Bruce Thomas Murray (SBN 306504)
451 E. California Blvd.
Pasadena, CA 91106
murray@sagelaw.us
(626) 304-0828; (619) 501-8556

Attorney for Plaintiff,
ANGELIKI A. KANAVOU

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

ANGELIKI A. KANAVOU, an individual

Plaintiff,

vs.

CHAPMAN UNIVERSITY, a California corporation, and DOES 1-25, inclusive,

Defendants.

CASE NO. 30-2016-00840960-CU-CO-CJC

PLAINTIFF ANGELIKI A. KANAVOU'S NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES (SET TWO) AND REQUEST FOR $3,406.29 IN MONETARY SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date:	March 27, 2017
Time:	10:30 a.m.
Judge:	Hon. Gregory H. Lewis
Dept.:	C26
Action Filed:	March 15, 2016
Trial Date:	April 17, 2017

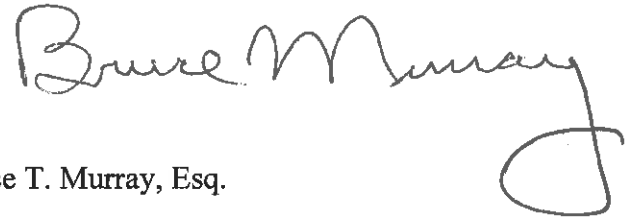
Reservation # 72543943

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 27, 2017 at 10:30 a.m. in department C-26 of the above-entitled Court, located at Central Justice Center 700 Civic Center Drive West, Santa Ana, CA 92701, Plaintiff Angeliki A. Kanavou will and hereby does move for an order compelling further responses to her Special Interrogatories (Set Two) and monetary sanctions payable from Paul, Plevin, Sullivan & Connaughton LLP and Chapman University to Mr. Bruce T. Murray, Esq. in the amount of $3,406.29. This motion is made on the grounds that the requested information is discoverable and the Defendants are withholding it without proper substantial justification.

This motion is based upon the attached memorandum of points and authorities, separate statement, the declaration of Bruce T. Murray, exhibits, all pleadings and records on file herein, all facts and other matters of which this Court may take judicial notice, and such other oral and documentary evidence as may be presented at hearing on this motion.

Dated: March 3, 2017

By: 

Bruce T. Murray, Esq.

Attorney for Plaintiff

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This is a wrongful termination/ disability discrimination/ breach of contract case that involves multiple claims – most importantly at this juncture, the discrimination-related causes of action. Intent to discriminate and pretext are essential elements of a case filed under section 12940 of the California Government Code (the Fair Employment and Housing Act). Plaintiff seeks evidence to show both intent and pretext. Defendants have resisted Plaintiff's discovery in this area, thus necessitating this motion.

A summary background of this case is as follows:

On January 13, 2007, the Plaintiff, Angeliki A. Kanavou, Ph.D., was struck by a car (as a pedestrian) and severely injured – nearly fatally. Exh. 1, ¶ 6. The injuries Plaintiff suffered in the accident necessitated eight surgeries over the course of more than seven years. Additionally, during that time, the Plaintiff underwent two, unrelated gynecological surgeries. Exh. 1, ¶ 3.

About five months before the accident, Dr. Kanavou entered into a contract with the Defendants as a tenure track professor. Exh. 2, No. 6. The contract called for an initial two-year term, and an overall seven-year probationary period. In light of her injuries, surgeries and recovery, the Defendants granted the Plaintiff two, one-year extensions to her "critical review" timeline. Exh. 2, Nos. 14, 38, 39. Tenure track candidates typically get two "critical year reviews" in advance of a final tenure review at the end of the probationary period. However, the university declined to grant Dr. Kanavou a third extension, despite recommendations to this effect made by Dr. Kanavou's supervisors on her behalf. Exh. 2, No. 61. On March 28, 2013, the Chapman University Chancellor, Daniele Struppa, informed Dr. Kanavou of her "non-reappointment" (dismissal). Exh. 2, No. 41.

Based on the contract between Plaintiff and Defendant, Dr. Kanavou would have been eligible for tenure consideration during the 2014-15 academic year. Exh. 2, No. 75.

On April 4, 2013, Dr. Kanavou initiated grievance against the Chancellor and the university, pursuant to the provisions of the Chapman University Faculty Manual. The grievance alleged disability discrimination and breach of contract. On May 7, 2013, Anuradha Prakash, President of the Faculty Senate, informed Dr. Kanavou that the Senate Executive Board had summarily dismissed her grievance, finding that "there is no *prima facie* case to support your allegations." Exh. 4. The Senate Executive Board never held a hearing for Dr. Kanavou or attempted to interview her.

