2d Civil No. B162407

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BARBARA CEAZAN,

Plaintiff and Appellant,

vs.

SAINT JOHN'S HOSPITAL & HEALTH CENTER,

Defendant and Respondent.

Appeal from Los Angeles County Superior Court, No. BC 248065
Honorable Alexander H. Williams III

RESPONDENT'S BRIEF

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INTRODUCTION

Does a hospital employer have to "reasonably accommodate" a senior nursing administrator's inability to work for her boss, the director of nursing, by relieving her of her job responsibility to report directly to and communicate directly with her boss? It shouldn't and it doesn't. On point authority repeatedly rejects appellant's attempt here to stretch both the law and common sense beyond all reasonable bounds.

Plaintiff Barbara Ceazan held an important administrative nursing position at Saint John's Hospital and Health Center ("Saint John's"). She was in charge of all of the nurses and nonclinical staff – everyone except the physicians – in one of the hospital's units, a 24-hour-a-day responsibility. She was ultimately responsible for patient health and safety in her unit. As the highest level nursing supervisor in the unit, she (like the nursing heads of other units) reported directly to the Vice President of Patient Care Services, Paula Smith, R.N. Both by internal hospital policy and by regulatory mandate, Ms. Smith was responsible for all nursing services at the hospital

Ms. Ceazan found Ms. Smith demanding and hard to work for. She took a medical leave claiming stress and depression. She sought to return to work insisting on the same salary and responsibilities, but refused to report directly to Ms. Smith as all of her peers did. When Saint John's informed her that it could not accommodate that request, she deemed herself constructively discharged and initiated this action premised on Saint John's supposed failure to reasonably accommodate her inability to work with Ms. Smith.

She also claims that, although she was concededly an at-will employee, Saint John's breached a supposed contractual promise in its

employee handbook as to how it would conduct and honor a grievance proceeding.

SUMMARY OF ARGUMENT

To this day, Ms. Ceazan has failed to identify what *reasonable* accommodation Saint John's could have made at the time. She categorically refused even to consider any lesser position or salary. She insisted that she not report to the only supervisor that there was for nursing administration. Her position was as if the Chief Financial Officer for an organization refused to report to the President. There simply was no one else in the hospital's organizational structure to report to.

She asserts that Saint John's could have hired a facilitator to "buffer" all communications between her and Ms. Smith, or that she could have reported to another supervisor who would then report to Ms. Smith on her behalf. Such demands for organizational change are presumptively unreasonable. As the highest level nursing supervisor in an important department in a major hospital she could not simply report to another supervisor. The chain of command – necessary for the health and safety of patients and employees – is destroyed if it is watered down through buffers through which clear directives can become fuzzy ones. It is simply not reasonable to require an employer to abandon or restructure important reporting and command relationships to accommodate a high-level administrative employee's issues in dealing with her boss. Consistent, on-point authority repeatedly rejects just such accommodation claims.

Ms. Ceazan also claims that Saint John's should have guaranteed her a position in a new administrative structure. Saint John's reorganized over six weeks after she deemed herself constructively discharged, in the process

combining Ms. Ceazan's job with another. She claims that Saint John's was required to hold a position in the new structure open for her, even though it required *all* affected administrators to resign and reapply and the new positions necessarily differed from her old job. The law does not require such a guarantee of preferential treatment to *former* employees. Again, on-point authority rejects her theory. In any event, Ms. Ceazan was given the opportunity to apply for one of the new positions, but she declined to do so.

Nor can Saint John's be liable for failing to engage in an interactive process to come up with a position that Ms. Ceazan could handle at the same high level of responsibility and salary that she unequivocally insisted upon, and insists upon to this day. Failing to participate in an interactive process is not actionable unless that process would have resulted in identifying a *reasonable* accommodation that would have satisfied the plaintiff. The law does not require an employer to engage in a futile interactive process when no accommodation is possible. In any event, the person who terminated the process was Ms. Ceazan herself, something she cannot deny based on her reliance on testimonial privilege to prevent discovery on the issue.

Finally, her contract claim is debunked by the employee handbook itself, which explicitly states that the grievance procedure was not intended to create a contractual obligation.

Given these undisputed circumstances, the unequivocal nature of Ms. Ceazan's demands, and the clear and unequivocal language of the employee handbook, the trial court correctly granted summary judgment as to both Ms. Ceazan's disability discrimination and breach of contract claims.

The judgment should be affirmed.

STATEMENT OF FACTS

A. Ms. Ceazan's High-Level Administrative Nursing Position.

Respondent Saint John's Hospital and Health Center ("Saint John's") employed plaintiff and appellant Barbara Ceazan, a Registered Nurse, as Team Leader for its Ambulatory Medicine Unit ("AMU").[1] (JA 55-56, 76-78, 168, 427.) As Team Leader, Ms. Ceazan supervised nursing staff and all administrative employees in the Unit. She had a 24-hour responsibility for overseeing everyone except the physicians, some 45-50 nurses and other employees, in the unit. (JA 56, 77, 168, 177, 427.)

A Team Leader managed the nursing and administrative services in one or more of each of the 16 hospital units. (JA 56, 168, 173, 428.) There were 11 Team Leaders overall. Each Team Leader directly supervised the entire nursing staff in his or her units or units. (JA 56, 168-169, 173, 428.)

The 11 Team Leaders all, in turn, reported directly to Saint John's Vice President of Patient Care Services who had ultimate direct responsibility for overseeing *all* clinical nursing staff. (JA 56, 139-140, 168, 173, 427-428.)

B. The Employee Handbook And Saint John's Nonbinding Grievance Procedure.

Ms. Ceazan was an at-will employee. (AOB 27, fn. 3, 31, see also JA 62, 210, 382, 438.) She received Saint John's Employee Handbook, signing an acknowledgment of receipt. (JA 122-123, 210, 308.) The

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[1] Ms. Ceazan's level was initially designated "Manager." (JA 168, 386, 427.) Shortly thereafter she was promoted to "Director." (JA 386, 427.) "Director" and "Manager" designated different pay grades for payroll purposes for the Team Leader position. (JA 169, 486.)

acknowledgment specified that Saint John's could "change, rescind or add to any policies, benefits or practices described in the handbook, other than the employment-at-will policies, from time to time in its sole and absolute discretion with or without prior notice." (JA 308, see also JA 62, 122.) The Handbook itself explicitly stated that it "only highlights Saint John's Health Center's policies, practices and benefits for your personal education *and cannot therefore be construed as a legal document.*" (JA 299, emphasis added.) Saint John's "*reserve[d] the right to amend, supplement or rescind any provisions of this handbook, other than its employment-at-will provisions, from time to time as it deems appropriate in its sole and absolute discretion, without advance notice.*" (*Id.*, emphasis in original.)

The Handbook described a *nonbinding* grievance procedure. (JA 301.) Specifically, it stated that "[n]othing in this grievance procedure is intended to create an express or implied agreement that alters the employment-at-will relationship that exists." (JA 301, emphasis omitted.)

According to the description of the grievance procedure, an aggrieved employee may request a hearing before a committee. The committee's recommendation may be internally appealed to an administrator whose decision is then final. (JA 301-302.)

C. Ms. Ceazan's Problems At Saint John's.

1. Ms. Ceazan flirts with new responsibilities and obtains an increased salary, but has conflicts with the new Vice President of Patient Care Services.

In 1997, Ms. Ceazan took on the responsibilities of Team Leader of the Emergency Department as well as the AMU. (JA 386.) Saint John's

increased Ms. Ceazan's salary substantially to reflect her new responsibilities. (JA 170.)

In February, 1998, Saint John's hired Paula Smith as the Vice President of Patient Care Services. (JA 168.) Ms. Ceazan did not work well under Ms. Smith. According to Ms. Ceazan, she did not feel supported by Ms. Smith, and Ms. Smith was condescending and hostile to her. (JA 56, 80-83, 89-92, 95-96, 101-102, 170, 386, 428.)

Barely a year after Ms. Smith came on board, in May, 1999, Ms. Ceazan resigned as Team Leader of the Emergency Department. (JA 170, 386.) She retained her role as Ambulatory Medicine Unit Team Leader. (JA 168-170.) Shortly after she gave up her Emergency Room responsibilities, Ms. Ceazan's pay grade for payroll purposes – but not her actual salary – was lowered to reflect her reduced responsibilities. (JA 170.)

