. (Estate of Lances (1932) 216 Cal. 397, 400; Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal.App.4th 202, 210-211.)

On appeal, the reviewing court evaluates the evidence by the same standards employed by the trial court. (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830, 839; Loral Corp. v. Moyes, supra, 174 Cal.App.3d 268, 272.) If there is any substantial evidence supporting a verdict in the plaintiff's favor, the judgment of nonsuit must be reversed. (Loral Corp. v. Moyes, supra, 174 Cal.App.3d at p. 272; Wheeler v. Raybestos-Manhattan (1992) 8 Cal.App.4th 1152, 1154.)

2. The trial court's in limine ruling properly excluded facts pertaining to plaintiff's eligibility for the CRIMP project.

Plaintiff first contends the trial court should have permitted him to challenge the determination that he was not medically qualified to work on CRIMP. Plaintiff seeks to demonstrate that he in fact met the medical standards for eligibility, or alternatively, that he should have been allowed to work "stateside" as an accommodation of his hypertension. Plaintiff insists he could have introduced evidence on these issues without violating the state secrets privilege asserted by the federal government.<sup>4</sup>

Plaintiff's contention suffers from several fatal flaws. First, the claim that GTE should have allowed him to challenge the medical disqualification directly contravenes the order denying summary judgment, in which the court affirmatively stated that GTE's application of the CRIMP medical standards "is not a basis of plaintiff's claim for wrongful employment discrimination." The court emphasized this ruling in its in limine orders by repeating that "in accordance with the federal Supremacy Clause, G.T.E.'s compliance with the federal medical standards cannot as a matter of law be a basis for a claim of unlawful discrimination." Plaintiff does not contest this ruling.

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<sup>4</sup> Plaintiff does not challenge the government's assertion or the court's recognition of the state secrets privilege. It is thus unnecessary to review the authorities cited by GTE and the United States describing the privilege and emphasizing the extreme deference to be accorded the interest at stake.

Second, plaintiff unjustifiably assumes that the claim of privilege by the United States was narrowly confined to the "identity of the Government [agency], the identity and location of the Host Country(ies), and the specific nature of the operations." The privilege, however, was not so limited. The government sought exclusion of any details about its contract with GTE, including the rationale for imposition of the medical standards. As the trial court pointed out, it would be virtually impossible to litigate the issues of whether plaintiff could have continued working on the project without disclosing details relating to the nature of the project itself.<sup>5</sup> Plaintiff himself observes that GTE could not have defended its application of the CRIMP guidelines without proving why travel was necessary and why plaintiff was discharged while others were retained. To resolve these issues the jury would have had to hear evidence on the conditions and demands of the work performed both domestically and abroad, and the skills and experience of other employees assigned to and retained on the project.

Finally, plaintiff's argument implicitly assumes that GTE was responsible for his disqualification. It was not GTE, however, but the United States that imposed the standards and had the authority to waive them. GTE was bound under its contract to accept the decisions of the sponsoring agency regarding all aspects of the program, including assignment of personnel.

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<sup>5</sup> Indeed, the trial court noted by way of example that classified information was accidentally revealed during oral argument on the motion for a new trial.

Furthermore, the determination that he failed to meet CRIMP medical standards was made by an independent physician at the Sunnyvale Medical Clinic. Plaintiff's suggestion that he would have been approved if he had switched to a non-beta blocker would not have altered this outcome, because he elected not to change his medication for the anticipated trip. Likewise, it would not have advanced his position to have offered the letter by his own physician, Dr. Kachulis, expressing the opinion that plaintiff could safely travel without a significant risk of a "major catastrophe." Dr. Kachulis's opinion was useful only insofar as it might have altered the agency's decision not to approve plaintiff for the program. The jury's evaluation of the likelihood of such an outcome would have depended on its consideration of the risks the government sought to avoid. The jury thus would have had to know whether adverse health problems that were not major catastrophes were of concern to the government; whether adequate medical care could have been found at the work site; whether damage to national security would have occurred if medical attention were required; and why plaintiff's participation was or was not essential to the program in light of its purposes. Clearly, such details were excluded by the appropriate rulings protecting the government's assertion of the state secrets privilege.

