

**JAMS ARBITRATION**  
**CASE REFERENCE NO. 1220071035**

**MARTHA HIERRO, M.D.**

**Claimant,**

**and**

**DIGESTIVE HEALTH ASSOCIATES OF  
SOUTHERN CALIFORNIA, ET AL., PROVIDENCE  
SAINT JOHN'S MEDICAL FOUNDATION,  
PROVIDENCE SAINT JOHN'S HEALTH CENTER,  
ENDOSCOPY CENTER OF SOUTHERN CALIFORNIA,  
RUDOLF BEDORD, M.D, LENNA MARTYAK, M.D.,  
MARC HARWITT, M.D., RICHARD CORLIN, M.D.,  
RAHUL DIXIT, M.D.**

**Respondent.**

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**RULING ON RESPONDENT DHA's MOTION FOR SUMMARY  
JUDGEMENT/ADJUDICATION**

Respondent Providence moves for summary judgment/adjudication against Claimant Martha E. Hierro, M.D. on the basis that no material issues of fact exist as to any of Claimant's causes of action against Providence and Providence is entitled to judgment as a matter of law. Respondent Providence's motion for summary judgment/adjudication is granted.

*Undisputed Facts*

Claimant is a practicing gastroenterologist and surgeon since 1989. On February 1, 2018, Claimant and other physicians with whom she had worked formed Digestive Health Associates ("DHA"), a private practice composed of skilled GI physicians. With this transition, on February

1, 2018 The Digestive Health Associate Respondents move for summary judgment/adjudication against Claimant Martha E. Hierro, M.D. on the basis that no material issues of fact exist as to any of Claimant's causes of action against DHA Respondents and DHA Respondents are entitled to judgment as a matter of law. DHA Respondents' motion for summary judgment is granted.

### *Undisputed Facts*

Martha Hierro is a gastroenterologist licensed to practice medicine in the State of California. In or about 1993 Claimant joined the Southern California Gastroenterology Group, where over time she practiced medicine with Drs. Rudolph Bedford, Richard Corlin, Marc Harwitt, Lenna Martyak, Rahul Dixit, and Dr. Thomas Kun.

Respondent Digestive Health Associates ("DHA") is a California professional corporation created in 2017. West Los Angeles Anesthesia Services is a California limited liability company. Endoscopy Center of Southern California is a California corporation. In 2017, West Los Angeles Anesthesia Services, a California corporation, was formed. West LA LLC's operations were migrated into West LA for purposes of regulatory compliance upon the advice of counsel.

Effective February 1, 2018, DHA and Respondent Providence St. John Medical Center (hereinafter "Providence") entered into a Professional Services Agreement ("PSA"), whereby Providence engaged DHA to provide medical services to its patients subject to, and in accordance with, the terms and conditions of the PSA. The PSA provides:

- "Each Physician must maintain an unrestricted license to practice medicine in the State of California, and at all times remain in good standing with the Medical Board of California or the Osteopathic Board of California, as applicable." Section 1.5(a) at pg. 4.

Claimant was an employee of DHA. Claimant's employment with DHA was governed by a written employment contract that required her to work full time servicing Providence St. John Health Clinic's patients. Claimant's employment agreement with DHA provides:

- "Unless waived in advance in writing by Group and Providence Medical Foundation, Physician must at all times (a) maintain an unrestricted license to practice medicine in the State of California." Section 1.4 (a) at pg. 2.
- "Physician shall comply with all applicable federal, state and municipal statutes, ordinances and regulations, all applicable rules and regulations of the Medical Board of California . . . ." Section 9.1 at pg. 12.
- "For purposes of Section 6.1, "cause" shall include the following circumstances, each of which shall be deemed a material breach of the Agreement by Physician: (i) Physician's license to practice medicine in the State of California is expired, revoked, suspended, or subject to terms or conditions of probation without regard to whether or not such revocation, suspension, restriction or conditions of probation have been finally adjudicated." Section 6.1(a)(i) at pgs. 7-8.

Claimant was asked to conform to office standards by letter dated August 27, 2013.

In the years preceding Claimant's separation from DHA, her medical practice was in decline. She was not a fully productive member of the group, and her productivity was generally below that of her colleagues. She frequently missed work and canceled procedures.

On or about November 16, 2017, an anonymous complaint about Claimant was made to the Medical Board of California.

On July 5, 2018, Claimant entered a 90-day residential treatment program at the Center for Professional Recovery for treatment of her alcohol use disorder.

Following an investigation, on October 3, 2018, Claimant's license to practice medicine was suspended.