2. Ms. Ceazan files a grievance.

In October, 1999, Ms. Ceazan filed an internal grievance in which she alleged Ms. Smith had wrongfully demoted her and had treated her unfairly, condescended to her, and embarrassed her in front of others. (JA 170-171.) Ms. Ceazan sought a return to her former pay grade and job title and appointment of a facilitator to work with Ms. Smith and the other Team Leaders. (JA 170-171, 387.) A grievance committee recommended that (1) Ms. Ceazan be reinstated to her prior salary pay grade and payroll title, and (2) an organizational psychologist work with Ms. Smith and all of the Team Leaders, including Ms. Ceazan. (JA 57, 429, 170-171, 387.)[2]

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[2] Ms. Ceazan's opening brief describes the grievance proceeding and its outcome by relying primarily on evidence which the trial court struck. (continued...)

3. In an internal appeal, Saint John's administration limits the grievance committee's recommendations.

On internal appeal, the Saint John's administrator who reviewed the matter declined to reinstate Ms. Ceazan's previous pay grade and job title (her salary remained the same) and limited the organizational psychologist to working with Ms. Smith and Ms. Ceazan, rather than also with other Team Leaders. (JA 171.) Ms. Ceazan was not concerned with whether someone was assigned to work with Ms. Smith and the other Team Leaders – she was concerned only with herself. (JA 57, 171, 387, 429.)

An organizational psychologist was assigned and met with and Ms. Smith and Ms. Ceazan on several occasions. (JA 57, 171, 429.)

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[2] (...continued)
(Compare AOB 6-7 and 23, citing JA 391 [grievance committee's decision] with JA 475 & RT 11-12 [striking paragraph 8, lines 12-13 of Ms. Ceazan's declaration and attached exhibit, at JA 387, 390-392]; AOB 8, citing JA 387:15-17 [Ms. Ceazan's proffered declaration that "I subsequently learned that Paula Smith was appealing the grievance committee's decision even though more than 10 days (i.e., 21 days) had elapsed since the ruling"] with JA 475 & RT 11 [striking these paragraph 9, lines 15-17 of Ms. Ceazan's declaration, at JA 387]; AOB 8, citing JA 387:19-21 [Ms. Ceazan's statement that "[w]hen the Administrative Staff Member issued his ruling, the most important aspects of the Grievance committee's decision, including the reinstatement of my former title and pay grade, were reversed"] with JA 476 & RT 12 [striking these paragraph 9, lines 19-21 of Ms. Ceazan's declaration, at JA 387].)

Ms. Ceazan makes no argument on appeal as to any error in the evidentiary rulings. Accordingly, the stricken evidence is not properly considered here. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [On appeal from the granting of summary judgment, the court "consider(s) all the evidence set forth in the moving and opposition papers *except that to which objections have been made and sustained,*" emphasis added].)

4. Ms. Ceazan goes on medical leave.

Shortly after the grievance process and despite the assistance of the organizational psychologist, Ms. Ceazan filed for Workers' Compensation in December, 1999. (JA 57, 143, 171 [erroneously stating that Ms. Ceazan filed for Workers' Compensation on December 20, *2000* rather than 1999], 429.) In January, 2000, she took a medical leave based on an asserted "mental disability." (*Ibid.*) According to Ms. Ceazan and her doctor, she was unable to perform "her regular job duties 'or equivalent job duties that would require the same type of cognitive abilities and emotional stability.'" (AOB 17; JA 714-715.) She claimed that Ms. Smith's mistreatment triggered repressed issues and she became depressed. (JA 6, 57-58, 143, 395-398, 429.)

In February, 2000, Ms. Ceazan's counsel wrote to Saint John's asserting that its actions had "resulted in the constructive discharge of Ms. Ceazan." (JA 57, 141, 489.)

5. Ms. Ceazan and her doctor contemplate Ms. Ceazan's return to work. Ms. Ceazan refuses to work under Ms. Smith.

In August, 2000, Ms. Ceazan and her treating physician, Dr. Bassett, began discussing Ms. Ceazan's return to work. Ms. Ceazan wanted to return to her former job. (JA 388.) At some point before September 14 Ms. Ceazan told Dr. Bassett that she could not work under Ms. Smith, however. (JA 132-135, 430-431, see also JA 489-493.)

Dr. Bassett then authorized Ms. Ceazan to return to work on September 15, 2000, with the restriction that Ms. Ceazan have "no direct supervision by Paula Smith." Dr. Bassett did not place any other restrictions on Ms. Ceazan's return to work. (JA 58, 130, 293-294, 388.)

D. Saint John's Tells Ms. Ceazan It Cannot Accommodate Her Because There Are No Open Positions At Her Level That Do Not Report To Ms. Smith and Unsuccessfully Invites Her To Explore Other Options With Saint John's.

On September 15, 2000, when Ms. Ceazan sought to return to work there were no open positions at Ms. Ceazan's level which did not report directly to Ms. Smith. (JA 67, 144, 147, 168, 173, 208-209, 428, 433, 497-499.)

On September 14, the day before she was scheduled to return to work, Saint John's Manager of Employee Health, Janice Pemberton, told her that there were no jobs available at her level that did not require her to report to Ms. Smith. Accordingly, there was no reason for her to come to work the next day. (JA 143, 388-389.)[3] The next day, Ms. Pemberton by letter reiterated that "there are no positions available at your level and relative to your qualifications, that do not require you to report to the Vice President of Patient Care Services." At the same time she proffered that "[t]here may be lesser positions available that you may be interested in that would not necessitate reporting to the Vice President of Patient Care Services" and invited Ms. Ceazan to "contact [her] if [she was] interested in considering other available nursing positions at Saint John's for which [she might] be qualified." (JA 147; see also JA 58, 111-112, 143-144, 293, 295, 388, 494-495.)

Ms. Ceazan never contacted Ms. Pemberton again. (JA 144.) Nor did Ms. Ceazan ask Saint John's to investigate another position for her. In discovery, Ms. Ceazan, asserting attorney-client privilege, refused to reveal

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[3] The facts are stated in the light most favorable to Ms. Ceazan, as required in evaluating a summary disposition. Saint John's believes that the nature of the conversation was not as Ms. Ceazan portrays it.

her reasons for not doing so. (JA 58-59, 109-112, 433, see also JA 495-497.)

E. Ms. Ceazan Files A Complaint To The Department of Fair Employment and Housing.

Instead, on November 7, 2000, Ms. Ceazan filed a complaint with the Department of Fair Employment and Housing claiming that she had been discriminated against because of a purported disability. (JA 211, 312.) She asserted that she was denied a reasonable accommodation of her medical condition, "Clinical Depression," because Saint John's had told her that "there were no positions available at my level and relative qualification that met my medical restrictions (no direct supervision by Paula Smith)." (JA 312.)

F. Over A Month After Ms. Ceazan's Claimed Constructive Discharge, Saint John's Restructures And Terminates All Team Leaders. Ms. Ceazan Is Offered An Opportunity To Apply For A Position. She Refuses.

In November 2000, six weeks after Ms. Ceazan sought to return to work and about the time that she filed her DFEH claim, Saint John's undertook a major restructuring. (JA 59, 145, 171, 434.) The reorganization eliminated all Team Leader positions, including Ms. Ceazan's former position as Team Leader of the Ambulatory Medicine Unit. (JA 59, 145, 171, 209-210, 434.) In place of the old system, Saint John's created a new, three-tier structure. As before, the Vice President of Patient Care Services retained ultimate nursing responsibility. Directly below her, five new management positions, Administrative Directors, were created. (JA 171-172, 176-177, 209-210.) These positions reported directly

to Ms. Smith. Below the Administrative Directors, a third tier of 9 Manager positions was created, similar in nature and pay to Ms. Ceazan's former position. The 11 Team Leader positions, however, were reduced to 9 Managers. There was no longer a separate Manager for the Ambulatory Care Unit; rather, oversight of that unit was combined with the Emergency Room. (JA 176.) The Managers did not report directly to Ms. Smith. Rather, they reported to the Administrative Directors who in turn reported to Ms. Smith. (JA 59, 171-172, 209-210, 434.)

In effecting the reorganization, Saint John's terminated all of the Team Leaders. (JA 59, 171, 209, 434.) The former Team Leaders were invited to apply for the new Administrative Director or Manager positions or, alternatively, to accept Saint John's standard severance package. (JA 60, 209, 435.)