For the first time on appeal, plaintiff argues that the trial court should have explored measures that would have protected classified information while enabling the jury to hear the case. As examples of such steps he suggests waiving jury

trial with an "in camera disposition by the court," obtaining security clearances for counsel and court personnel, or changing counsel and court personnel to those who have such clearance.

This argument is untimely. Plaintiff cites no authority requiring the trial court to adopt such procedural measures absent a request by a party or the holder of the privilege. We will not find error where the court did not have an opportunity to hear and consider the merits of any of these suggestions.

3. In light of the state secrets privilege, plaintiff was unable to establish a prima facie case of discrimination.

Plaintiff contends he presented substantial evidence that GTE discriminated against him on the basis of his age and his disability -- i.e., hypertension. His arguments may be summarized as follows: Because he was able to perform the essential functions of his job, including travel (as long as he took his medication), GTE unreasonably relied on Dr. Kanter's medical opinion that he did not meet the CRIMP medical standards. GTE should have allowed plaintiff to show that he did meet the medical requirements. Alternatively, GTE should have accommodated plaintiff's disability by allowing him to work "stateside" on BLACKJACK, or by paying for a security clearance for another department within GTE.

We need not enter the parties' debate over whether plaintiff's hypertension was a disability within the meaning of the FEHA. (See American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal.3d 603; but see Cassista v. Community Foods, Inc. (1993) 5 Cal.4th 1050, 1057-1059 [criticizing

American National].) Even assuming it was a disability under these circumstances, plaintiff's opening statement failed to present facts that would have permitted a jury to find discrimination. As the trial court reminded plaintiff, GTE's compliance with the federal government's medical standards could not be a basis for a discrimination claim. Thus, plaintiff was not permitted to introduce any evidence bearing on his qualifications for either CRIMP or BLACKJACK. The issues of whether plaintiff was in fact qualified for CRIMP and whether GTE should have accommodated him by allowing him to work "stateside" simply could not be considered.

The trial court repeatedly invited plaintiff to prove discrimination by showing GTE failed to find him another position within the company, but not involving CRIMP or BLACKJACK. Although plaintiff now argues that he did present evidence of discrimination in GTE's failure to allow him to transfer to another department, the record suggests otherwise. It is clear from counsel's opening statement, and the trial court so found, that plaintiff wanted to stay in the program. Moreover, according to the opening statement, GTE's Human Resources representative circulated plaintiff's resume along with a memo asking employee representatives of other departments whether there was any work available for plaintiff. At a subsequent meeting with company managers and the Human Resources representative, plaintiff learned that "reasonable [accommodation] in Mr. Kohn's disability was looking for another job at G.T.E. They said to Mr. Kohn that it was not his physical

problem, that it was only the procedure, that there can be no accommodation to the procedure. They interpreted the law requiring accommodation as excluding accommodation to the CRIMP guidelines." Plaintiff's response was to contest the latter portion of this advisement. He did not ask for further help in seeking positions outside the department or even acknowledge that as an option; instead, he read to his managers a passage on discrimination from a labor law book for nonlawyers. The opening statement contained no facts regarding opportunities in other departments that GTE prevented plaintiff from pursuing.

The only evidence plaintiff offered to prove that did not bear upon his suitability for the CRIMP/BLACKJACK program consisted of the following: (1) The department supervisor "quizzed" him about his retirement plans, and did the same with two other logistics specialists, also over age 55 and at the same grade level as plaintiff; and (2) certain co-workers of plaintiff believed that Terry Ting, the program manager,<sup>6</sup> "was targeting the older employees in the department and used her position to make sure that they would go on to physicians and would not be able to go overseas . . . and she got along much easier with the younger employees." Neither of these anticipated "facts" raises anything more than the vaguest conjecture and speculation regarding a motive to eliminate the jobs of older employees.

