Nos. 05-55624/05-56647/05-56760

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SALIM IQAL

Plaintiff/Appellant, Cross-Appellee

v.

UNITED INSURANCE COMPANY OF AMERICA

Defendant/Appellee, Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(No. 04-3064 GPS, Hon. George P. Schiavelli United States District Judge)

BRIEF OF APPELLEE UNITED INSURANCE COMPANY OF AMERICA

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CORPORATE DISCLOSURE STATEMENT – CIRCUIT RULE 26.1

Pursuant to Ninth Circuit Rule of Appellate Procedure 26.1, United Insurance Company of America identifies the following parent corporation. Other than the parent corporation named below, there is no other publicly held corporation that owns 10% or more of United's stock:

Parent Corporation – Unitrin, Inc.

Dated: February 3, 2006

Respectfully submitted,

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I.

INTRODUCTION

The district court properly entered summary judgment because United treated Iqal lawfully and fairly at all times. United's employee, Salim Iqal, did not return to work for six months after he began a leave of absence to have heart surgery. Iqal gave no indication that he could work again. When Iqal's employment terminated after the six months, Iqal gave no indication that he wanted to or could return to work. Iqal continued drawing disability benefits for another year. United cannot be faulted for not putting Iqal back on the job when it had no way to know he would be able to return. This was not a close case.

Iqal worked for United for 47 years. On the morning of August 1, 2002, Iqal became ill and left work. He was rushed to the hospital and underwent emergency heart surgery before the day was through. From August 1, 2002, through at least October 31, 2004, Iqal and his doctors consistently reported that Iqal was totally disabled due to physical injuries from a prior work-related car accident, cardiovascular injuries due to his weak heart, and a host of serious psychiatric injuries caused by job-related stress.

When Iqal became disabled, United placed him on a leave of absence. United's policy allows employees who become disabled to remain employed on a leave of absence for up to six months. United's policy gives its employees three

months more than the federal Family Medical Leave Act and the California Family Rights Act require. If an employee of United does not return to work after the expiration of the six-month leave of absence, his or her employment is then terminated. If the employee thereafter recovers and becomes able to return to work, the employee is entitled to be rehired.

In Iqal's case, he did not recover, he never sought to be rehired by United at any time, and he never requested any form of accommodation from United. Under the circumstances, United had no reason to think that Iqal would have wanted or would have benefited from any form of accommodation. When Iqal did not return to work after the six-month period, his employment terminated.

Thereafter, Iqal collected disability insurance benefits for one year. Iqal stated the reasons why he was disabled and could not perform his job function in his own handwriting on December 10, 2002: "I am afraid to drive my car 120 to 130 miles per day. This will indanger my life and the life of others. … My job function had LOTS OF STRESS. I am allready STRESSED out. Adjustment disorder with mixed anxity. I am in depressed mood (309.28) If I go back to work with all these sufficient condition will worsen my stress and will create more harm

to my health." ER:v.II:t11:459 [Exh. 210 (misspellings in original)].[1]

Exactly one year after his employment terminated, Iqal filed a claim for employment discrimination against United with the California Department of Fair Employment and Housing, and thereafter he filed this action.

United's motion for summary judgment was based upon Iqal's December 10, 2002 statement quoted above, his pleadings, deposition admissions, contention interrogatory responses, and numerous doctor reports. United proffered a non-pretextual reason for the termination of Iqal's employment (his failure to return to work after the six month leave of absence); established as an undisputed fact that Patrick Stowers, the regional manager accused by Iqal of age discrimination, played no part in any decision to terminate Iqal's employment; that Iqal could not establish a prima facie case of age or disability discrimination because he was not able to perform his job functions; that Iqal's claim for failure to accommodate his disability failed because Iqal never requested any accommodation and, as a matter of a law, an employer is not obligated to provide a leave of absence of indefinite duration; and Iqal's age harassment claim failed because Iqal admitted in deposition that United never did anything to him that he found "harmful or unpleasant."

[1] Since Iqal's Excerpts of the Record comprises 10 volumes, for the Court's convenience United has included in its citations the volume number ("v"), the tab

In his opposition to United's summary judgment motion, Iqal filed a declaration that purported to establish "facts" that contradicted his pleadings, deposition testimony, interrogatory responses, and his many sworn doctors' reports. The new "facts" consisted of supposed conversations that Iqal had had with his immediate supervisor and a human resources employee in United's home office. Because Iqal failed to show that the contradictions between what he claimed was said in these conversations and his previous sworn testimony which negated the possibility that these conversation actually took place were the result of an honest discrepancy, a mistake, or the result of newly uncovered evidence, the district court granted a motion to strike them as sham within the meaning of *Kennedy v. Allied Mut. Ins. Co.,* 956 F.2d 262, 267 (9th Cir. 1991). ER:v.VII:t35:1843-1851. The district court also found that even if the alleged conversations had taken place, they did not raise a triable issue of fact so as to avoid summary judgment. *Id*.

On appeal, Iqal's brief simply ignores many of the critical facts which resulted in summary judgment. He ignores his December, 2002 letter stating that he is unable to work. He ignores his November, 2002 deposition in his worker's compensation case where he swore that he could not work due to stress and his inability to drive. He ignores the fact that his cardiologist, Dr. Burstein, testified

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number ("t"), and the page numbers, all set off by colons.

under oath that Iqal was totally disabled and unable to work from August 1, 2002 through long after his employment terminated. He ignores his admission that no United supervisor did anything harmful or offensive to him. The facts do not disappear just because Iqal ignores them, and summary judgment must be affirmed.