During the first half of November 2000, Saint John's notified Ms. Ceazan's treating physician, Dr. Bassett, of the reorganization and the opportunity for Ms. Ceazan to apply for new positions which might not require to direct reporting to Ms. Smith. (JA 145.) Saint John's then forwarded the materials to Dr. Bassett on November 16, 2000, requesting that she review them with Ms. Ceazan. (JA 60, 145, 435, see also JA 499-500.) Ms. Ceazan did not apply for any of the new positions. (JA 60, 109, 145, 210, 435, see also JA 500-501.)[4]

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[4] She claimed that she never received the application materials. (JA 113-115, see 109-110.) She produced them in discovery, however. (JA 60, 115, 435.)

PROCEDURAL HISTORY

A. The Complaint.

After receiving a Right To Sue letter from the Department of Fair Employment and Housing (JA 7, 14-17), Ms. Ceazan filed this action against Saint John's alleging (1) wrongful termination and (2) breach of contract. (JA 1-10.) She asserts that she was constructively terminated on September 15, 2000, when Saint John's had no vacant position for her at her level and salary that did not report to Ms. Smith. (JA 1, 6-8.)

B. The Summary Judgment Motion.

Saint John's moved for summary judgment. (JA 28-54, 447-458.) Saint John's undisputed evidence included that at the time Ms. Ceazan sought to return to work, September 15, 2000, Saint John's had no vacant nursing positions at Ms. Ceazan's level that did not report directly to Ms. Smith. (JA 67, 144, 147, 168, 173, 208-209, 428, 433, 497-499.) Saint John's undisputed evidence also included its Employee Handbook and the acknowledgment of receipt of that handbook that Ms. Ceazan had signed. (JA 122-123, 210, 297-305, 308.)

In opposing summary judgment, Ms. Ceazan abandoned any claim of wrongful termination and recast her cause of action as one for failure to reasonably accommodate her purported disability. (RT 5-6.) She likewise conceded she had no evidence to "overcome the [express] at-will language in the Employee Handbook" and withdrew any claim that Saint John's breached any implied promise not to terminate her except for cause. (JA 382.) She argued, instead, that Saint John's had an implied contractual promise to strictly adhere to and accept the results of the grievance procedure outlined in the Employee Handbook. (JA 382-384.)

She did not dispute that there was no vacant nursing Team Leader position for her when she sought to return to work that did not report directly to Ms. Smith. (JA 428, 433.) She continued to insist that she could not have been placed in a position where she reported directly to Ms. Smith. (JA 375-377, 388, 550.) Rather, she argued that:

(1) she should have been accommodated by having Saint John's hire a "facilitator" to buffer all communications between her and Ms. Smith (JA 376-377),

(2) alternatively, she should have been allowed to report to another Team Leader who in turn would report to Ms. Smith (JA 377),

(3) Saint John's should have engaged in a continuing dialogue with her as to how to accommodate her refusal or inability to report to Ms. Smith (JA 375, 378), or

(4) speculating that a changed organizational structure was in the works by September 15, 2000, she should have been guaranteed one of the positions in the new administrative structure that Saint John's sought to create two months later in November, 2000. (JA 377-378.)[5]

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[5] Again, although relied on in the opening brief (AOB 11-12, citing JA 389:7-14), the trial court *struck* Ms. Ceazan's speculation that the reorganization would have been in the works before November, 2000. (RT 12 & JA 482 [striking paragraph 16, lines 10-14, of Ms. Ceazan's declaration, at JA 389.) Again, Ms. Ceazan has not challenged that ruling on appeal and her speculation is not properly considered on appeal. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

The trial court also sustained objections to portions of Saint John's evidence. (RT 13; see JA 444-445, 143-144 [Pemberton declaration], 208-211 [Blake declaration].) Saint John's does not rely on that evidence here.

C. The Trial Court Grants Summary Judgment Finding That, As A Matter Of Law, No Reasonable Accommodation Was Available Given Ms. Ceazan's Conditions And That There Was No Contract Right To The Grievance Procedure.

After affording Ms. Ceazan five hearings in which to clarify her theory, the trial court granted summary judgment in favor of Saint John's. (JA 860-861; RT 216-217.) The trial court also summarily adjudicated punitive damage liability in Saint John's favor. (JA 860-861.) Ms. Ceazan did not challenge that ruling on appeal.

The trial court noted that it was undisputed that in September, 2000, Saint John's had no positions at her level that did not report to Ms. Smith. (RT 39.) It then determined that "that which Ms. Ceazan wanted and insisted on as an accommodation was unreasonable as a matter of law." (RT 215.) It refused to hold, as Ms. Ceazan sought, that "an employee has the right to dictate who they work for as a condition of employment under the disabilities act of FEHA or ADA." (*Ibid.*)

Specifically, the court rejected Ms. Ceazan's proffered "facilitator" dual reporting structure accommodations as unreasonable as a matter of law. (JA 375-377, 860-861; RT 215-216.)

As to the November, 2000 reorganization, it held nothing "require[s] the defendant to reassign the plaintiff to a new position in a new structure after all employees of the various departments have been terminated and asked to reapply for the new positions." (RT 41-42.) It rejected as "speculat[ion]" unsupported by any admissible evidence the claim "that the reorganization must have been in the works for months and that the hospital must have known that the new positions were being created in September 2000, prior to the termination of the employees." (*Ibid.*)

Finally, the trial court held that there was no "interactive process" to engage in:

> [Plaintiff] was not insisting on a dialogue. She was not insisting on a process. She was insisting on a specific, clear, unambiguous result [her old job back with no reporting to Ms. Smith].
>
> And her conduct, as pointed out in the evidence, as pointed out by counsel, clearly was consistent with that: "if you make me work for Ms. Smith, I will not work here and I'm going to sue you."

(RT 215.)

As to the breach of contract claim, the trial court agreed that Ms. Ceazan's was an at-will employee. (RT 62-65.)

It further concluded that the Employee Handbook's "clear and unequivocal language" precluded her from "assert[ing] that [Saint John's] was contractually bound to conduct grievance procedures in any particular manner." (RT 62-65, 69-70.)

D. Entry Of Judgment And Appeal.

Judgment was entered on August 30, 2002. (JA 865.) Ms. Ceazan timely appealed. (JA 868.)

STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment de novo, except that it does not consider evidence "to which objections have been made and sustained." (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 334.) In doing so, however, it is "not bound by the trial court's stated reasons or rationales." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 223.)

As we now explain, summary judgment in favor of Saint John's was proper because (1) there was no *reasonable* accommodation that could be made of Ms. Ceazan's insistence that she return to her old job but not report to Ms. Smith, and (2) the Employee Handbook explicitly stated that its grievance procedure did not create any contract right.

ARGUMENT

I. SAINT JOHN'S DID NOT FAIL TO REASONABLY ACCOMMODATE MS. CEAZAN AS THE ONLY "ACCOMMODATIONS" SHE HAS IDENTIFIED AS ACCEPTABLE WERE UNREASONABLE AS A MATTER OF LAW.

Ms. Ceazan claims Saint John's failed to "reasonably accommodate" her inability to work for Ms. Smith. She insists that Saint John's had to return her to the same or an equivalent senior administrative nursing position *and* that she could not report to Ms. Smith.[6] The trial court properly held that Ms. Ceazan's combination of conditions – "that the hospital employ her and employ her only in her present capacity, not in any other job, but working for somebody else" – was unreasonable as a matter of law. (JA 860-861; RT 99.)

A. At The Time Ms. Ceazan Sought Accommodation, There Was No Team Leader Position That Did Not Report Directly To Ms. Smith.

There is *no* dispute that when Ms. Ceazan sought to return to work there was *no* comparable position at her level and salary – Team Leader – did not report to Ms. Smith. (JA 67, 144, 147, 168, 173, 208-209, 428, 433,

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[6] E.g., AOB 23 [Dr. Bassett's restriction required "'no direct supervision by Paula Smith'"]; 24-25 [insisting that Saint John's had to allow Ms. Ceazan to "maintain her current position" or provide her a position "at the same grade or level" and "'similar in nature and pay' to her former position"]; JA 377 [summary judgment opposition, contending that she was entitled to "reassignment to a vacant position 'at the same level'"].

497-499.) An employer's duty to provide an employee with an acceptable position *only* "if an already funded, vacant position at the same level exists." (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972; *Spitzer v. Good Guys, Inc., supra*, 80 Cal.App.4th at p. 1389 [same; "an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job . . . if there is no vacant position for which the employee is qualified"].) The employer is properly granted summary judgment if "there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.) Here there was no such position.

Thus, the only issue is whether Saint John's had to reinvent Ms. Ceazan's job so that she did not report to Ms. Smith. The established law, as we now discuss, is that it did not.