Claimant did not notify DHA or Drs. Bedford, Corlin, Harwitt, Dixit, or Martyak that she was the subject of an investigation by the Medical Board of California.

Effective December 28, 2018, Claimant agreed to the conditional revocation of her medical license pending her successful completion of a five year probationary period. She agreed to maintain a practice jointly with other physicians, rather than a solo practice, have a worksite monitor, and submit to drug testing upon request.

In light of the discipline imposed by the California Medical Board, on January 16, 2019, Providence asked DHA to permanently suspend Petitioner. Petitioner's employment with DHA was terminated effective April 1, 2019.

DHA's Bylaws provide that upon termination of a shareholder's employment with the company, the shareholder's ownership interest shall end. West LA LLC's operating agreement provides that upon termination of a member's employment with DHA, the company has the right to purchase the terminating member's interest in the business. West Los Angeles Anesthesia Services, a California corporation, was formed in 2017 and the operations of West Los Angeles Anesthesia Services LLC were merged into the corporation.

Endoscopy Center of Southern California's shareholder agreement provides that upon termination of a shareholder's employment with the company, the company has the right to purchase the terminating shareholder's stock.

On August 29, 2019, DHA and West LA LLC exercised their rights to purchase Claimant's ownership interests and tendered payment to Petitioner for her membership interest in that entity.

On January 29, 2020, after obtaining an appraisal from a third party, DHA tendered payment of \$464,000 for Petitioner’s shares of Endoscopy Center of Southern California. The money is now being held in a segregated, interest-bearing account.

*Summary Judgment Standard*

In moving for summary judgment, DHA must “show that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action.” (Civ. Proc. Code § 437c (p)(2); *Featherstone v. S. Cal. Permanente Med. Grp.*, 10 Cal. App. 5th 1150, 1158 (2017).) Once this has been shown, the burden shifts to Claimant “to show that a triable issue of one or more material facts exists as to the cause of action or [as] a defense thereto.” (Civ. Proc. § 437c (p)(2).) The motion must be granted “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” (Civ. Proc. § 437c (c).)

In ruling on a motion for summary judgment/adjudication, the court must consider the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party opposing the motion. (*Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 843 (2001).)

*First Cause of Action for Disability Discrimination*

The California Fair Employment and Housing Act (FEHA) (California Government Code § 12900 et seq.) prohibits employment discrimination on the basis of “physical disability, mental disability [and] medical condition . . .” (Cal. Gov. Code § 12940(a).) To establish a cause

of action for discrimination under FEHA, a plaintiff must prove (1) membership in a classification protected by the statute; (2) discriminatory animus on the part of the employer toward members of the classification; (3) an action by the employer adverse to the plaintiff's interests; (4) a causal link between discriminatory animus and the adverse action; (5) damage to the employee; and (6) a causal link between the adverse action and the damage. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) To establish a prima facie case under FEHA, the employee must establish that she suffered from a disability, was qualified to do her job, and that she was subjected to an adverse employment consequence because of her disability. (*Finegan v. County of L.A.* (2001) 91 Cal.App.4th 1, 7.)

FEHA prohibits discriminatory decisions made because of a person's disability, not decisions made because of facts related to the disability. (*See Lopez v. Pac. Mar. Assn.* (2011) 657 F.3d 762 (one-strike rule that eliminates candidates who test positive for drug use does not facially discriminate against recovering or recovered drug addicts); *see also Raytheon Co. v. Hernandez* (2003) 540 U.S. 44, 53-54 (employer's policy not to rehire workers who lost their jobs due to drug-related misconduct constituted legitimate, nondiscriminatory reason for refusing to rehire employee.))

Claimant's disability discrimination claim is subject to the burden-shifting framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz*, 24 Cal.4th at 354.) On motion for summary judgment or summary adjudication the initial burden is on the employer to either undermine an element of the plaintiff's prima facie case—by affirmatively negating it or showing the plaintiff cannot prove it—or provide a legitimate nondiscriminatory reason for the adverse employment action alleged. (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926.) If the employer does so, the burden again shifts to the employee to establish that the

defendant intentionally discriminated against her. (*Id.*) The employee may do this by proving the legitimate reasons offered by the employer were false, creating an inference that those reasons served as a pretext for discrimination. (*Id.*)

DHA argues that Claimant's three FEHA causes of action are without merit because the discipline imposed by the medical board is not a "disability" under FEHA and constituted "cause" for the termination of her employment contract. To undermine Claimant's prima facie case, DHA argues (1) that Claimant cannot establish that she was qualified to work for DHA, because the Medical Board's disciplinary action and her suspension from treating Providence patients rendered her unqualified to work for DHA, and (2) that Claimant cannot establish discriminatory animus, because she herself argues that she was fired not out of discriminatory animus, but so that Respondents could steal her patients. DHA also argues that it had legitimate, non-discriminatory reasons for the termination of her employment: the Medical Board's discipline of Claimant, Claimant's loss of hospital privileges with Providence, and Claimant's failure to notify DHA that she was under investigation by the Medical Board despite a contractual obligation to do so.