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<sup>6</sup> According to plaintiff's opening brief, "Terry Tyng" was a program manager "in charge of the overseas projects." If so, then any bias she held against older employees was immaterial, since plaintiff was disqualified from overseas travel for legitimate medical reasons.

Plaintiff presented no evidence that GTE was seeking to replace him because he was too old.

The trial court expressly recognized its duty to accept as true all the facts set forth in plaintiff's opening statement, give those facts all the value to which they are legally entitled, and indulge in every legitimate inference that can be drawn from those facts. Based on the facts presented, the court properly found that no competent evidence of sufficient substance to support a verdict in plaintiff's favor.

4. The trial court did not abuse its discretion in denying GTE attorney's fees.

After obtaining judgment, GTE filed a cost bill claiming \$161,896.83 in attorney's fees and \$6977.63 in costs. Plaintiff moved to tax costs. The trial court expressed strong reservations about the justification for attorney's fees under the procedural circumstances of the case. GTE, the court pointed out, did not prevail on the merits, but succeeded only because the federal government "interfered and prevented the case from going ahead." The court queried, "how can I, as a judge . . . say, 'G.T.E., you prevailed, it's not only legally sound, it's morally sound and you should get your attorney's fees,['] when through no fault of [plaintiff's] and no abilities on your part the case just didn't get tried[?]"

Subsequently, in its order addressing plaintiff's motion to tax costs, the court stated it had "carefully considered" the attorney's fee question. "The Court has reviewed four volumes and has balanced on the one hand a recognition that there has been no



adjudication on the merits and that there is a strong public policy to eliminate job discrimination; yet, on the other hand, it has noted . . . that at times the lawyering was out of focus. After balancing and reviewing these factors and many others, the Court declines to allow the recovery of attorney's fees . . . ." The court struck the attorney's fee claim and one item of costs, allowing the balance of GTE's cost bill in the amount of \$6,663.13.

In its cross-appeal, GTE argues that it should have been awarded its reasonable attorney's fees as provided for in the FEHA, because plaintiff's claims were "patently frivolous and unreasonable." We disagree.

Government Code section 12965 authorizes the court to award attorney's fees and costs to the prevailing party in a suit under the FEHA.<sup>7</sup> Where, as here, it is the defendant who prevails, such awards are permitted "'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" [Citation.]" (Christiansburg Garment Co. v. EEOC (1977) 434 U.S. 412, 421; Cummings v. Benco Building Services (1992) 11 Cal.App.4th 1383, 1387; Delaney v. Superior Fast Freight (1993) 14 Cal.App.4th 590, 600.) A trial court's order granting or denying a request for attorney's fees under section 12965 will not be reversed absent

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<sup>7</sup> The relevant part of this section states: "In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity."

an abuse of discretion. (Cummings v. Benco Building Services, supra, 11 Cal.App.4th at p. 1387.)

We find no abuse of discretion here. It is obvious that the trial court understood its duty and gave careful thought to the question of attorney's fees. It reasoned that GTE prevailed only because the in limine ruling prevented plaintiff from trying his case the following day. It is true that during opening statement, plaintiff was unable to provide facts beyond those encompassed within the court's exclusionary order, thereby justifying nonsuit. But this inability to present his case does not mean plaintiff's case was "objectively 'groundless,'" as GTE claims; if there were no legal grounds for suit, then GTE's summary judgment motion would have been successful. As the United States Supreme Court cautioned in Christianburg Garment Co. v. EEOC, supra, 434 U.S. at pages 421-422, "it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the

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Elia, J.

WE CONCUR:

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Cottle, P.J.

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Premo, J.

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outset, a party may have an entirely reasonable ground for bringing suit." We conclude the trial court properly exercised its discretion in declining GTE's request for attorney's fees. No abuse has been shown.

Disposition

The judgment is affirmed. Each party to bear its own costs on appeal.