B. Ms. Ceazan's Demand That She Be Returned To A Team Leader Position But Not Report To Her Boss, Ms. Smith, Was Unreasonable As A Matter Of Law.

Ms. Ceazan asserts that Saint John's had to restructure her position so that, unlike all of her peers, she would not have to report to Ms. Smith. As plaintiff, she "bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows [her] to perform the job's essential functions." (*Lucas v. W.W. Grainger, Inc.* (11th Cir. 2001) 257 F.3d 1249, 1255-1256; accord *Earl v. Mervyns, Inc.* (11th Cir. 2000) 207

F.3d 1361, 1367; *Reed v. LePage Bakeries, Inc.* (1st Cir. 2001) 244 F.3d 254, 259.)[7]

To do so, she asserts that Saint John's was obliged (1) to create a new, "dual reporting structure" in which she would stay at her same job but report to some unidentified third person, who, in turn, would then report to Ms. Smith on her behalf, or (2) to hire a "facilitator" to act as a "buffer" between her and Ms. Smith in all of their communications and interactions. (See AOB 23-24; JA 375-377.) This sort of wholesale organizational restructuring and operational interference, however, as a matter of law, is not a *reasonable* accommodation.

All the governing law requires is that an employer "make *reasonable* accommodation." (Gov. Code, § 12940, subd. (m), emphasis added.) As a result, "[t]here are limits on the restructuring that an employer needs to do." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948; cf. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 401 [122 S.Ct. 1516, 152 L.Ed.2d 589] [Americans with Disabilities Act's reasonable accommodation requirements "do not . . . demand action beyond the realm

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[7] Because FEHA was modeled on the federal Rehabilitation Act and Americans with Disabilities Act (ADA), decisions interpreting those laws are persuasive in deciding cases under FEHA where the statutory language is the same. (*Spitzer v. Good Guys, Inc., supra*, 80 Cal.App.4th at p. 1384; *McCullah v. Southern Cal. Gas Co.* (2000) 82 Cal.App.4th 495, 499; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 948.) Some portions of FEHA's statutory language differ from that in the Rehabilitation Act and the ADA. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019 [definition of disability]; *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344 [requiring accommodation even if disability does not affect essential job functions].) As to those aspects, federal authority may not be helpful. But FEHA's scope as to what constitutes a "reasonable accommodation" is identical to the federal standard. (Compare Gov. Code, § 12926, subds. (f) & (n) with 29 C.F.R. § 1630.2 (n) & (o)(2); Gov. Code, § 12940, subd. (n) [expressly adopting federal standard regarding interactive process].)

of the reasonable.") Specifically, an employer need not create a new job to accommodate the employee. (*Hastings v. Department of Corrections, supra*, 110 Cal.App.4th at p. 972; *Spitzer, supra*, 80 Cal.App.4th at p. 1389.)

Ms. Ceazan's claim here is that she should have been given her old job back but that she should not have had to report to, take direction from, or interact with her boss, Ms. Smith. Given her position, that was unreasonable.

1. Reporting to the Vice President of Patient Care Services was an essential function of the Team Leader job.

"An accommodation can qualify as 'reasonable,' . . . only if it enables the employee to perform the essential functions of the job." (*Lucas v. W.W. Grainger, Inc., supra*, 257 F.3d at p. 1255.) Here, reporting to and receiving direction from Ms. Smith was an essential function of the Team Leader position.

Given Ms. Ceazan's position as a nursing administrator in charge of an entire hospital department, the reporting structure was an essential element of her position. Her superior, Ms. Smith, was the Vice President of Patient Care Services. In Saint John's structure, she was the person who held ultimate responsibility for *all* nursing at Saint John's. (JA 168.) California regulations require that the hospital's "nursing service shall be under the direction of *an* administrator of nursing services who shall be a registered nurse . . . ." (Cal. Code Regs., tit. 22, § 70211, subd. (b), emphasis added; see JA 56, 168, 139-140, 173, 428.) By regulatory mandate, "the administrator of nursing services has authority, responsibility and accountability for the nursing service within the facility." (§ 70211, subd. (c).) Saint John's internal policy designated the Vice President of

Patient Care Services as that person with the responsibility for overseeing all of the clinical nursing staff. (JA 56, 168, 173, 428.)[8] Each of the 11 Team Leaders reported directly to Ms. Smith. (JA 56, 168-169, 173, 428.) All of this was undisputed. (JA 428.) Reporting to Ms. Smith was part and parcel of the Team Leader's job description. (See *Robertson v. Neuromedical Center* (5th Cir. 1998) 161 F.3d 292, 295 [administrative duties were essential function of neurologist's job].)

Reporting to a particular superior is an essential function of any job. Accordingly, "[m]ost courts have held that an employer is not required to accommodate an employee by providing a different supervisor . . . ." (Pfeiffer, Employment Discrimination Law (3d ed. 2000 cum. suppl.) p. 186, fn. omitted.) An employer has as much of a legitimate interest in maintaining its existing reporting structure and chain of command as it does in maintaining a seniority system. (Cf. *US Airways, Inc. v. Barnett*, *supra*, 535 U.S. 391 [presumption that attempt to disregard functioning seniority system is not reasonable].)

Kennedy v. Dresser Rand Co. (2d Cir. 1999) 193 F.3d 120, is directly on point. There a nurse at a factory found it stressful to work for her supervisor who supervised all healthcare personnel at the plant. As a result, just as Ms. Ceazan claims here, she developed clinical depression. She asserted that as a reasonable accommodation she should not be required to report to or interact with her original supervisor. In upholding summary judgment, the Second Circuit found the claimed accommodation of creating a new reporting relationship *unreasonable as a matter of law*.

It held that "[t]here is a presumption . . . that a request to change supervisors is unreasonable, the burden of overcoming that presumption

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[8] Ms. Ceazan's avowed goal was to force Saint John's to remove Ms. Smith from any further supervisory position. (JA 219.)

(i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) . . . lies with the plaintiff." (*Id.* at pp. 122-123; see also *Wernick v. Federal Reserve Bank* (2d Cir. 1996) 91 F.3d 379 ["(n)othing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy"]; *Weiler v. Household Finance Corp.* (7th Cir. 1996) 101 F.3d 519, 526 [reasonable accommodation "does not require (the employer) to transfer (plaintiff) to work for a supervisor other than (his present supervisor) or to transfer (the supervisor)"]; *Snyder v. Medical Service Corp. of Eastern Washington* (2001) 145 Wash.2d 233, 241-242 [35 P.2d 1158, 1162-1163] ["no duty under (state disability law) to reasonably accommodate an employee's disability by providing her with a new supervisor"].)

That presumption applies here in spades. Ms. Ceazan was not an assembly-line worker or low-level employee where changing supervisors was of no consequence. Whom she reported to was critical to the hospital's proper functioning. Creating a new structure would have required reworking the whole organization. When Saint John's ultimately reorganized, it created new *higher-level* Administrative Directors, giving them no more than two to three units each to oversee. And, it reduced the number of the new Manager positions some of which necessarily had more combined responsibilities each. For example, the Team Leader position that Ms. Ceazan had held for the AMU was combined with that for the Emergency Room (responsibilities Ms. Ceazan had given up) into one Manager position. (JA 171-172, 176-177, 209-210.)

The Team Leader position was an integral part of the "chain of command." In any such chain there has to be responsibility and accountability with each link, *especially* at the senior levels. As long as Ms.

Ceazan wanted to remain a senior link in the nursing administration chain, there was no one to whom she could report or receive direction from other than Ms. Smith.

2. As a matter of law it was unreasonable to assign Ms. Ceazan's reporting and chain of command responsibilities to another employee.

Ms. Ceazan asserts that she could have reported to another person who then could have reported to Ms. Smith. But that would have imposed new, 24-hour-a-day responsibilities on another individual. The law is clear that it is not a reasonable accommodation to carve out and assign an essential function of a job to other employees. (E.g., *Emerson v. Northern States Power Co.* (7th Cir. 2001) 256 F.3d 506, 514 [rejecting as unreasonable plaintiff's "suggest(ion) that the (stressful) calls could have been routed to another consultant, . . ."]; *Basith v. Cook County* (7th Cir. 2001) 241 F.3d 919, 927, 929 [holding that employer's ability to assign duties to another employee does not make them nonessential]; *Robertson v. Neuromedical Center*, *supra*, 161 F.3d at p. 295 ["'the law does not require an employer to transfer from the disabled employee any of the essential functions of his job,'" citation omitted; no duty to hire or assign administrative duties to administrative assistant]; *Feliciano v. Rhode Island* (1st Cir. 1998) 160 F.3d 780, 785; see also Pfeiffer, *supra*, p. 139, fn. 101.)