II.

STATEMENT OF JURISDICTION

This court has subject matter jurisdiction, based upon diversity of citizenship. (28 U.S.C. §1332). All pending appeals were timely filed.

The district court granted summary judgment on March 24, 2005. ER:v.VII:t35:1839-1851. Iqal's original notice of appeal was filed on March 29, 2005, docketed as No. 05-55624. United's Supplemental Excerpt of the Record "SER": 1. An order granting summary judgment is an appealable final order pursuant to 28 U.S.C. § 1291.

Iqal's March 29, 2005 notice of appeal was filed before the expiration of United's deadline to file a motion for attorneys' fees which, pursuant to Federal Rule of Civil Procedure 54(d)(2)(B), must be filed within 14 days after entry of judgment. A motion for attorneys' fees tolls the deadline to file a notice of appeal. Circuit Rule 4 (a)(4)(iii). The Ninth Circuit, pursuant to its order filed May 6, 2005, stayed Appeal No. 05-55624 pending resolution of United's attorneys' fee

motion.

On October 21, 2005, the district court entered an order partially granting United's motion for attorneys' fees and entered an amended judgment on that same date. SER:129-134. On October 24, 2005, Iqal filed an amended notice of appeal, docketed as No. 05-56647, appealing the partial grant of attorneys' fees in United's favor. ER:v.X:t44:2783-2794. That notice of appeal was timely pursuant to Circuit Rule 3(a)(1) because it was filed within 30 days of the date of the last pending post-trial motion before the district court.

On November 15, 2005, United filed a notice of cross-appeal of the partial denial of its motion for attorneys' fees. United is filing a motion to dismiss its cross-appeal and thus has not briefed the issues raised therein.

III.

STATEMENT OF ISSUES

Iqal's two appeals present the following issues for this Court to decide:

1. Did the district court properly summarily adjudicate Iqal's age discrimination claim for at least one of the following reasons?:

   A. Iqal was unable to perform his job functions at the time his employment terminated due to physical, cardiovascular, and psychiatric disabilities.

   B. Iqal's employment terminated due to a legitimate business

reason, not age discrimination, namely United's six-month finite leave policy that is three months longer than the law requires.

C. Iqal did not establish pretext because of one or more of the following reasons:

(1) Patrick Stowers, the only individual accused by Iqal of age bias, played no part in any decision to discharge Iqal.

(2) Iqal's declaration offered to prove pretext was properly stricken as sham because it contradicted Iqal's previous testimony and Iqal failed to show that the contradictions were the result of an honest discrepancy, a mistake, or the result of newly uncovered evidence.

(3) Stowers' alleged conversations with Iqal were at least as likely to indicate legitimate friendly concern about Iqal's health as opposed to improper bias.

2. Did the district court properly summarily adjudicate Iqal's age harassment claim because no evidence offered by Iqal showed objectively or subjectively that harassment occurred.

3. Did the district court properly summarily adjudicate Iqal's disability discrimination claim, predicated upon United's failure to accommodate Iqal's disability for at least one of the following reasons?:

A. Iqal was unable to perform his job at the time his employment terminated due to physical, cardiovascular, and psychiatric disabilities. Iqal's declaration offered to prove that he could have returned to work in October 2002 was properly stricken as sham because it contradicted Iqal's pleadings and prior testimony, and Iqal failed to show that the contradictions were the result of an honest discrepancy, a mistake, or the result of newly uncovered evidence. Iqal's testimony regarding his disability was also incompetent to contradict his doctors' opinions.

B. Iqal never requested any accommodation, including an indefinite leave, despite being able to do so and despite signing a notice acknowledging his right to request disability accommodations.

C. As a matter of law, United had no obligation to provide a leave of absence of indefinite duration.

D. An indefinite leave would have been futile because Iqal never regained the ability return to work.

4. Did the district court properly summarily adjudicate Iqal's disability discrimination claim, predicated upon the assertion that Iqal was discharged "because of" his disability on at least one of the following grounds?:

A. Iqal was unable to perform his job at the time his employment

terminated due to physical, cardiovascular, and psychiatric disabilities.

B. United lawfully affords disabled employees a leave of absence up to six months, and the termination of Iqal's employment when he failed to return to work after six months was lawful.

5. Did the district court properly award partial attorneys' fees to United under California Labor Code Section 218.5, because Iqal sought unpaid wages in his initial pleading and United was the prevailing party?

IV.

STANDARD OF REVIEW AND CHOICE OF LAW

The standard of review on an appeal of the grant of summary judgment is de novo. *See Continental Ins. Co. v. Metro-Goldwyn-Mayer, Inc.,* 107 F.3d 1344 (9th Cir. 1997). The Ninth Circuit applies federal procedural law, including the federal burden-shifting standards, in reviewing summary judgment of state employment discrimination claims. *See Snead v. Metropolitan Property & Cas. Ins., Co.,* 237 F.3d 1080 (9th Cir. 2001).

With respect to the substantive law applicable to Iqal's state law claims (there are no federal claims), the Ninth Circuit applies state law. *See Snead, supra* at 1090.

