

14 AUG -5 PM 2:50

ROSA PINHEIRO, CLERK

BY Paula
DEPUTY

THIS CASE HAS BEEN ASSIGNED TO
JUDGE J. A. L. ELLIOTT IN
DEPARTMENT 33 FOR ALL PURPOSES,
INCLUDING TRIAL

IN AND FOR THE COUNTY OF SAN JOAQUIN

Case No.: 39-2014-00314475-CU-OE-STK

COMPLAINT FOR DAMAGES FOR

1. **DISABILITY DISCRIMINATION**
2. **FAILURE TO ACCOMMODATE**
3. **FAILURE TO ENGAGE IN
INTERACTIVE PROCESS**
4. **RETALIATION FOR TAKING
PROTECTED MEDICAL LEAVE**
5. **FAILURE TO PREVENT
DISCRIMINATION AND
RETALIATION**

JURY TRIAL DEMANDED

Plaintiff Kristina MacKay ("MacKay") brings this action against Kaiser Foundation Health Plan, Inc. ("Kaiser"), a corporation, and Does 1 through 100, for general, compensatory, punitive, and statutory damages, costs and attorneys' fees, resulting from the defendants' unlawful and tortious conduct, as ground therefore alleges.

1. MacKay is an individual and is, and was at all times relevant herein, a resident of San Joaquin County, California. At all times relevant herein, MacKay was employed in San Joaquin County, and was an "employee" as defined by Government Code section 12926.

1 2. MacKay is informed and believes and thereon alleges that Kaiser is a California
2 corporation. MacKay is informed and believes and thereon alleges that Kaiser is an "employer" as
3 defined by Government Code sections 12926(d), 12940(a), and 12940(j)(4)(A).

4 3. Kaiser and Does 1-100 are collectively referred to as Defendants.

5 4. MacKay is not aware of the true names and capacities of the Defendants sued herein
6 as Does 1 through 100, whether individual, corporate, associate, or otherwise, and therefore sues
7 such Defendants by these fictitious names. MacKay will amend this complaint to allege their true
8 names and capacities when ascertained. MacKay is informed and believes, and on that basis
9 alleges, that each of the fictitiously named Defendants is responsible in some manner for the
10 occurrences herein alleged and that MacKay's injuries and damages herein alleged were legally
11 caused by such Defendants. Unless otherwise indicated, each Defendant was acting within the
12 course and scope of said agency and/or employment, with the knowledge and/or consent of said co-
13 Defendant.

14 5. MacKay is informed and believes and thereupon alleges that at all times mentioned
15 herein, each of the Defendants, including each Doe Defendant, was acting as the agent, servant,
16 employee, partner and/or joint venturer of and was acting in concert with each of the remaining
17 Defendants, including each Doe Defendant, in doing the things herein alleged, while at all times
18 acting within the course and scope of such agency, service, employment partnership, joint venture
19 and/or concert of action. Each Defendant, in doing the acts alleged herein, was acting both
20 individually and within the course and scope of such agency and/or employment, with the
21 knowledge and/or consent of the remaining Defendants.

22 **VENUE AND JURY TRIAL DEMAND**

23 6. Venue is proper in this court because the discriminatory acts alleged herein took
24 place in San Joaquin County, California, and MacKay's former place of employment with Kaiser is
25 located within San Joaquin County. MacKay hereby demands a jury trial.

26 ///

27 ///

28 ///

GENERAL ALLEGATIONS

7. In or around October of 2000, MacKay began employment with Kaiser. At the time of her separation, MacKay held the title of Professional Services Coder I. During her employment, MacKay earned high marks for her quality of work—for example, after ninety days in the Professional Services Coder I position, on or around July 27, 2012, Kaiser rated MacKay's work quality was rated at 97.6 percent.

8. Beginning in around 2011, MacKay began to suffer from carpal tunnel syndrome in her right wrist. Her disability grew so severe that she underwent surgery for it in September of 2012 and took a resulting medical leave of approximately eight weeks.

9. Despite her surgery, MacKay continued to suffer from pain related to her carpal tunnel syndrome, and she also developed a case of "trigger thumb," aka stenosing tenosynovitis—a common disorder characterized by catching, snapping, or locking of the thumb, associated with dysfunction and pain.

10. As an accommodation for her carpal tunnel syndrome, MacKay repeatedly requested (through her supervisor, Monique Waterford) that Kaiser make ergonomic adjustments for her workstation. However, Kaiser refused to make an appropriate evaluation and adjustment of MacKay's workstation, and her symptoms worsened. Waterford directly and sternly told MacKay that Kaiser had "done everything required" and would do nothing further.

11. Further, following MacKay's first medical leave and her numerous, emphatic requests for accommodation, Waterford's attitude toward her worsened as well, and she practically stopped talking to MacKay altogether. Kaiser also gave MacKay pretextual write-ups attacking her work performance in a campaign to set her up for termination. For instance, though MacKay always met her work quotas, Kaiser criticized her for a supposed lack of productivity.