Prior to his issuance of the March 28 dismissal letter, Chancellor Struppa made statements regarding Dr. Kanavou's employment situation that are prejudicial and may be shown to have biased the grievance process toward a foregone conclusion. On March 19, 2013, Art Blaser, a Chapman faculty member who is disabled, sent the Chancellor Struppa an email in attempt to intercede on Dr. Kanavou's behalf:

> "[I] feel strongly that she should have the opportunity to develop her current work on Cambodia. In Angie's case, the medical leave was not sufficient to give her that opportunity. Therapy and surgery she's had since returning to the classroom have not left much time for research, and adding a year to the tenure clock would be a reasonable accommodation. I'm also very concerned about the process." Exh. 5.

Struppa replied, "I understand the consequences of her tragic accident, but that does not justify a further extension, since she has demonstrated, in my view, a lack of ability of producing

scholarship. You mention, in your email, a concern with the process, but I am not aware of anything that might have altered the outcome of the decision."[1] Exh. 5.

Here, the Chancellor has made his bias "public" by conveying his views directly to a faculty member (albeit not a member of the Senate Executive Board). Because the Chancellor has made his views "public," the members of the Senate Executive Board should be presumed to know the Chancellor's views – and how he would want the outcome of any grievance. By so conveying his views to an interested faculty member, the Chancellor has tainted the grievance process.

Furthermore, the Plaintiff heard the Chancellor make statements that could be deemed either directly or indirectly prejudicial toward someone in Dr. Kanavou's position, as the "victim" or an accident (or the victim of anything else.) "On about March 10, 2013, I visited Chancellor Daniele C. Struppa's office with a representative file of my work at the University. Beginning our conversation with small talk, the Chancellor remarked that 'this country is not the same anymore' because 'everybody plays victim in America.' These comments made me feel uneasy. I felt as if they were directed at me, as the 'victim' of an accident." Exh. 1 ¶ 15; Exh. 2, Nos. 32-33.

All of these statements show bias and potentially taint the grievance process, thus indicating pretext and the Chancellor's discriminatory intent. Defendants' handling of Dr. Kanavou's grievance appears to be the type of "charade of due process by an employer that has already made up its mind" that Justice Mosk warned of in *Cotran v. Rollins,* 17 Cal. 4th (1998) at 110.

The Plaintiff here seeks information regarding the university's grievance process to determine a pattern of discrimination, bias and pretext. Therefore, the information that Plaintiff seeks is relevant and discoverable.

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[1] The "decision" referred to here by the Chancellor refers to the Jan. 31, 2013 recommendation by the Faculty Personnel Council not to continue Plaintiff's tenure-track employment. The Chancellor issued his dismissal notice to Dr. Kanavou on March 28, 2013. Dr. Kanavou instituted her grievance on April 4 2013.

II. FACTS – THE DISCOVERY PROCESS

On May 2, 2016, the Plaintiff served on Defendant the Plaintiff's Special Interrogatories (Set 1.) This set of interrogatories included Special Interrogatory No. 45, which stated: "Provide a record of all grievances filed in accordance with the Chapman University Faculty Manual since 2006. Such a record is inclusive of, but not limited to, the nature of the grievance, the outcome of the grievance, the basis of the decision, and the members of the Faculty Senate during the time of the grievance(s)." Exh. 6.

In its Aug. 5, 2016 responses, Defendants refused to answer Special Interrogatory 45 and objected on the following bases: (1) "that the request is vague and ambiguous as to 'a record'"; (2) "that the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence"; (3) "that the request is overbroad in time and scope"; (4) "that the request is unduly burdensome and harassing"; (5) "third-party privacy"; (6) "that it is compound and conjunctive." Following these objections, Defendants provided no answer. Exh. 7.

On September 7, 2016, Plaintiff's counsel sent Defendant's counsel a meet and confer letter, addressing each of the Defendants' objections and issues as follows: (1) **'Unduly burdensome':** Plaintiff questioned whether Chapman University has had so many grievances filed against it that it cannot reasonably produce the requested documents; (2) **relevance and 'reasonably calculated'**: Plaintiff asserted that the information she seeks is relevant and discoverable based on the rules set forth in *McDonnell Douglas Corp. v. Green* (411 U.S. 792) and its progeny; (3) **'vagueness and ambiguity'** regarding the word 'record': Plaintiff asserted that she used the word "record" as it is defined in Cal. Evid. Code § 1271; and (4) **third-party privacy**: Plaintiff asserted that Defendants "are quite capable of redacting the names of third parties in order to protect their privacy. Exh. 8.