"An employer is not required . . . to reallocate job duties in order to change the essential function of a job. [Citations.] An accommodation that would result in other employees having to work harder or longer hours is not required. [Citation.] . . . [A]ssigning plaintiffs lighter loads would fundamentally alter the nature of defendant's . . . operation, a change not demanded by the law." (*Milton v. Scrivner, Inc.* (10th Cir. 1995) 53 F.3d

1118, 1124-1125.) It is clear that assigning additional reporting and chain of command responsibilities to another person would be an increased burden on that person.

What Ms. Ceazan, in effect, proposes is that Saint John's had to create two new positions to accommodate her: one, a special "modified" Team Leader position for her, where she did not report to Ms. Smith, and a second managerial position with increased responsibilities for someone else where that other person not only performed his or her own job, but was responsible for accurately reporting from Ms. Ceazan to Ms. Smith and relaying directives from Ms. Smith to Ms. Ceazan. But creating new positions is decidedly outside of the employer's reasonable accommodation obligation. (See *Hastings v. Department of Corrections, supra*, 110 Cal.App.4th at p. 972 [no duty to create new job]; *Spitzer v. Good Guys, Inc., supra*, 80 Cal.App.4th at p. 1389 [same].)

Ms. Ceazan implicitly argues that because Saint John's *later* reorganized its reporting structure by creating Administrative Director positions (at a higher pay level and with greater responsibilities than the pre-existing Team Leaders), it could have accommodated her inability to work for Ms. Smith by specially creating such a reporting structure for her. (AOB 25.) But the relevant time period for determining whether accommodation is available is during the plaintiff's employment tenure, not some time thereafter. (See *Spitzer, supra*, 80 Cal.App.4th at pp. 1389-1390 [issue is whether employer had available positions "between June 1995, when she first sought reassignment as a necessary accommodation, and March 1998, when she left the company"]; *Emerson v. Northern States Power Company, supra*, 256 F.3d at p. 516 [availability of positions after employment terminated is irrelevant].)

The fact that the employer later creates positions that the employee might have been able to perform in is not the same as saying that an employer *must* restructure its chain of command whenever doing so might accommodate an employee's inability to work with her present boss. There is a wide chasm between what an employer may undertake for other reasons (and the disruptions it might endure to do so) and requiring the employer to take those steps and undergo those disruptions simply to accommodate one employee's inability to work with a particular boss.

Indeed, this very argument was rejected in *Voytek v. University of California* (N.D.Cal. 1994) 1994 WL 478805, *18:

> [P]laintiff asserts that the fact that (the employer) restructured the department and distributed his responsibilities among several new positions is evidence that the failure to do so on his behalf was unreasonable. . . . [The employer] was not obligated to offer plaintiff a new position. The elimination of his former position and redistribution of the tasks to several employees is not a job restructuring; it is the creation of several new positions.

If an employer has to reorganize its reporting structure for senior administrative employees every time personality conflicts make it difficult for subordinates to work with particular bosses, there will be chaos. The law's limitation to *reasonable* accommodations cannot be read to require organizational restructuring whenever there are working-relationship issues.

3. Hiring someone to "buffer" all communications between a senior administrative nursing supervisor and her boss, the Vice President of Patient Care Services is an inherently unreasonable recipe for disaster.

Ms. Ceazan's proffered alternative accommodation to rejiggering Saint John's organizational structure is that Saint John's should have hired a "facilitator" to "buffer" every communication between her and her boss, Ms. Smith. (See AOB 23-24; JA 375-377.) In light of the nature of Ms. Ceazan's complaints, the only purpose for such a "facilitator" would be to "soften" directives from Ms. Smith.[9] Again, this "accommodation" is unreasonable as a matter of law.

The law is that an employer need not hire someone to perform an essential function of the employee's job. "[A]n employer is not required to hire two individuals to perform one person's job; nor is the employer required to reassign essential functions of the job to an assistant." (Pfeiffer, *supra*, p. 178 & fn. 237, citing numerous cases.) But that is what Ms. Ceazan's hypothesized accommodation would require: hiring a third party to perform her required, essential functions in communicating up and down the chain of command and paying Ms. Ceazan herself to perform other parts of her job. The law does not require that. (E.g., *Gilbert v. Frank* (2d Cir. 1991) 949 F.2d 637, 644 [assigning coworkers to assist with physically demanding aspects of job employee could no longer perform was *not* a reasonable accommodation because it sought elimination of essential job functions].)

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[9] The proposed facilitator's role, thus, was much different from that of the Administrative Director positions Saint John's eventually created.

Nor would the idea of a communications "buffer" for Ms. Ceazan have been feasible. Again, there is on-point authority in analogous circumstances: *Altman v. New York City Health and Hospitals Corp.* (S.D.N.Y. 1995) 903 F.Supp. 503. In *Altman* the plaintiff doctor was the chief of the defendant hospital's internal medicine department. He was also a recovering alcoholic. Plaintiff contended that he could be accommodated by being placed back in his chief of department position, but having others monitor him to ensure that he had not slipped back into his alcoholic ways. The District Court rejected that noting that, as here, the position at issue involved 24-hour responsibility for the safe delivery of health services in a department of a major hospital:

> [P]laintiff's duties as Chief of Service extended beyond the confines of the workplace and the ordinary workday; and the decisions which plaintiff would have had to make at odd hours, without warning, almost by definition would have involved crises in the Department.

(*Id.* at p. 512.)

For the same reasons, Ms. Ceazan's suggestion that Saint John's hire a facilitator to act as an intermediary in all communications between her and Ms. Smith is patently unreasonable. Ms. Ceazan was a high level nursing supervisor in a major hospital who had direct responsibility for ensuring patient safety and quality care. She was responsible for *all* of the clinical nursing staff and employees – in other words, everyone but the physicians – some 45 to 50 nurses and other employees in one of the hospital's major units. (JA 168, 79.) She admittedly had 24-hour-a-day supervisory responsibility. (JA 427.) She needed to be able to have direct communication with her boss *at any time*. Her position was such that one could not wait for a "facilitator" to be available before communications

could take place. Important communications could not be put on hold until the facilitator was available.

At the same time, her boss needed to be able to obtain direct input from Ms. Ceazan, not from a surrogate from whom she could not determine whether matters were properly being handled. As in *Altman*, "even during normal hours in the workplace, [a monitor or facilitator] neither would have, nor could have, overseen plaintiff's performance of [her] clinical duties in any meaningful way; and it is precisely while carrying out those duties . . . that plaintiff could have done harm the most easily, and also could have done the greatest harm . . . ." (903 F.Supp. at p. 512.)

Ms. Ceazan's position was in supervising a department at a major *hospital*. (See *id.*) Even more so than in a business, where efficiency and productivity are key to profits, it was critical at Saint John's that the chain of command at all levels, especially the highest, remain unobstructed. At stake was not just Saint John's finances, but the health and well-being of patients with potentially serious medical problems as well as the safety of its employees. Saint John's – rightly – faced enormous potential liability should communications from its Vice President of Patient Care Services to its nursing staff get garbled due to a high-level nursing supervisor's inability to get along with her.

If a high-level supervisor could insist that an independent third party act as an intermediary simply because she could not work with her boss, the consequences for health care and for business and the economy as a whole would be grievous. Employers would lose all discretion over management functions. Productivity would grind to a halt. As a matter of law and common sense, the duty to reasonably accommodate cannot require such obstruction and clouding of the chain of command. Clarity and directness is precisely what is needed in a hospital chain of command.

Is it a reasonable accommodation to have a facilitator interpret or soften a Board of Directors' instructions to a company CEO or a Court of Appeal Justice's views on a case to a research attorney or a colonel's orders to a lieutenant or a doctor's orders to a nurse? Of course not. But it is no more reasonable to have the directives of the one person who by regulatory mandate and internal policy is responsible for the hospital's nursing services watered down or softened on their way to her senior clinical staff.