12. In June of 2013, MacKay notified Kaiser that she would require another surgery, this time for her trigger thumb, and also a subsequent period of medical leave. Very soon thereafter, on or around July 17, 2013, Kaiser placed MacKay on a "last chance agreement," again attacking her supposedly substandard productivity. On or around August 27, 2013, MacKay underwent surgery, and took a subsequent medical leave of approximately three weeks.

1 13. Upon returning to work in mid-September 2013, MacKay was prescribed light duty,
2 and Kaiser reassigned her to a position in optical sales.

3 14. However, after only three days of working in optical sales, MacKay was summoned
4 to a meeting with her supervisors and her union representative, Jonathan Hernandez. At that
5 meeting, Hernandez informed MacKay that she was going to be terminated for poor work
6 productivity. However, advised Hernandez, MacKay had the option of voluntarily resigning.
7 Understanding that a voluntary resignation was preferable to a termination, MacKay was forced to
8 resign her employment with Kaiser. Kaiser classified the cessation of employment as "termination
9 – involuntary."

10 15. At all times relevant herein, MacKay was capable of performing her essential job
11 duties with or without reasonable accommodation.

12 16. On November 22, 2013, MacKay filed all appropriate charges with the Department
13 of Fair Employment and Housing, and was issued a "right-to-sue" notice that same day.

14 17. The list of misconduct by Defendants in the above allegations is a partial list only,
15 and by way of example.

16 18. Since being fired from Kaiser, MacKay has suffered injury and damages.

17 **FIRST CAUSE OF ACTION**
18 **VIOLATION OF GOVERNMENT CODE SECTION 12940(a)**
19 **(Disability Discrimination)**
20 **Against Kaiser and Does 1 – 100**

21 19. MacKay hereby realleges and incorporates by reference Paragraphs 1 through 18
22 above as though fully set forth herein, except as said paragraphs are inconsistent with the
23 allegations of this cause of action.

24 20. The Fair Employment and Housing Act ("FEHA") explicitly prohibits an employer
25 from refusing to hire or employ a person, discharging a person from employment, or discriminating
26 against such person in compensation or in terms, conditions or privileges of employment on the
27 basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability,
28 medical condition, marital status, sex, age or sexual orientation. Gov. Code § 12940(a). "Race,
religious creed, color, national origin, ancestry, physical disability, mental disability, medical

condition, marital status, sex, age, or sexual orientation" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. Gov. Code § 12926(n).

21. At all times herein mentioned, MacKay was qualified for the position she held with Kaiser.

22. Kaiser was at all times material herein MacKay's employer pursuant to Government Code section 12926(d) and was therefore barred from discriminating in its employment decisions in violation of Government Code section 12940(a).

23. Nevertheless, as set forth above, Kaiser discriminated against MacKay based on her disability, perceived disability, and/or future perceived disability, in violation of Government Code section 12940(a).

24. The acts taken toward MacKay were carried out by and/or ratified by Defendants and/or managing agents/employees of Defendants acting in an oppressive, fraudulent and malicious manner in order to injure or damage MacKay, thereby justifying an award to her of punitive damages.

25. As a direct and proximate result of Defendants' conduct, MacKay suffered damages and requests relief as hereafter provided.

SECOND CAUSE OF ACTION
VIOLATION OF GOVERNMENT CODE SECTION 12940(m)
(Failure to Accommodate)
Against Kaiser and Does 1 – 100

26. MacKay hereby realleges and incorporates by reference Paragraphs 1 through 25 above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

27. The FEHA requires an employer to "make reasonable accommodation for the known physical or mental disability of an applicant or employee." Gov. Code § 12940(m).

28. Kaiser was at all times material herein MacKay's employer pursuant to Government Code section 12926(d), had knowledge of MacKay's disabilities, and was required to reasonably accommodate her pursuant to Government Code section 12940(m).

1 29. Nevertheless, as set forth above, Kaiser failed to make a reasonable accommodation
2 for MacKay's known disabilities in violation of Government Code section 12940(m).

3 30. The acts taken toward MacKay were carried out by and/or ratified by Defendants
4 and/or managing agents/employees of Defendants acting in an oppressive, fraudulent and malicious
5 manner in order to injure or damage MacKay, thereby justifying an award to her of punitive
6 damages.

7 31. As a direct and proximate result of Defendants' conduct, MacKay suffered damages
8 and requests relief as hereafter provided.

9 **THIRD CAUSE OF ACTION**
10 **VIOLATION OF GOVERNMENT CODE SECTION 12940(n)**
11 **(Failure to Engage in Interactive Process)**
12 **Against Kaiser and Does 1 – 100**

13 32. MacKay hereby realleges and incorporates by reference Paragraphs 1 through 31
14 above as though fully set forth herein, except as said paragraphs are inconsistent with the
15 allegations of this cause of action.