DHA has satisfied its burden of identifying legitimate nondiscriminatory reasons for terminating Claimant. Claimant's employment was conditioned on the maintenance of her medical license, as well as her ability to practice at Providence. When her license was restricted and her hospital privileges were suspended, and when she failed to notify the DHA Respondents she was under investigation by the Medical Board, Claimant fell out of compliance with requirements imposed by her employment agreement, and her termination was the result. The burden now shifts to Claimant to present sufficient evidence to create a triable issue of material fact as to whether these reasons were pretextual.

Claimant does not carry her burden. Claimant does not present any evidence that the DHA Respondents harbored discriminatory animus toward her, and she does not present any evidence that the DHA Respondents lied about their reasons for termination.

Instead of presenting such evidence, Claimant argues that her employment agreement's termination agreement is not enforceable because the imposition of discipline is assured once the Medical Board learns a physician is an alcoholic, and therefore the agreement itself is discriminatory.

Claimant's employment contract outlines the conditions that can lead to termination, including professional discipline, failure to report pending investigations, and loss of hospital privileges. The contract is neutral and directly related to medical practice, with all specified termination events having occurred in this case. Claimant has not provided evidence that the conditions triggering termination disproportionately affect disabled individuals, such as recovering or recovered alcoholics. Claimant's employment agreement is enforceable.

Claimant's first cause of action for disability discrimination fails as a matter of law.

*Second Cause of Action for Failure to Engage in the Interactive Process*

Liability for failing to engage in the interactive process under FEHA generally requires the employee to show she initiated the process, identify the disability and resulting limitations, and suggest the reasonable accommodation that should have been allowed. (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169.) To prevail the employee must prove a failure to engage in the interactive process and the identification of an available reasonable accommodation. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1017; *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87.)



Claimant's cause of action for failure to engage in the interactive process fails as a matter of law because it is undisputed that she never initiated a discussion relative to a disability covered by FEHA or requested accommodation under FEHA.

*Third Cause of Action for Failure to Accommodate*

The elements of a failure to accommodate claim are: 1) the employee has a disability covered by FEHA; 2) the employee is a qualified individual, i.e., she can perform the essential functions of the position; and 3) the employer failed to reasonably accommodate the employee's disability. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766; Gov. Code § 12940.)

Claimant's cause of action for failure to accommodate fails as a matter of law because Claimant became unable to fulfill her employment contract with DHA after Providence asked DHA to permanently suspend Claimant from serving Providence patients in light of the discipline imposed by the California Medical Board. Claimant's employment contract with DHA required her to work full time serving Providence St. John Health Clinic's patients, and her inability to do so meant she could no longer perform the essential functions of the position with DHA.

*Fourth Cause of Action for Breach of Fiduciary Duty Against the Physician Defendants*

Claimant's breach of fiduciary duty claim focuses on the Physician Respondents, alleging they owed her a fiduciary duty. A fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal. App. 4th 1141, 1160.) Shareholders in legally

established corporations do not inherently hold fiduciary responsibilities towards each other, without a showing of more. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1159.) Claimant has not alleged facts showing that the Physician Respondents owed her a fiduciary duty above and beyond their relationship to her as co-shareholders. Claimant's fourth cause of action fails as a matter of law.

*Fifth Cause of Action for Intentional Interference with Prospective Economic Advantage*

To plead a claim for interference with prospective economic advantage, a plaintiff must allege an economic relationship between it and a third party that carries a probability of future economic benefit to the plaintiff, defendant's knowledge of the relationship, intentional acts by the defendant designed to disrupt the relationship, actual disruption of the relationship, and economic harm to the plaintiff proximately caused by the defendant's acts. (*Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1220 (2006).) In addition, the plaintiff must allege that the defendant's conduct was wrongful by some measure beyond the fact of the interference itself. *Id.* An act is independently wrongful if it is unlawful. *Id.*

Claimant alleges that the DHA Respondents' actions disrupted her relationships with patients. Claimant cannot establish that an economic relationship that would likely bring future economic benefits existed. Claimant treated Providence's patients under the PSA and her employment contract, and could not reasonably expect future gain from these patients, as by maintaining a relationship with them after moving to private practice. Therefore, Claimant's claim for intentional interference with prospective economic advantage fails as a matter of law.