Ms. Ceazan contends that the "facilitator" accommodation she suggests was not unduly burdensome because the grievance committee previously recommended that an organizational psychologist work with her and Ms. Smith. (AOB 23; JA 376-377.) But what efforts the employer may have made in the past to seek to resolve organizational friction is not the measure of what it must do to accommodate an employee who is unable to work with others: "Good deeds ought not be punished, and an employer who goes beyond the demands of the law to help a disabled employee incurs no legal obligation to continue doing so." (*Lucas v. W.W. Grainger, Inc.*, *supra*, 257 F.3d at p. 1257, fn. 3, citing *Terrell v. USAir* (11th Cir. 1998) 132 F.3d 621, 626, fn. 6 ["An employer that 'bends over backwards to accommodate a disabled worker . . . must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation'"]; cf. *US Airways, Inc. v. Barnett*, *supra*, 535 US. at pp. 399-401 [rejecting notion that absence of undue burden is measure of reasonableness].)

In any event, what the grievance committee recommended (and Ms. Smith and Saint John's accepted) was that an organizational psychologist work with Ms. Smith and Ms. Ceazan to improve their relationship. (JA 57, 429.) To that end Ms. Smith and Ms. Ceazan met with him a few times. (JA 57, 171, 429.) But that didn't work – Ms. Ceazan immediately

thereafter went out on medical leave claiming clinical depression. (JA 57, 171, 387, 429.)

That was a far cry from the no-direct-reporting condition that Ms. Ceazan said was medically necessary. Ms. Ceazan suggests a facilitator acting as an intermediary *any* time she had contact with Ms. Smith. She *refused to communicate directly with Ms. Smith*, period. In her words: "[Saint John's] states: 'plaintiff's desired accommodation would have required Ms. Smith to communicate with Ms. Ceazan, through a buffer, as it were.' Exactly." (JA 376, citation omitted.) In her view, Saint John's had to create circumstances where she did "not have either direct contact with or directly report to Ms. Smith," or as an alternative, "to have a facilitator work with Ms. Smith and Ms. Ceazan, and meet with them *whenever they would have contact* to try and facilitate their communications." (JA 403, emphasis added; see AOB 10 [the proposed "professional facilitator" would act to "'buffer' the one-on-one direct contact between Smith and Ceazan"], 23-24.) That is exactly the sort of direct interference with all communication that would destroy the chain of command.

C. Saint John's Did Not Fail To Reasonably Accommodate Ms. Ceazan When It Invited Her To Reapply For A New Position After It Restructured And Terminated All Team Leader Positions.

Ms. Ceazan next contends that when Saint John's eventually reorganized in November 2000 it should have unilaterally given her a position that did not report to Ms. Smith. (AOB 25-26.) The restructuring, however, eliminated all Team Leader positions, including Ms. Ceazan's position as Team Leader of the Ambulatory Medicine Unit, and created entirely new positions. (JA 59, 145, 171, 219-210, 434.) Saint John's

terminated all Team Leaders and gave them a choice either to apply for a new position or to accept Saint John's standard severance package. (JA 60, 209, 435.) Saint John's offered Ms. Ceazan the same opportunity to apply for one of the new positions. She claims that wasn't enough. In fact, it was more than Saint John's was obligated to do.

1. Saint John's had no duty to accommodate Ms. Ceazan indefinitely.

Ms. Ceazan asserts and judicially admits – in her complaint, her pleadings, and her deposition – that she was constructively discharged no later than September 15, 2000.[10] (JA 7, 76-77, 612, 688-689, see JA 312.) Her position is that as of that date her employment had irrevocably *terminated.* (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 ["Constructive discharge occurs when an employer's conduct effectively forces an employee to *resign,*" emphasis added], 1251 [to establish constructive discharge, an employee must prove "working conditions that were so intolerable or aggravated at the time of the employee's *resignation* that . . . a reasonable person in the employee's position would be compelled to *resign*"].)

Saint John's did not reorganize until November, 2000, over six weeks after Ms. Ceazan admittedly was no longer employed. Saint John's had no obligation to provide *any* reasonable accommodation to Ms. Ceazan after she was no longer an employee. (*Emerson v. Northern States Power Company, supra*, 256 F.3d at p. 516 [rejecting plaintiff's argument that employer "had a continuing duty to notify her of available positions even

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[10] In fact, as early as February 2000, Ms. Ceazan's counsel asserted that Saint John's actions had "resulted in the constructive discharge of Ms. Ceazan." (JA 57, 141, 489.)

after she was terminated"].) If an employer could be held to have an obligation to search for accommodations for *former* employees, how long would such an obligation last? A week? A month? Six months? Two years? Fairness and common sense, as well as the law, dictate that the duty to accommodate an employee does not persist after the employee is no longer employed. In this case, that means after September 15, 2000, when Ms. Ceazan alleges she was constructively discharged.

Ms. Ceazan asserts the restructuring was in the works while she was still an employee. But she had no admissible evidence to that effect. The trial court ruled her foundationless speculation on the subject inadmissible, a ruling she has not challenged on appeal. (JA 482 & RT 12; JA 389; see *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 334 [on appeal from the granting of summary judgment, court should not consider evidence to which trial court sustained objection].) There simply is *no evidence* that the restructuring was being planned or any decision had been made while Ms. Ceazan was still an employee. (See JA 171 [decision to restructure made in November 2000].)

But even if there was such evidence, so what? Businesses plan for all sorts of eventualities and possibilities, but that doesn't mean that they will come to fruition. It is not reasonable to require an employer to prematurely disclose organizational or other moves that it may or may not ultimately adopt. Nor is it reasonable for both the employer and the employee to have to put their relationship on hold to see what may develop in the future. The employer's obligation is to afford a reasonable accommodation, if one is possible, *based on the circumstances that exist at the time*, not circumstances that may or may not come to pass in the future.

2. Saint John's had no duty to *guarantee* Ms. Ceazan a position when all other supervisors at her level were terminated and had to apply for new positions.

Even assuming Saint John's had an obligation to accommodate Ms. Ceazan months after she, by her own admission, was no longer an employee, Saint John's had no duty to guarantee Ms. Ceazan a position when all others at her level were terminated and had to apply for new positions.

It is undisputed that when Saint John's reorganized, it eliminated *all* Team Leader positions, including Ms. Ceazan's former AMU Team Leader position. *All* Team Leaders lost their jobs and had apply anew for positions within the new organization. None was guaranteed a job. Although the newly created "Manager" positions no longer directly reported to Ms. Smith, there were fewer of them – 9 instead of 11 – compared to the old Team Leader positions. As a result, some of them had broader responsibilities. For example, Ms. Ceazan's AMU Team Leader position was replaced by a new Manager position covering *both* the AMU and the Emergency Room. (JA 176.) The new position, thus, added the Emergency Room responsibilities that Ms. Ceazan had resigned from more than a year previously. (JA 170, 386.)

No case holds a disabled employee entitled to be *automatically* rehired where the entire workforce was terminated and required to reapply for new positions. (See *Voytek v. University of California, supra*, 1994 WL 478805 at p. *18.) And no case holds that an employee has to be automatically relocated into a position with greater responsibility than in her old job. (See *Emerson v. Northern States Power, supra*, 256 F.3d at p. 515 [employer not required to prefer plaintiff's application for a full-time position because it was a promotion over her part-time position]; *Hastings*

v. Department of Corrections, supra, 110 Cal.App.4th at p. 972 [employer not required to promote disabled employee].) Ms. Ceazan has no claim that Saint John's discriminatorily failed to hire her for one of the new positions because she did not even bother to apply. (JA 60, 109-112, 145, 210, 435, see also JA 500-501.)

It is undisputed that Saint John's invited Ms. Ceazan to apply for one of the new positions, forwarding the materials to her treating physician.[11] Ms. Ceazan asserts, however, that the materials arrived too late. (AOB 12; JA 165, 435.) The record is otherwise. Saint John's forwarded the materials on November 16, 2000. (JA 60, 145, 435, see also JA 499-500.) The materials revealed that interviews for managers were scheduled to continue through November 29, and would continue through December if any positions remain unfilled. (JA 165.) Managers were not to be selected before November 30. (JA 165.) Ms. Ceazan had more than sufficient time to participate in the application and interview process. *She* chose not to.

In sum, Ms. Ceazan had no right to one of the *new* positions created by Saint John's unrelated, after-the-fact organizational overhaul.

D. There Was No Plausible Interactive Process For Saint John's To Participate In.

Failing to identify a *reasonable* accommodation that should have been made, Ms. Ceazan asserts that Saint John's should be liable for failing to adequately engage in some abstract interactive process to identify possible accommodations for her. (AOB 21-24, 26.) This theory, too, is meritless.