The district court's evidentiary rulings striking portions of Iqal's declaration

were predicated upon a factual determination of sham by the district court and are reviewed for abuse of discretion. *Jackson v. Dillard's Dept. Stores, Inc.*, 92 Fed. Appx. 583, 585-586 (10th Cir. 2003) [district court's order striking as sham declaration testimony in opposition to summary judgment motion in employment discrimination case is reviewed for abuse of discretion just as all evidentiary rulings]; *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991) [district court must make factual finding of sham before striking testimony]; *Quevedo v. Trans-Pac. Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998) [trial court's decision to exclude evidence on summary judgment is reviewed for abuse of discretion].

United agrees with Iqal with respect to the standard of review with respect to the district court's partial grant of attorneys' fees; namely whether the district court had statutory authority to award fees is reviewed de novo, and whether the district court erred as to the amount of fees awarded is reviewed for abuse of discretion.

V.

STATEMENT OF THE CASE

On February 24, 2004, Iqal filed an action in Los Angeles Superior Court against United and others, alleging breach of an oral and written contract, age discrimination, and age harassment. ER:v.I:t1:1-14. United removed the action to federal court. Iqal voluntarily dismissed all defendants except United.

Iqal was granted leave to amend and filed a first amended complaint which repeated all causes of action set forth in the original complaint and added a disability discrimination cause of action. ER:v.I:t3,4:25-42.

United moved for summary judgment. ER:v.I:t7,8:84-130. In opposition, Iqal abandoned his breach of contract claims and opposed summary adjudication of the remaining claims. ER:v.III:t14:553-582 [see fn. 1, p. 560].

The district court granted summary judgment in an order filed and entered on March 21, 2005. ER:v.VII:t35:1839-1852. Iqal filed a timely notice of appeal as to the grant of summary judgment. SER:1.

United timely filed a motion for attorneys' fees, which Iqal opposed. SER:6-128; ER:v.VII:t38:1859-1879. This motion tolled the pendency of Iqal's appeal. On October 21, 2005, the district court partially granted United's motion, awarding $20,185 in fees. SER:129-134. Iqal timely filed an amended notice of appeal as to the award of attorneys' fees. ER:v.X:t44:2783-2794. United filed a notice of cross-appeal of the partial denial of attorneys' fees which it has moved to dismiss.

VI.

STATEMENT OF FACTS

On August 1, 2002, Iqal reported to work as a sales manager for United, where he had been employed since 1955. In the late morning, Iqal felt very ill, left work abruptly, and was rushed to the emergency room. ER:v.I:t8:116 [Undisputed

Fact "UF" 2]. He had a blocked artery and underwent emergency heart surgery before the day was through. *Id*.

Two weeks later, United received two notices signed by Iqal that his cardiovascular injury resulted from stress caused by management responsibility, sales and collection pressure, and prolonged driving. ER:v.II:t11:324-325 [Exh. 202]. United also received a note from Iqal's doctor stating that Iqal was disabled and off work until further notice. ER:v.II:t11:322[Exh. 201]. United never received any "further notice" that Iqal was no longer disabled or could return to work.

United placed Iqal on a leave of absence. Under the federal Family Medical Leave Act and California's Family Rights Act, United was required to provide employees who cannot work due to a serious medical condition up to 12 weeks of unpaid leave. United had a more generous nationwide policy pursuant to which it allowed disabled employees a leave of absence of up to 26 weeks (six months) during which the employee draws short term disability benefits from United. ER:v.I:t8:118[UF 4]; T10:135 [Oehler Dec. ¶ 3]. If the employee did not return to work after the six-month leave of absence, the employee's employment would terminate automatically, subject to re-hire if the employee recovered and was able to work again. *Id*.

Throughout Iqal's six-month leave of absence, Iqal's psychiatrists and

doctors consistently reported him as totally disabled and unable to work by reason of a variety of psychiatric, orthopedic, and cardiac conditions. ER:v.I:t8:117-118, 125 [UF 3, 24]. They diagnosed him as totally disabled by reason of major depression, passive suicidal ideation, panic reactions, sleep disturbance and nightmares, adjustment disorder with mixed anxiety and depressed mood, social withdrawal, tearfulness, lowered self esteem, cognitive impairment, fear of driving long distances, chronic neck and back pain, arthritis, atherosclerotic cardiovascular disease, coronary artery disease, hypertension, and hypertensive cerebrovascular disease.[2]

By reason of his disability, Iqal was unable to perform the essential job functions of his position as a sales manager. ER:v.I:t8:123 [UF 19]. As Iqal expressed in his own handwriting on December 10, 2002:

> THESE ARE THE REASONS THAT I AM DISABLED AND CAN NOT FULLFILL MY JOB FUNCTION:
>
> I am afraid to drive my car 120 to 130 miles per day. This will indanger my life and the life of others. Because of the sever pain and the limitation of movement in my neck and shoulders. The chest pain. The shortness of breath. The dizziness spell. The high hypertension.
>
> My job function had LOTS OF STRESS. I am allready STRESSED out. Adjustment disorder with mixed anxity. I am in depressed mood (309.28) If I go back to work with all these sufficient condition will worsen my stress and will create more harm to my health. My job junction have lots of dangerus area that I work in. I handle money collecting from these

[2] ER:v.I,II:t11:159-169, 186-223, 225, 283-293, 308, 329-334, 459, 461-462, 464, 466, 468 [Exhs. 104, 107, 109, 113, 138, 150, 203, 210, 211, 212, 213, and 214].

> dangerus area always afraid of being shot or robbed even killed. I was robbed once of 1200 dollars. He took my car key & left me stranded indangering me. I can not fullfill my job function because of me taking therapy 4 times a week different time of the day and taking 12 kind of medication every day the side effect of these medications make me edgy, tierd, and week to do anything. ER:v.II:t11:459 [Exh. 210 (misspellings in original)].