Regarding Defendants' objection on the basis of "compound and conjunctive" (Cal. Civ. Proc. Code § 2030.060(f), Plaintiff stated, "I presume you are referring to the second sentence of the interrogatory, 'Such a record is inclusive of, but not limited to, the nature of the grievance, the outcome of the grievance, the basis of the decision, and the members of the Faculty Senate during the time of the grievance(s).' This second sentence is merely definitional and sets forth the scope of the question. The second sentence calls out no questions. Therefore, the interrogatory is not 'compound, conjunctive, or disjunctive.' The question is simple and singular, based on the construction of the first sentence, 'Provide a record of all grievances filed in accordance with the Chapman University Faculty Manual since 2006.' [Therefore], Please answer the call of the question." Exh. 8.

On October 28, 2016, Defendants' counsel sent a reply to Plaintiff's Sept. 7 meet and confer letter. Defendants again refused to answer the question, objecting primarily on the basis of relevance, asserting that "the SEB's [Senate Executive Board's] determination that Kanavou's grievance did not meet the standards in the University's Faculty Manual for a prima facie grievance has no bearing on the decisionmaker's motivations, and records related to other grievances are even further removed." Exh. 9.

Additionally, Defendants objected on the basis of (1) "third parties' privacy rights," (2) "overbroad"; (3) "compound"; (4) that "the members of the SEB change annually" [thus somehow undercutting the relevance of the question]; and (4) since "there were no other grievances related to disability discrimination, we do not see how grievances related to other topics could have any relevance here." Exh. 9.

December 23, 2016, Plaintiff served Defendant Special Interrogatories (Set Two), which included 10 questions related to the Defendant's grievance process. These questions attempted to

cure all of the alleged defects about form and substance that Defendants' had raised regarding Special Interrogatory 45 (Set One). Additionally, the Set Two interrogatories are substantially more specific and targeted than Special Interrogatory 45 (Set One). Thus, although these questions concerned Defendants' grievance process, they constituted an entirely new set of questions. Exh. 10.

On January 23, 2017, Defendants submitted their objections and responses to Plaintiff's Special Interrogatories (Set Two.) Defendants objected to Special Interrogatories 1-10 on the following (non-inclusive) bases: (1) "that the interrogatory is duplicative of previously served Special Interrogatory No. 45"; (2) "that the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence"; (3) "that the request is overbroad in time and scope"; (4) "that it would be unduly burdensome for Chapman to compile, review and summarize grievance materials"; (5) "that the interrogatory is compound and conjunctive; and (6) "that it is not self-contained, and incorporates a definition from other documents." Exh. 11.

Following their objections, the Defendants' simply answered, "Kanavou's grievance is the only grievance since 2007 for alleged disability discrimination" (No. 1); and "Other than Kanavou, no faculty member has filed a grievance regarding alleged disability discrimination" (Nos. 2-10). Exh. 11.

January 27, 2017, Plaintiff's attorney sent Defendant's counsel a meet and confer letter, objecting to Defendant's non-answers. Plaintiff addressed each of the Defendants' five objections in detail. Specifically, regarding the issue of relevance, Plaintiff stated that the relevance of an employer's investigation process and grievance procedures is well-established under the holding of *Cotran v. Rollins Hudig Hall Internat., Inc.,* 17 Cal. 4th 93, 108 (1998). Additionally, the relevance of comparative evidence in wrongful termination cases is also well-established. *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 804 (1973). Therefore, Plaintiff asserted that Defendants' objection on the basis of relevance lacks support. Exh. 12.

On February 8, 2017, Defendants' counsel sent Plaintiff's attorney a response to his Jan. 27 meet and confer letter. Defendants' objected on numerous bases, alleging (1) that questions 1-10 (Set 2) were "duplicative" of Special Interrogatory No. 45 (Set 1), "which also requested information about all faculty grievances"; and (2) "she has thus waived the right to bring a motion." Defendants also objected on the bases of (3) relevance; (4) that the questions were "overbroad," and (5) "burdensome." Exh. 13.

On February 10, 2017, Plaintiff's counsel (Bruce Murray) called Defendants' counsel (Jeffrey P. Michalowski) in order to continue "meeting and conferring" with respect to the special interrogatories. Defense counsel agreed to talk.

On February 15, 2017, Murray and Michalowski discussed the matter over the phone. Michalowski said the main issue with the interrogatory questions was relevancy. Therefore, he suggested that Murray write him another memo, focusing particularly on relevancy, in order to justify a response to the interrogatories. Murray agreed.