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[11] Although Ms. Ceazan claimed below that she never received the application materials (JA 113-115, see 109-110), she produced them in discovery. (JA 435.) That they were provided to her treating physician is undisputed. (JA 435.)

As discussed above, she cannot identify any reasonable accommodation that would have come out of such a process. She made clear that her demands regarding not reporting to Ms. Smith were non-negotiable and refused to even respond – for reasons she won't reveal – to Saint John's overtures.

1. A claim of failure to engage in an "interactive process" requires that there existed a reasonable accommodation to be reached.

An employer is not independently liable for failing to engage in an interactive process unless, in fact, a reasonable accommodation would have been possible.[12] Where an employer "fail[s] to engage in the interactive process, liability would be appropriate [only] *if a reasonable accommodation would otherwise have been possible*." (*Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1117 (en banc), emphasis added, revd. on other grounds, 535 U.S. 391.)[13]

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[12] Government Code section 12940, subdivision (n), expressly imposing on an employer an obligation to "to engage in an interactive process," was added in 2000, effective January 1, 2001. (Deering's Ann. Gov. Code (2003 supp.) foll. § 12940, pp. 46-47.) That amended section, thus, does not apply to the events here. In any event, the Legislature merely codified the existing federal "interactive process" obligations. (See *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 263, fn. 7.)

[13] Accord *Lucas v. W.W. Grainger, Inc., supra*, 257 F.3d at p. 1256, fn. 2; *Emerson v. Northern States Power Company, supra,* 256 F.3d at p. 515; *Kennedy v. Dresser Rand Co., supra*, 193 F.3d at p. 122; *Rehling v. City of Chicago* (7th Cir. 2000) 207 F.3d 1009, 1015-1016; *Sieberns v. Wal-Mart Stores, Inc.* (7th Cir. 1997) 125 F.3d 1019, 1023 ("The interactive process . . . is not an end in itself; rather it is a means for determining what reasonable accommodations are available to allow a disabled individual to perform the essential job functions of the position sought").

As just discussed above, there was no reasonable accommodation to be reached given Ms. Ceazan's position and demands. Thus, whether or not Saint John's engaged in an "interactive process" is irrelevant.

2. There was no "interactive process" to engage in as Ms. Ceazan categorically rejected reporting to Ms. Smith or accepting a lesser position.

In any event, here, there was no "interactive process" to engage in. Ms. Ceazan insisted on an administrative nursing position at her same level that did not report to Ms. Smith. (JA 58-59, 109-112, 208, 293-294, 377, 388, 432-433, 550; AOB 23-25.) She has not varied from her position that she would accept nothing else. (AOB 23-24; JA 375-377.)

Saint John's indisputably sought to open dialogue with her. Saint John's Employee Health Manager, in confirming that there were no available positions at her level that did not report to Ms. Smith, asked Ms. Ceazan to contact Saint John's to discuss alternative, admittedly lower-level, positions that would not report directly to Ms. Smith. (JA 147, 144.) Ms. Ceazan did not even respond. (JA 144.) Her unequivocal assertion that she considered herself constructively discharged when she received Saint John's letter inviting further communications shows that she had no intention of continuing discussions with Saint John's.

Despite her stony silence, Saint John's invited Ms. Ceazan, through her treating physician, to apply for the new Administrative Director and Manager positions once it reorganized. Again, Ms. Ceazan did not respond. The record is, thus, clear that there was no reasonable interactive process to engage in with Ms. Ceazan.

She asserts for the first time on appeal that had Saint John's, despite her rebuff of its efforts to engage her, persisted and probed further, it would

have learned that her inability to work with Ms. Smith would not necessarily have been permanent. (AOB 23-24.) She raised no such theory, and pointed to no supporting facts, in the trial court. In not doing so, she has waived any such claim. She may not raise this new, fact-based theory on appeal. (E.g., *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 945, fn. 13; *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-32.)

Nor is there *any* evidence to support this new theory. The one piece of random deposition testimony she now cites states only that her "self-esteem" was a temporary problem, but says nothing about her inability to work with Ms. Smith. (JA 404.) And even now she affords no hint as to how long her inability to work with Ms. Smith would have lasted.

In any event the initial burden was on Ms. Ceazan to disclose to Saint John's the nature *and extent* of her disability that needed to be accommodated, including whether it was permanent or temporary. The employer's duty to engage in "the interactive [reasonable accommodation] process must ordinarily begin with the employee providing notice to the employer of the employee's disability *and any resulting limitations*." (*Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1171-1172 & fn. 9 (en banc), emphasis added.) Only when she had done so would Saint John's have had any obligation to engage in an interactive process to determine how to accommodate the issues that *Ms. Ceazan* identified.

The only information that Ms. Ceazan ever provided to Saint John's was that she unequivocally could not directly report to Ms. Smith. "Where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have

obstructed the process." (*Beck v. University of Wisconsin Bd. of Regents* (7th Cir. 1996) 75 F.3d 1130, 1136.) If Ms. Ceazan needed only temporary accommodation that was information uniquely in Ms. Ceazan's hands; if that information was not relayed to Saint John's that is uniquely Ms. Ceazan's responsibility.

There simply was no interactive process for Saint John's to engage in given Ms. Ceazan's insistence that she remain in a position at her same level yet not report to Ms. Smith and her failure to disclose that she thought her inability to work with Ms. Smith temporary. And because no reasonable accommodation was possible, Saint John's cannot be held liable for failing to engage in an interactive process that would have led nowhere.

3. Ms. Ceazan's refusal to reveal her reasons for not responding to Saint John's overtures estops her from claiming any failure by Saint John's to engage in an interactive process.

Even if there were an interactive process to have been engaged in, Ms. Ceazan is estopped from claiming that Saint John's was responsible for the breakdown of such a process. Invoking privilege, she refused in discovery to disclose her reasons for not engaging in that process. (JA 58-59, 109-112, 433, see also JA 495-497.) She can't have it both ways. She can't both refuse to disclose her reasons for not continuing dialogue *and* claim that any breakdown in the process was Saint John's fault.

A plaintiff cannot use a testimonial privilege as a sword. She cannot seek to recover based on a defendant's alleged wrongful conduct but then use a testimonial privilege to avoid disclosing her own relevant conduct or intent. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 128 [in employment discrimination action, an employer

that raises the defense that it investigated employee's complaint and took action appropriate to the investigation's findings "put[s] the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The [employer] cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege . . . [is] thereby waived"]; see also *Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1431-1432 [effectively nonsuiting plaintiff's case to the extent plaintiff invoked Fifth Amendment privilege against self-incrimination; "the courts have never allowed a plaintiff to use . . . the self-incrimination privilege as a 'shield and as a sword.' The courts have prevented the plaintiff in such a situation from 'blowing hot and cold'"]; *Dalitz v. Penthouse International, Ltd.* (1985) 168 Cal.App.3d 468, 475, 480 [reporters' defamation claim properly dismissed where they refused to discuss confidential sources under reporter's shield privilege; "[i]n asserting the privilege as plaintiff the newspersons are seeking the use of the privilege as a sword rather than a shield"].)[14]

Here, Ms. Ceazan cannot both complain that Saint John's failed to engage in an interactive process and at the same time refuse to fully reveal

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[14] See also *Newson v. City of Oakland* (1974) 37 Cal.App.3d 1050, 1055-1057 [plaintiff cannot both assert privilege as to tax return information and claim for lost earnings; plaintiff "'couldn't have his cake and eat it too'"]; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 560 [assertion of Fifth Amendment privilege against self-incrimination as to source of fire bars plaintiff's insurance bad faith claim; "plaintiff . . . may yet claim is privilege, but he will have to dismiss his lawsuit if he persists in doing so . . . 'he cannot have his cake and eat it too'"]; *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 174-175 [upholding dismissal of plaintiff's case based on plaintiff's assertion of self-incrimination privilege].

her reasons why she did not respond to Saint John's overtures.[15] By asserting privilege, she precluded Saint John's from exploring in discovery whether she was not really interested in the interactive process, but rather was only interested in setting up litigation. The only reasonable inference is the latter:

> [Plaintiff employee] elected to cut off the interactive process before it was done, and to resort instead to the legal process. That was her choice, of course, but having made it, she cannot complain that [the employer] failed to reasonably accommodate her. [Citation.] Although the interactive process need not go on indefinitely before legal action is taken if the process proves to be fruitless, responsibility for a breakdown in the process caused by an employee's unreasonable failure to help the employer determine what specific accommodations are necessary must be assigned to the employee. [Citation.]