Iqal acknowledged in his deposition that the substance of his December 10 statement was true. ER:v.VII:t29:1777.

Iqal was aware that United had a policy of accommodating disabilities and that if he became disabled and needed an accommodation, he was expected to communicate in writing the relevant information to his supervisor or United's Human Resources Department. Iqal received United's policy statement, which stated:

> The company has a policy to make reasonable accommodations for all qualified individuals with a disability as defined under law. If you have a disability and you need us to provide a reasonable accommodation to enable you to perform the essential functions of your job, please contact your supervisor or the Human Resources Department to discuss your disability and to develop a reasonable accommodation. Your medical matters will be kept confidential. We prefer that you submit your request for accommodation to your supervisor or the Human Resources Department in writing to make sure we address your needs quickly and appropriately. ER:v.II:t11:352 [Exh. 206].

Iqal was obviously aware of this policy because it contains his signature acknowledging that he reviewed it.

Iqal never requested United to provide any form of accommodation for the limitations resulting from his disability. ER:v.I:t8:123-124 [UF 21]. Iqal did not

return to work after the expiration of his six-month leave of absence, and his employment terminated automatically on January 31, 2003. *Id.* at 118 [UF 6, 7]. Sometime in February, 2003, Iqal called Ken Oehler, United's Vice President, Human Resources, to ask why his employment had terminated. ER:v.II:t11:395-396 [Exh. 209, Iqal Depo., 61:2-62:4]. Oehler reminded Iqal of the company policy when an employee fails to return to work after a leave of absence of 26 weeks, the employment is automatically terminated. *Id*. Iqal did not then or ever ask Oehler or anyone else at United if he could be re-employed, if he could have an additional leave of absence, or for any accommodation. *Id.*; ER:v.I:t8:123-124 [UF 21].

Iqal then began drawing long term disability benefits of $3,872.10 per month from insurance purchased through United. ER:v.II:t11:336-347 [Exh. 204]. On February 20, 2003, Iqal's psychotherapist, Dr. Angsten, wrote in her therapy progress notes that Iqal had received a letter of termination stating that he was eligible for long term disability benefits. *Id.* at 295-304 [Exh. 147]. On February 27, 2003, Dr. Angsten wrote that Iqal had approached an attorney and that he had one year left of long term disability through February 2004. *Id*.

On February 1, 2004, after Iqal had finished collecting all available long term disability benefits, he filed a claim for employment discrimination against United with the California Department of Fair Employment and Housing, and this

suit followed.

Iqal claimed that United terminated his employment by reason of age discrimination. The district court summarily adjudicated this claim against Iqal because Iqal's employment terminated for a legitimate non-pretextual business reason (failure to return to work after a six-month leave of absence), and Iqal produced no evidence that age bias played any role. ER:v.I:t8:117-120 [UF 3-16]).

Iqal also claimed that he was subjected to harassment on account of his age. *Id.* at 121 [UF 17]. The district court summarily adjudicated this claim against Iqal because objectively the few asserted slights upon which Iqal based his claim could not reasonably be characterized as harassment, and subjectively Iqal admitted he did not feel harassed. *Id.* at 121 [UF 18]; ER:v.VII:t35:1847-1848.

Iqal also added in his Amended Complaint a disability discrimination claim based on the contention that United should have accommodated his disability by putting him on an open-ended extended leave of absence without a specific ending date. *Id.* at 123 [UF 20]. The district court summarily adjudicated this claim against Iqal for several reasons. First, as a matter of law, United had no duty to offer an accommodation for a disability because Iqal never requested or gave United any reason to think he would want an accommodation of any kind, including a further leave of absence. *Id.* at 123-124[UF 21]. Certainly in light of the apparent severity and complexity of Iqal's disability, United had no basis for

guessing what if any accommodation Iqal may have wanted or benefited from. *Id.* at 125 [UF 24]. Second, as a matter of law, California's Fair Employment and Housing Act (FEHA) does not require employers to provide leaves of absence of indefinite duration beyond the statutorily prescribed period of 3 months. Third, any further leave of absence beyond the six-month leave of absence United did provide would have been futile because Iqal was totally disabled and unable to work from August 1, 2002 through and including the date the Complaint was filed, and thereafter at least until October 7, 2004. *Id.* at 117-118, 123, 125-126 [UF 3, 19, 25-26]; ER:v.II:t1:308 [Exh. 150]. Consequently, fourth, Iqal suffered no damages by any lack of a further leave of absence. *Id.*; ER:v.I:t8:124 [UF 23].

United filed its motion for summary judgment based on undisputed facts derived primarily from Iqal's deposition testimony and his doctors' reports. One critical fact barred both the age and disability discrimination claims – that Iqal became disabled and unable to work on August 1, 2002, he remained disabled for more than two years and his employment terminated when he failed to return to work after his six-month disability leave of absence ended. The motion was also based on several of Iqal's admissions that in effect proved that he had no evidence of any discriminatory conduct.

To oppose summary judgment, Iqal submitted a declaration that directly contradicted several facts asserted in Iqal's First Amended Complaint, his

deposition testimony, and his sworn interrogatory answers. Because the contradictions were so stark and Iqal was unable to reconcile the new facts with his previous sworn testimony or show them to have resulted from an honest discrepancy, a mistake, or the result of newly uncovered evidence, the district court found the new facts to be sham and excluded them from evidence. The district court also found that even if Iqal's new facts were considered, summary judgment would still be granted. ER:v.VII:t35:1851.