### *Sixth Cause of Action for Wrongful Termination in Violation of Public Policy*

Either party to a contract of employment without a specified term may terminate the contract at will (Lab.Code, § 2922), but this ordinary rule is subject to the exception that an employer may not discharge an employee for a reason that violates a fundamental public policy of the state. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 931–32 (citations omitted).) To support such a cause of action, the policy in question must satisfy four requirements: “First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be ‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be ‘fundamental’ and ‘substantial.’” (*Id.* (citations omitted))

Similar to her FEHA claims, Claimant’s wrongful termination claim lacks evidence of adverse employment actions resulting from her alcoholism. Her employment with DHA and relationships with other Respondents terminated due to the Medical Board’s disciplinary action and other breaches of contract justifying those terminations. Consequently, Claimant’s claim for wrongful termination in violation of public policy fails as a matter of law.

### *Seventh Cause of Action for an Accounting*

An accounting is not an independent cause of action but a type of remedy. (*See Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, disapproved on other grounds

in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.) The Arbitrator cannot order an accounting in the absence of some valid cause of action for which an accounting could be a resulting remedy.

#### *Eighth Cause of Action for Intentional Infliction of Emotional Distress*

To establish liability for intentional infliction of emotional distress, Claimant must prove (1) extreme and outrageous conduct by the Physician Respondents with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe or extreme emotional distress; (3) an actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499. Liability for intentional infliction of emotional distress only exists "for conduct exceeding all bounds usually tolerated by decent society... ."

The evidence that Claimant cites is largely inadmissible, and the evidence that is admissible does not rise to the level of "extreme and outrageous" conduct. Claimant's claim for intentional infliction of emotional distress fails as a matter of law.

#### *Ninth Cause of Action for Conspiracy*

Conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994).) "[C]onspiring defendants must have actual knowledge that a tort is planned and

concur in the tortious scheme with knowledge of its unlawful purpose.” (*Favila v. Katten Muchin Rosenman LLP*, 188 Cal. App. 4th 189, 206 (2010).) Even if one has knowledge of the act, knowledge alone is insufficient; intent to aid is required. (*Id.*)

Claimant’s other statutory and tort claims lack merit, leading to the automatic failure of her conspiracy claim.

### *Conclusion*

The Arbitrator grants the DHA Respondents’ motion for summary judgment against Claimant for the following reasons:

1. **Disability Discrimination:** The Arbitrator finds that Claimant’s FEHA claims fail because she cannot establish that her discipline by the Medical Board constituted a “disability” under FEHA or that the termination of her employment contract was based on discriminatory animus. Her employment contract’s termination conditions were neutral and directly related to medical practice.
2. **Failure to Engage in the Interactive Process:** The Arbitrator determines that Claimant did not initiate the interactive process nor request accommodation under FEHA, thus her claim fails as a matter of law.
3. **Failure to Accommodate:** The Arbitrator concludes that the events flowing from the Medical Board’s actions meant Claimant could no longer perform the essential functions of her position, and thus her failure to accommodate claim fails as a matter of law.

4. **Breach of Fiduciary Duty:** The Arbitrator rules that Claimant has not alleged facts showing that the Physician Respondents owed Claimant a fiduciary duty. Her breach of fiduciary duty claim against them fails as a matter of law.
5. **Intentional Interference with Prospective Economic Advantage:** The Arbitrator finds that Claimant cannot establish an economic relationship with third parties that would likely bring future economic benefits, leading to the failure of her claim for intentional interference with prospective economic advantage.
6. **Wrongful Termination in Violation of Public Policy:** The Arbitrator determines that Claimant's termination was not based on her alcoholism, but rather on the Medical Board's disciplinary action and other breaches of her employment contract, resulting in the failure of her wrongful termination claim.
7. **Accounting:** The Arbitrator clarifies that an accounting is a remedy, not a standalone cause of action, and cannot be ordered without a valid cause of action for which it could be a resulting remedy.
8. **Intentional Infliction of Emotional Distress:** The Arbitrator concludes that the evidence cited by Claimant does not demonstrate conduct exceeding all bounds tolerated by decent society, leading to the failure of her claim for intentional infliction of emotional distress.
9. **Conspiracy:** The Arbitrator finds that Claimant's conspiracy claim fails due to the lack of merit in her other claims.

Dated: September 1, 2023

  
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Hon. Elizabeth A. White (Ret.)  
Arbitrator