On February 16, 2017, Murray emailed Michalowski a memo focusing on the relevancy issue. Exh. 14.

February 27, 2017, Michalowski responded to Murray's Feb. 16 memo, stating that "Chapman still does not see the relevance of the information you seek"; and hence, he did not supply further responses to the interrogatories. Exh. 15.

Pursuant to Cal Code Civ Proc § 2030.300(c), the deadline for a motion to compel further responses to written interrogatories is 45 days of the service of the verified response. Here,

Defendants served their verified response December 23, 2016. With nine days remaining in December, and 28 days in February, the deadline for a motion to compel falls on March 8, 2017.

III. ARGUMENT

a. Broad Scope of Discovery

Courts have construed the discovery statutes broadly so as to uphold the right to discovery whenever possible. *Greyhound Corp. v. Superior Court*, 56 Cal.2d. 355, 377-78 (1961); *Emerson Elec. Co. v. Superior Court*, 16 Cal.4th 1101, 1108 (1977); *Obregon v. Superior Court*, 76 Cal.App.4th 424, 434 (1998).

b. Standard for Compelling Further Responses

"Upon receipt of a response to interrogatories, the propounding party may move for an order compelling further response if the propounding party deems that any of the following apply: (1) An answer to a particular interrogatory is evasive or incomplete … (3) An objection to an interrogatory is without merit or too general." Civ. Proc. Code § 2030.300 (a).

c. Relevance within the *McDonnell-Douglas* framework

The information Plaintiff seeks regarding Chapman University's grievance process is relevant to show both pretext and intent to discriminate. These elements fall within the *McDonnell-Douglas* analytical framework as follows:

"In the first stage of the *McDonnell Douglas* test, the plaintiff bears the burden to establish a prima face case of discrimination. The burden in this stage is not onerous, and the evidence necessary to satisfy it is minimal. On a disability discrimination claim, the prima facie case requires

the plaintiff to show he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. If the plaintiff meets this burden, the burden shifts to the defendant to articulate [4] a legitimate nondiscriminatory reason for its employment decision. This likewise is not an onerous burden and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision. Finally, if the defendant presents evidence showing a legitimate, nondiscriminatory reason, the burden again shifts to the plaintiff [5] to establish the defendant intentionally discriminated against him or her. The plaintiff may satisfy this burden by proving the legitimate reasons offered by the defendant were false, [6] creating an inference that those reasons served as a pretext for discrimination." *Wills v. Superior Court,* 195 Cal. App. 4th 143, 160 (summarizing the holding of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Here, the Plaintiff seeks to discover information in order to satisfy elements (3), [5] and [6] – intent to discriminate and pretext – within this overall analytical framework.

d. Pretext and employee investigations

Moving from the larger *McDonnell-Douglass* framework to the specific issue of pretext and what constitutes pretext, an "inadequate investigation is evidence of pretext." *Mendoza v. Western Medical Center Santa Ana*, 222 Cal. App. 4th 1334, 1344 (2014); *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243, 277 (2009). An adequate investigation, the Court stated, is "a reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond ... In *Board of Education v. Rice* (1911) App. Cas. 179, 182, Lord Halsbury, describing the duties of a school board

in resolving a claim of salary discrimination, wrote: 'I need not add that [the board] must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.'" *Cotran v. Rollins Hudig Hall Internat., Inc.*, 17 Cal. 4th 93, 108 (1998).

Further, the Court gauges employee investigations by an objective standard: "The jury was to assess the objective reasonableness of the employer's factual determination of misconduct. To this end, the jury had to determine whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or pretextual. ... '[T]he question critical to defendants' liability is ... whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.'" *Silva v. Lucky Stores,* 65 Cal.App.4th 256, 262 (1998) (quoting from *Cotran*).

Here, the Plaintiff seeks to assess the objective reasonableness of Chapman's investigation of her grievance. It is impossible for her to assess the objective reasonableness of Chapman's grievance process if she can't determine whether that process *ever* works, or if it even works at all, which is what her interrogatories probe. If Chapman were to assert that its investigation of the Plaintiff's grievance was reasonable under the circumstances, Plaintiff would have no way of assessing this if she can't compare her grievance to another; and then compare her circumstances with other circumstances, and finally reach some conclusion as to what is objectively reasonable (or what is not). With only her own case to go on, she can make no objective inference; and she is

forced to accept someone else's subjective assertion that the process was "good," or "fair." This leaves her nowhere.

e. The relevance of grievances against the Chancellor

Among other aspects of Chapman University's grievance process, Plaintiff seeks to discover how many grievances were filed against the Chancellor himself during the overlapping time of her own employment and Daniele Struppa's Chancellorship. Exh. 10. This data is relevant to show any pattern of discrimination or complaints against the Chancellor, and whether those complaints were upheld. Thus, the information Plaintiff seeks is relevant and discoverable.

f. The Chancellor's role in the grievance process

In denying the relevance of the information Plaintiff seeks regarding the Chapman University grievance process, Defendant states, "The question in this action is whether the decision-maker at Chapman acted in a discriminatory fashion. The conduct of the Senate Executive Board, a group composed of faculty members, i.e., Kanavou's peers, none of whom were involved in decisions related to her employment, is not at issue." Exh. 13.