The main new "fact" upon which Iqal relied was his claim that he had not been disabled and actually could have worked in October 2002. This new "fact" directly contradicted Paragraph 37 of the First Amended Complaint, in which Iqal alleged that he was disabled from August 2002 through January 2003 (ER:v.I:t4:37), and Iqal's previous sworn testimony, including his December 10 letter, quoted above, and his November 7, 2002 deposition in his worker's compensation case where he swore that he was physically and emotionally unable to work:

> Q. I am just asking about your own feelings. Is there anything you know of that would prevent you from returning to the same employment as a staff manager for United Insurance Company?
> A. You ask me if I could go back to work or not?
> Q. Yes.
> A. I can't go back to work.
> Q. What problem has been identified for you either by your medical or psychiatric advisors, or that you have identified yourself?
> A. If I drive more than half an hour, I, you know, I get my – a lot of pain in my neck.

Q. Okay. And in the last – okay. Go ahead.
A. And I'm stressed out. I don't know why I'm stressed.
ER:v.I:t11:249 [Exh. 116, 124:1-17]

Iqal's new "facts" also contradicted Iqal's doctors' numerous sworn medical-legal reports which stated that Iqal's prior work-related car accident, heart disease caused by work-related stress, and serious psychiatric problems caused by work stress, all prevented him from returning to work from August 1, 2002 through at least October, 2004.[3]

Under controlling authority, these contradictions were considered as sham because Iqal did not reconcile his new facts with his earlier contradictory testimony and his doctor reports or otherwise explain how the new facts arose. ER:v.VII:t35:1843-1851. Moreover, Iqal's contradictory evidence, even if considered, was insufficient as a matter of law to support any of Iqal's claims because the new "facts" did not eliminate other remaining undisputed facts that barred his claims. ER:v.VII:t35:1851.

After summary judgment was granted, the district court awarded United part of its attorneys' fees in the amount of $20,185 pursuant to Labor Code

[3] ER:v.I,II:159-169; 186-205; 207-223; 228; 254-255; 258; 264-281; 284-293; 295-306; 308; 310; 312; 314; 316; 318-320; 322; 329-334; 464-466; 468 [Exhs. 104, 107, 109, 115, 117, 118, 127, 138, 147, 150, 151, 152, 153, 154, 200, 201, 203, 212, 213, and 214 - all doctor reports, doctor notices, and other documents stating that Iqal was totally disabled due to serious physical, cardiovascular, and psychiatric reasons for an undetermined amount of time since

August 1, 2002 through long after his employment automatically terminated on January 31, 2003].

§ 218.5 on the grounds that Iqal had sought wages as damages pursuant to his breach of contract claims and that he voluntarily allowed summary adjudication to be entered against him on those claims. Thus, United was the prevailing party and was entitled to those fees.

VII.

IQAL'S EMPLOYMENT TERMINATED FOR A LEGITIMATE REASON AND NOT AGE DISCRIMINATION

A. Iqal Did Not Meet His Burden of Producing Evidence.

The following burden-shifting test determines whether to summary adjudication of Iqal's age discrimination claim was proper. *See Snead v. Metropolitan Prop. Cas. Co.,* 237 F.2d 1080, 1090-1091 (9th Cir. 2001); *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973); *Hersant v. California Dept. of Social Services*, 57 Cal.App.4th 997, 1003, 67 Cal.Rptr.2d 483, 486 (1998).

1. Iqal had the burden of establishing a prima facie case of discrimination. *Snead, supra* at 1090-1091. This required him to establish the elements of his prima facie case under California law: (1) that he suffered an adverse employment action; (2) when he was over 40 years of age; (3) that he was satisfactorily performing his job; and (4) that he was replaced by a significantly younger person. (*Hersant*, *supra*, at 1003, 67 Cal.Rptr.2d at 486).

2. If Iqal had been able to establish a prima facie case, United would then have had the burden of stating a legitimate, non-age-based reason for the adverse employment action. (*Hersant*, *supra*, at 1003, 67 Cal.Rptr.2d at 487).

3. If United met this burden, Iqal would have had to produce substantial evidence demonstrating that United's justification was untrue or a pretext for discrimination. (*Hersant*, *supra*, at 1004-05, 67 Cal.Rptr.2d at 488).

Applying the burden-shifting, Iqal was unable to prevail at any step. Iqal could not establish one of the elements of his prima facie case, namely that he was satisfactorily performing his job, because Iqal was totally disabled and unable to work. ER:v.I:t8:117, 123, 125 [UF 3, 19, 25]. Even if Iqal had been able to establish a prima facie case, United stated a legitimate non-age-based reason for why Iqal's employment terminated (failure to return to work after a six-month leave of absence) *Id.* at 118 [UF 4-7], and with the burden shifted back to him, Iqal had no evidence that United's stated reason for terminating his employment was a pretext for discrimination. *Id.* at 119-120 [UF 8-16].