(*Swanson v. Allstate Insurance Company* (N.D.Ill. 2000) 102 F.Supp.2d 949, 977-978; cf. RT 215.)

Having precluded Saint John's from exploring in discovery the reasons why she did not respond to its attempts to open dialogue, Ms. Ceazan is estopped from claiming that Saint John's bears the responsibility for the lack of a more successful interactive process.

* * *

There was no failure to reasonably accommodate here. The judgment as to Ms. Ceazan's "disability" claim should be affirmed.

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[15] The one reason she did reveal was patently unreasonable, if not childish: she was upset that Saint John's communications came from its Employee Health Director instead of its Human Resources department. (JA 58, 110, 112, 433.)

II. THE EMPLOYEE HANDBOOK CREATED NO CONTRACTUAL RIGHT TO ANY GRIEVANCE PROCEDURE, BUT EVEN IF IT DID MS. CEAZAN CANNOT SHOW HARM.

Alternatively, Ms. Ceazan asserted breach of an implied contract. She *conceded* that she had no evidence to "overcome the express at-will language in the Employee Handbook" and withdrew her claim of an implied promise not to terminate her except for cause. (JA 382.) Likewise, on appeal "Ceazan does not dispute her at-will status." (AOB 27, fn. 3, 31.)

Her sole remaining contractual claim is that Saint John's breached a supposed promise "to conduct an employee grievance in accordance with the procedures set forth in the Employee Handbook, and to conduct the proceedings in a fair and forthright manner." (AOB 27; JA 382.)

But, as the trial court found, the Employee Handbook *expressly disavows* creating any such contract right. And even if such a contract right existed, Ms. Ceazan *prevailed* in her grievance and, thus, has nothing to complain about.

A. The Employee Handbook Explicitly Disavowed Creating Any Contractual Grievance Right.

Ms. Ceazan claims a contract right arising solely out of the Employee Handbook. (AOB 31-32.) But the Handbook's express provisions clearly enunciate that they create no such contract right.

It expressly provides that it "cannot . . . be construed as a legal document," i.e., that it creates *no* contract rights. (JA 299.) "*Saint John's . . . reserve[d] the right to amend, supplement or rescind any provisions of th[e] handbook, . . . in its sole and absolute discretion, without advance*

notice." (*Ibid.*, original emphasis, see also JA 210, 308.)

The Handbook's description of the grievance procedure itself provides that "*[n]othing in this grievance procedure is intended to create an express or implied agreement that alters the employment-at-will relationship that exists.*" (JA 301, original emphasis.)

An implied promise to follow a particular grievance procedure or adhere to a particular grievance result would be inconsistent with both the admitted at-will nature of the relationship and the Handbook's express language. (E.g., *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 345 [where evidence limited to employer's written personnel documents, there can be "no triable issue of an implied contract on terms broader than the specific provisions of those documents," emphasis omitted]; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1390 [plaintiff "could not reasonably have relied upon any allegedly implied promises by (his employer) which contradicted the express provisions of both the application for employment he signed and the employee handbook"].)[16]

B. The Implied Covenant Of Good Faith And Fair Dealing Adds Nothing To Ms. Ceazan's Case.

The opening brief refers in passing to the implied covenant of good faith and fair dealing as somehow separately binding Saint John's to follow the Employee Handbook's grievance procedures. (AOB 3.) Ms. Ceazan did not raise this theory in the trial court (see JA 47-51), and she does not argue the point now. Thus, any such argument is waived. (E.g., *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995)

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[16] See also *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 629-630; *Tomlinson v. Qualcomm, Inc., supra*, 97 Cal.App.4th at p. 944-945; *Haggard v. Kimberly Quality Care, Inc.* (1995)39 Cal.App.4th 508, 521.

38 Cal.App.4th 523, 559 ["Clearly, appellants have waived this issue on appeal by failing to support it by argument or citation of authority"].)

In any case, the implied covenant cannot help Ms. Ceazan here. The covenant only protects existing contractual rights; it does not create new substantive terms beyond those of the contract. (E.g., *Guz, supra*, 24 Cal.4th at p. 349-350 [the implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement"].)[17] Because Ms. Ceazan had no contractual right to the conduct of a grievance procedure in any particular manner, to any grievance recommendation or result, or to any grievance procedure at all, the implied covenant of good faith and fair dealing is irrelevant.

C. Even Assuming A Contract Grievance Right, Ms. Ceazan Cannot Show She Was Harmed.

Even if the Handbook somehow created a contract right in its grievance procedure, Ms. Ceazan has no claim because she cannot show that she was damaged by any alleged failure to follow the procedure to which she claims she was entitled.

A plaintiff cannot recover for breach of contract without showing damage. (*Reichert v. Gen. Ins. Co. of America* (1968) 68 Cal.2d 822, 830; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570; see Civ. Code, §§ 3300, 3301.). Here, Ms. Ceazan has offered no theory, not to mention evidence, to show that any alleged grievance breach caused her

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[17] See also *Eisenberg, supra*, 74 Cal.App.4th at pp. 1390-1391 ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract. . . . Thus, the implied covenant does no more than protect the right to enjoy the benefits of the contract."); *Camp, supra*, 35 Cal.App.4th at p. 631.

damage. Ms. Ceazan was *satisfied* with the grievance committee's decision. Her only complaint was with the internal appeal of that decision. Yet, in this action she does not complain about the *result* of that process.

On internal appeal, Saint John's administratively eliminated the recommendation that Ms. Smith work with an organizational psychologist regarding her interactions with other Team Leaders. But Ms. Ceazan concedes that she was *not* concerned with this aspect of the grievance recommendation. (AOB 30 [describing "the Grievance Committee's decision that [Ms. Smith] must work with a facilitator to mend her relationships with the other Team Leaders" as "*an issue that did not even concern Ceazan*," emphasis added].) Saint John's administration *upheld* the portion of the grievance committee's decision recommending that a psychologist work with Ms. Smith and Ms. Ceazan; Ms. Ceazan admits that she *prevailed* in this regard. (JA 171; AOB 31.) In other words, Ms. Ceazan *won* on this issue.

The only part of the grievance committee's recommendation that Ms. Ceazan cared about that was *reversed* by Saint John's administration was the reinstatement of Ms. Ceazan's previous job title and pay grade. (AOB 31; JA 387.) The trial court sustained Saint John's objection to Ms. Ceazan's evidence on this point. (JA 476 & RT 12; JA 387.) Ms. Ceazan has not challenged the trial court's ruling; thus, there is no evidence suggesting any impropriety in that regard. (See *Guz, supra*, 24 Cal.4th at p. 334.)

But even assuming proper evidence, there can be no harm. Regardless her job title and pay grade, Ms. Ceazan's actual salary remained the same. (JA 170.) And, as an at-will employee, Saint John's was free to change Ms. Ceazan's job title and pay grade, or fire her altogether, at any time and without cause. (*Guz, supra*, 24 Cal.4th at p. 335.) Thus, there

could be no causative link between the grievance committee's recommendation – whether followed or not – and any change or lack of change in Ms. Ceazan's job title or pay grade.

III. MS. CEAZAN'S "RENEWED" EVIDENTIARY OBJECTIONS ARE WAIVED AS UNSUPPORTED BY ANY ARGUMENT OR AUTHORITY.

Ms. Ceazan's opening brief states that she renews various objections she raised in the trial court to Saint John's evidence. (AOB 32-33.) But Ms. Ceazan has utterly failed to make any argument as to or cite any authority in support of why the trial court may have erred. In failing to do so, she has waived any right to have this Court review the trial court's evidentiary rulings.[18]

In any case, Ms. Ceazan's renewed objections are irrelevant. The trial court sustained all of them except the last three listed objections to the declaration of Janice Pemberton. (JA 445 & RT 12-13; see AOB 32-33.) That evidence is wholly immaterial to this appeal and Saint John's nowhere relies upon it.

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[18] E.g., *San Mateo County Coastal Landowners' Assn., supra*, 38 Cal.App.4th at p. 559 ("Clearly, appellants have waived this issue on appeal by failing to support it by argument or citation of authority"); *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 ("'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities . . .'").

CONCLUSION

For the above reasons, the judgment in favor of Saint John's Hospital and Health Center should be affirmed.

Dated: October 28, 2003

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c), I certify that this Respondent's Brief contains 12,442 words, not including the tables of contents and authorities, the caption page, signature blocks, or this certification page.

Dated: October 28, 2003

Lillie Hsu