The problem with this statement is, while it might be true in theory; in fact, the Chancellor is a very influential man at Chapman University; and Chancellor Struppa makes his opinions known. As he told Prof. Blaser, "I understand the consequences of her tragic accident, but that does not justify a further extension, since she has demonstrated, in my view, a lack of ability of producing scholarship. You mention, in your email, a concern with the process, but I am not aware of anything that might have altered the outcome of the decision." Exh. 5.

The members of the Senate Executive Board had a decision to make regarding the Plaintiff's grievance. Based on what the Chancellor told Prof. Blaser, it should be presumed that the members of the SEB knew exactly what outcome the Chancellor wanted in the Plaintiff's case; and as it happens, the SEB acted in accord with the Chancellor's stated opinion.

The grievance process was compromised in the Plaintiff's case. This process may have been compromised in other cases. This is evidence of pretext and a pattern of discrimination. Therefore, the information Plaintiff seeks is relevant and discoverable.

g. Comparative evidence and similarly situated employees

The *McDonnell* case, in addition to establishing the analytical framework cited above, stands for the principle that a litigant alleging discrimination may discover information about similarly situated employees. Not only is such evidence relevant, but it is essential. As the *Wills* court stated, "To establish pretext in this manner, Wills must identify other similarly situated employees the OC Court did not terminate. Another employee is similarly situated if, among other things, he or she "'engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Wills,* 195 Cal. App. 4th at 172 (citing *Marquez v. Bridgestone/Firestone, Inc.* 353 F.3d 1037, 1038 (8th Cir. 2004).

In attempt to counter Plaintiff's reliance *Wills* and *Cotran* in this context, Defendants cite *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 583 (6th Cir. 1992), in which the court stated that "the plaintiff must show that the 'comparables' are similarly-situated in all respects." (citing *Stotts v. Memphis Fire Department,* 858 F.2d 289 (6th Cir.1988). In *Mitchell,* a black employee alleging discrimination attempted to show that she was similarly situated to white employees who had not been discharged for allegedly having done "worse things." *Id.* at 580.

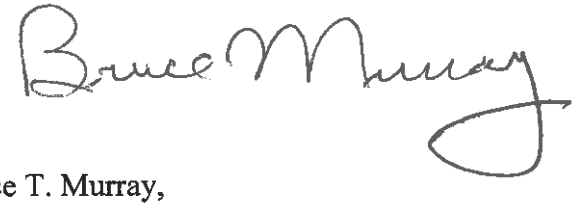
First of all, in this case, the Plaintiff is not attempting to compare her own on-the-job-behavior with the misfeasance or nonfeasance of other employees. Rather, the Plaintiff is focused on what she alleges to be the discriminatory misfeasance of the Chancellor. Thus, in seeking comparative information into the grievance process, the Plaintiff seeks to discover how the Chancellor dealt with similarly situated faculty members, i.e., faculty members who filed grievances.

Although the fact formula in *Mitchell* is not analogous to this case, the Plaintiff still satisfies it: She is a former Chapman faculty member who seeks information regarding other faculty members who filed grievances. Any Chapman faculty member, engaging in academic research, teaching, etc. is similarly situated to my client, based on the *Wills* definition – quite simply, "[a]nother employee is similarly situated if, among other things, he or she engaged in the same conduct without any mitigating or distinguishing circumstances." *Wills,* 195 Cal. App. 4th at 172.

But the Defendants instead illicitly narrow this rule; they narrow Plaintiff's interrogatories; and conveniently, they come up with a narrow answer that amounts to a non-answer, i.e., "Kanavou's grievance is the only grievance since 2007 for alleged disability discrimination." Consequently, Plaintiff ends up with nothing; and she is denied her ability to make her case.

Therefore, Defendants should be compelled to answer Plaintiff's interrogatories.

Dated: March 3, 2017

By: 

Bruce T. Murray,

Attorney for Plaintiff, Angeliki A. Kanavou