B. Iqal Did Not Establish a Prima Facie Case of Age Discrimination.

Satisfactory job performance at the time of termination is an essential element of Iqal's prima facie case of age discrimination. The Ninth Circuit has held that an employee who is totally disabled cannot satisfy this element to establish age discrimination. *See Risetto v. Plumbers and Steamfitters Local 343*,

94 F.3d 597 (9th Cir. 1996). In *Risetto*, an employee asserted an age discrimination claim but also received worker's compensation benefits based on a claim of total disability. The Ninth Circuit determined that the employee could not establish age discrimination:

> "We hold that summary judgment was properly entered because plaintiff was unable to satisfy the element of her prima facie case that required her to show that she 'was performing her job in a satisfactory manner...'" *Id.*, 94 F.3d at 600.

Iqal's age discrimination claim failed for the same reason.

To establish the ability to perform his job, Iqal pointed to his history of excellent work performance. United does not dispute Iqal's past work performance. But the ability of a worker to perform satisfactorily before becoming disabled does not imply an ability to work after becoming disabled. As shown by Iqal's and his doctors' sworn admissions, severe physical, cardiovascular, and psychiatric injuries caused by work-related stress and a car accident rendered him totally disabled from August 1, 2002 through long after his employment automatically terminated on January 31, 2003. Thus, Iqal was unable to establish a prima facie case of age discrimination.

C. Iqal Could Not Have Returned to Work Before His Leave of Absence Ended.

i. Iqal's Declaration that He Could Have Returned to Work in October, 2002 Contradicted His Prior Sworn Statements and His Doctors' Expert Opinions.

Before United filed its summary judgment motion, Iqal and his doctors consistently maintained that he was disabled from August 1, 2002 until at least October 7, 2004, by reason of physical, cardiovascular, and psychiatric conditions.[4] In opposition to United's motion, Iqal contradicted his pleadings and earlier testimony by submitting a declaration in which he claimed that he had returned to health and was not disabled in early October 2002, and that his supervisor Joel Smith allegedly told him that the regional manager, Patrick Stowers, wanted to get Iqal fired, causing Iqal to relapse:

> "By early October of 2002, I returned to my normal health and was able to engage in all activities as I had before, without any difficulties." ER:v.III:t15:558 (Iqal Dec. ¶ 26).
> …
> In late October I became very anxious and depressed over the events of the present months, most particularly how Stowers had been trying to get rid of me and what Joel Smith had told me at the hospital about Stowers wanting

[4] See, inter alia, ER:v.I:t11: 186-223, 227-228, 248-249, 308, 329-334, 354-377, 405-406, 380, 444, 448, 459 [Exhs. 107 (Dr. Bloch report), 109 (Dr. Angsten reports), 115 (Dr. Bloch letter), 116 (Iqal Worker's Comp. Depo., 123:17-124:24), 150 (Dr. Procci certification of inability to work until October 7, 2004), 203 (Dr. Burstein report, dated March 4, 2003 "[Iqal] has been temporarily totally disabled on an industrial basis, from an internal medicine point of view since August 1, 2002", p. 4 ¶ 8, p. 5 ¶ 2), 207 & 208 (responses to Interrogatories, pp. 9-11 15-17), 209 (Iqal. Depo., 94:19-21; 94:8-9; 96:1-14; 22:11-15; 276:19-279:4; 280:4-10), and 210 (Iqal handwritten note).

to fire me." *Id*. at 589 [Iqal Dec. ¶ 29].

A declaration is sham if it flatly contradicts earlier sworn testimony without an explanation for the inconsistency, by showing that the contradiction was the

result of an honest discrepancy, a mistake, or the result of newly uncovered evidence. *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991). The district court determined Iqal's new "facts" to be a sham attempt to contradict his prior deposition testimony and interrogatory responses without a satisfactory explanation why his testimony changed. ER:v.VII:t35:1843-1851. *See also Radobenko v. Automated Equip. Corp.,* 520 F.2d 540 (9th Cir. 1975) [declaration that contradicted prior deposition stricken]; *School Dist. No. 1J v. ACandS, Inc.,* 5 F.3d 1255 (9th Cir. 1993) [declaration that contradicted prior interrogatories stricken].

Also, as a matter of law a lay witness is not competent to contradict his own doctors' expert opinions of his medical condition. In *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000), an employee attempted to do just what Iqal did here. The employer won summary judgment disposing of the employee's age and gender discrimination case on the grounds that she was temporarily totally disabled for an "undetermined" period of time as the employee's doctor reports proved. The employee filed a declaration stating that she would have been able to return to work by a date certain if not for defendants' harassment. The Tenth Circuit disregarded this declaration, holding that an employee's own declaration that contradicts her doctors' written opinions is not competent to raise a triable issue as to whether she could have returned to work. As in *Cisneros*, Iqal's declaration that

he got better and could have returned to work in October 2002, was not competent to contradict the sworn medical-legal opinions of his numerous doctors, all of which stated that he was totally disabled and unable to work from August 1, 2002 through at least October, 2004 due to work-related injuries.

Iqal's new declaration also contradicted Paragraph 37 of Iqal's First Amended Complaint which states "Plaintiff suffered disabilities as defined under FEHA. From August of 2002 through January of 2003, defendant was made aware of this disability." Iqal cannot controvert his operative pleading by claiming he returned to normal health in October 2002. *See White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983).

ii. Dr. Bloch's Declaration Did Not Establish that Iqal Could Have Returned to Work in October 2002

The district court properly limited the effect of Dr. Bloch's declaration which was submitted to prove that Iqal could have returned to work in October 2002. First, Dr. Bloch did not recall if he was ever consulted about clearing Iqal for work, nor did he know if Iqal was ever cleared to return to work. (ER:v.VII:t29:179 [Exh. 235, Bloch Depo., 7:7-15])

Second, Dr. Bloch lacked personal knowledge about Iqal's ability to work since he saw Iqal only twice (ER:v.II:t11:446 [Exh. 209, Iqal. Depo., 278:14-16]), and it was Dr. Angsten who was primarily responsible for Iqal's psychological

treatment, not Dr. Bloch. (ER:v.II:t11:523-524 [Exh. 218, Angsten Depo., 6:18-7:4]).