16 33. The FEHA requires an employer "to engage in a timely, good faith, interactive
17 process with the employee or applicant to determine effective reasonable accommodations, if any,
18 in response to a request for reasonable accommodation by an employee or applicant with a known
19 physical disability or known medical condition." Gov. Code § 12940(n).

20 34. Kaiser was at all times material herein MacKay's employer pursuant to Government
21 Code section 12926(d), had knowledge of MacKay's disabilities, and was required to engage in the
22 interactive process pursuant to Government Code section 12940(n).

23 35. Nevertheless, as set forth above, Kaiser failed to engage in a timely, good faith,
24 interactive process to determine effective reasonable accommodations in violation of Government
25 Code section 12940(n).

26 36. The acts taken toward MacKay were carried out by and/or ratified by Defendants
27 and/or managing agents/employees of Defendants acting in an oppressive, fraudulent and malicious
28 manner in order to injure or damage MacKay, thereby justifying an award to her of punitive
damages.

37. As a direct and proximate result of Defendants' conduct, MacKay has suffered damages and requests relief as hereafter provided.

FOURTH CAUSE OF ACTION
VIOLATION OF GOVERNMENT CODE SECTION 12945.2
(Retaliation for Taking Protected Medical Leave)
Against Kaiser and Does 1-100

38. MacKay hereby realleges and incorporates by reference Paragraphs 1 through 37 above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

39. The California Family Rights Act ("CFRA"), part of the FEHA, explicitly prohibits an employer or person from discharging, expelling, or otherwise discriminating against any person because the person has taken protected medical leave. Gov. Code § 12945.2(l).

40. Kaiser was at all times material herein MacKay's employer pursuant to Government Code sections 12926(d) and 12945.2(2)(c) and was therefore barred from retaliating against her for taking protected medical leave.

41. Nevertheless, as set forth above, Defendants retaliated against MacKay based on her taking of protected medical leave, in violation of Government Code section 12945.2(l)(1).

42. The acts taken toward MacKay were carried out by and/or ratified by Defendants and/or managing agents/employees of Defendants acting in an oppressive, fraudulent and malicious manner in order to injure or damage MacKay, thereby justifying an award to her of punitive damages.

43. As a direct and proximate result of Defendants' conduct, MacKay suffered damages and requests relief as hereafter provided.

FIFTH CAUSE OF ACTION
VIOLATION OF GOVERNMENT CODE SECTION 12940(k)
(Failure to Prevent Discrimination and Retaliation)
Against Kaiser and Does 1 – 100

44. MacKay hereby realleges and incorporates by reference Paragraphs 1 through 43 above as though fully set forth herein, except as said paragraphs are inconsistent with the allegations of this cause of action.

1 45. The FEHA requires an employer to "take all reasonable steps necessary to prevent
2 discrimination and harassment from occurring." Gov. Code § 12940(k).

3 46. Kaiser, at all times material hereto, was MacKay's employer pursuant to
4 Government Code section 12926(d) and were therefore required to prevent discrimination and
5 retaliation as set forth in Government Code section 12940(k).

6 47. Kaiser knew or should have known of the discrimination and retaliation by its
7 employees, supervisors, managers, and Does 1-100, inclusive.

8 48. Nevertheless, as set forth above, Kaiser did nothing to rectify or prevent said
9 discrimination and retaliation. Instead, Kaiser consented to, encouraged, permitted and/or
10 acquiesced to the discrimination and retaliation.

11 49. The acts taken toward MacKay were carried out by and/or ratified by Defendants
12 and/or managing agents/employees of Defendants acting in an oppressive, fraudulent and malicious
13 manner in order to injure or damage MacKay, thereby justifying an award to her of punitive
14 damages.

15 50. As a direct and proximate result of Defendants' conduct, MacKay suffered damages
16 and requests relief as hereafter provided.

17 **PRAYER FOR RELIEF**

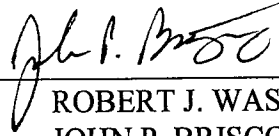
18 WHEREFORE, MacKay prays judgment against Defendants as follows:

- 19 1. Economic (special) and non-economic (general) damages;
 - 20 2. For injunctive relief pursuant to Government Code section 19265(c)(3);
 - 21 3. For punitive and/or exemplary damages; and
 - 22 4. For statutory attorneys' fees and costs, including those available under Gov. Code §
23 12965(b) and Code of Civil Procedure § 1021.5;
 - 24 5. Prejudgment and post-judgment interest according to any applicable provision of
25 law or as otherwise permitted by law, including that available under Civil Code §§
26 3287(a) and 3289(b);
 - 27 6. All other and further relief as the court deems just and proper.
- 28

1 **DATED:** August 4, 2014

MAYALL HURLEY P.C.

2
3 By



4 ROBERT J. WASSERMAN
5 JOHN P. BRISCOE
6 Attorneys for Plaintiff,
7 KRISTINA MACKAY
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28