Third, Dr. Bloch did not purport to have personal knowledge of whether Iqal was disabled due to his physical or cardiovascular, as opposed to psychiatric conditions. (ER:v.II:t11:484-485 [Exh. 215, Bloch Depo., 52:12-53:5]). Dr. Bloch was a psychiatrist, and he did not treat Iqal for his physical injuries or cardiovascular injuries. Iqal was treated by Dr. Tabaddor for physical injuries and Dr. Burstein for cardiovascular injuries. Dr. Bloch admitted that he could only predict that Iqal would have been able to return to work if Iqal's psychiatric conditions standing alone were the sole cause of Iqal's disabilities:

> "[Dr. Bloch] … If he didn't have the chronic pain, he wouldn't have had the psychiatric symptoms. But would the psychiatric symptoms alone have led me to say he was disabled from his employment? Probably not, although if at all, for a limited period of time. The big disablement was from the orthopedic symptoms and a little bit from the cardiovascular.
> …
> Q. But in Mr. Iqal's case, he also had serious physical problems which exacerbated his psychological and psychiatric problems, did he not?
> A. Yes.
> …
> Q. Do you have any understanding as to when, if ever, the physical problems that he suffered from became alleviated?
> A. No.
> …
> Q. Looking at your October 30, 2002, report and focusing on that time, in order to truly understand the degree to which Mr. Iqal's psychological and psychiatric conditions would prevent him from returning to any type of work, it would be necessary to also understand when his physical limitations would get better, right?
> A. My expert medical opinion is yes.

ER:v.II:t11:483-485 [Exh. 215, Bloch Depo 51:19-25, 52:12-19, 52:25-53:5].

Dr. Burstein, Iqal's cardiologist, found Iqal temporarily totally disabled due to a heart condition from August 1, 2002 until at least March 4, 2003. In his March 4, 2003 sworn report, Dr. Burstein stated: "[Iqal] has been temporarily totally disabled … from an internal medicine point of view since August 1, 2002." ER:v.II:t11:333 [Exh. 203, p. 5, ¶ 4].

Iqal's appellate brief incorrectly claims that the district court rejected Dr. Bloch's testimony as improper expert opinion. The district court merely acknowledged Dr. Bloch's deposition testimony, read Dr. Bloch's testimony in light of his deposition admissions in which Dr. Bloch acknowledged that he was unable to render an opinion as to when Iqal could have returned to work after his physical disabilities ended, and thus held that Iqal's evidence was insufficient to controvert the undisputed fact that Iqal was unable to work from August 1, 2002 through the date his employment automatically terminated.

Iqal's brief also baldly claims, without citation, that Dr. Bloch's opinion was supported by the medical records. *See* Iqal's Opening Brief 30:9-11 ["Here, of course, Dr. Bloch's testimony was supported by Iqal's medical records. The details were there. (no citation)"]. As shown above, Iqal's medical records did not support Dr. Bloch's testimony at all.

Iqal's cardiologist's sworn opinions refutes Iqal's arguments that "If the trier

of fact believes Iqal and Dr. Bloch, Iqal wins. If the trier of fact believes United, Iqal loses." Iqal Opening Brief 57:18-19). Not so. Even if a jury believed Iqal and Dr. Bloch, and even if a jury ignored the contradictions between their declarations and other sworn statements, Iqal's claims would still fail because he presented no competent evidence to contradict the sworn opinion of Dr. Burstein who determined that Iqal was physically disabled and unable to work from August 1, 2002 until after his leave of absence expired.

iii. Iqal's Employment Contract Prevented Him From Returning Without Doctor Clearance Which Iqal Never Provided.

By his contract, Iqal could not return to work after his disability leave until he produced medical evidence to United that he was capable of resuming his duties at work. ER:v.I:t11:179 [Exh. 105, p. 7, ¶ XVI]. Iqal testified that he was never cleared to return and thus produced no medical evidence so stating:

> Q. How about Dr. Bloch [the supervisor of Iqal's psychologist, Dr. Angsten], has he ever said you are ready to go back to work or he would give you a release?
> A. I only saw Dr. Bloch twice.
>
> Q. Did he ever say you were ready to go back to work?
> A. No.
>
> Q. Has Dr. Tabaddor [who treated Iqal for physical injuries] ever said you were ready to go back to work?
> A. No, not when I was under his treatment.
> …
>
> Q. Has Dr. Angsten [Iqal's psychologist] ever told you were ready to go back to work?

A. No.

Q. Has any doctor yet told you that you were ready to go back to work?
A. No. ER:v.I:t11:446-447 [Exh. 209, 278:14-279:14]

Q. So if I am understanding you correctly, up to now, no doctor has cleared you to work in any capacity with or without assistance from the employer, correct?
A. There's no doctor told me that -- that.

Q. And you always follow your doctor's directions, correct?
A. That's why you go to a doctor. *Id.* at 448 [Exh. 209, 280:4-10].

Thus, as a matter of law, Iqal's age discrimination claim and his new claim that he was terminated because of his disability fail because he was physically unable to return to work before his leave expired.

D. United's Leave of Absence Policy is Legitimate and Non-Discriminatory.

Even if Iqal could have established a prima facie case for age discrimination, United's policy of providing a six-month leave of absence for disabled employees was legitimate and non-discriminatory. If the employee does not return to work after six months, the employment relationship terminates automatically, subject to re-hire if the employee recovers and is able to work again. ER:v.I:t8:118 [UF 4]. This policy is even more generous than state and federal requirements. Federal law requires employers to provide a 12-week unpaid leave of absence to seriously injured employees (Family Medical Leave Act, 29 USC §2612(a)(1)), and California law also requires a 12-week unpaid leave of absence (Family Rights

Act, Cal. Gov't Code § 12945.2(a)). United allows six months (26 weeks) and applies its policy uniformly in a non-discriminatory fashion. ER:v.I:t8:118 [UF 4-5].

Finite disability leave policies are clearly legal under federal and California law. In *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998) (cited with approval in *Hansen v. Lucky Stores, Inc.,* 74 Cal.App.4th 215, 224, 87 Cal.Rptr.2d 487, 493 (1999)), an employer's policy provided for a maximum of one year of leave. When the leave expired, the employer notified the employee she was discharged. The employee sued, claiming age and disability discrimination. The trial court granted summary judgment for the employer on both claims, and the Sixth Circuit affirmed, holding that when an employer applies a uniform finite leave policy and discharges an employee for failing to return, that is not age or disability discrimination. (*Id.* at 1046).

Iqal insinuates, but does not directly argue, that United's stated reason for termination was wrong, and thus this implies pretext. Iqal was involved in an incident that led to the discharge of Robik Avakian another United employee. Avakian was a United employee supervised by Iqal. Avakian stole money from a customer. Iqal told Avakian to pay cash from his pocket to the complaining customer to obtain a release. Avakian's employment was terminated due to this incident. United's Market Conduct Review Committee also resolved to terminate

Iqal's employment because it was highly improper of Iqal to have authorized a cash payment to a customer whose premiums had been stolen by a sales representative. Insurance companies issue corporate checks when refunds are necessary. It would have appeared to the customer that Iqal, the supervisor, was attempting to avoid making a record as a cover-up. Insurance companies are highly regulated, and Iqal's conduct placed United in jeopardy. ER:v.I:t.10:137-138 [Oehler Dec ¶ 11]. This decision was never acted upon before Iqal left work on disability or after. Even if United had terminated Iqal's employment, it would not have been actionable or subject to challenge as a pretext unless Iqal could show that subjectively United did not believe it was justified in doing so. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002). The Avakian incident is thus irrelevant.

E. Iqal Cannot Prove that United's Leave of Absence Policy Was a Pretext for Age Discrimination.

With the burden shifted back to him, Iqal adduced no evidence that the automatic termination of his employment after a failure to return to work was a pretext for age discrimination. When asked in deposition for any facts he had that suggested that his employment was terminated because of his age, Iqal recounted a repeated conversation with Pat Stowers in which Stowers would shake Iqal's hand and ask the question "Sam, you are too old, when are you going to retire?" to which Iqal would respond the same way every time, "The day I die."

ER:v.II:t11:386-388 [Exh. 209, 52:24-54:25]. According to Iqal, the same conversation took place every month when Stowers visited Iqal's district office. *Id*. at 388 [Exh. 209, 54:20-22].

In his deposition, Iqal claimed that his sole basis for believing he suffered from age discrimination was the Stowers' conversations cited above along with the following three alleged facts, which Iqal's lawyer later acknowledged did not support his claim: (1) no one at United invited Iqal to the United office Christmas party during his absence; (2) no one called Iqal to see how he was feeling; and (3) clerical staff at United failed to forward a required insurance form to him. (*Id.* at 420-421 [Exh. 209 124:4-125:7; 223:6-224:13]. But Iqal later conceded in his reply to the motion, as he does on appeal, that these three alleged facts did not support Iqal's age discrimination. *See* Iqal's Opening Brief p. 3, fn. 1.

The district court found Iqal's evidence of pretext insufficient to meet his burden. First, Stowers did not play any role in the termination of Iqal's employment (which occurred automatically when Iqal failed to return to work at the end of his 6-month leave of absence). ER:v.I:t8:118-119 [UF 7, 8, 15]; T10:136 [Oehler Dec. ¶5]; T10:142 [Stowers Dec., ¶2];T11:419 [Exh. 209, 123:8-11]. Iqal could not dispute this fact with competent evidence because he admitted that he did not know which United employee was responsible for his discharge:

> "Q. Do you know which person at United actually made the decision to terminate your employment, if there was somebody?

A. I have no idea." *Id.* at 419 [Exh. 209, 23:8-11].

Consequently, there could be no causal connection between the Stowers conversations and the termination of Iqal's employment.

Moreover, the Stowers conversations at most could be considered as "stray remarks," insufficient to ward off summary judgment, as in *Gibbs v. Consolidated Services*, 111 Cal.App.4th 794, 4 Cal.Rptr.3d 187 (2003), where a manager told an employee, "maybe you are getting too old" to be a driver. The employee was terminated and sued for age discrimination. The court of appeal affirmed summary judgment against the age discrimination claim, finding:

> "Plaintiff also relies on [the manager's] remark that he was too old to be a driver. As discussed above, plaintiff cannot establish discriminatory purpose from the failure to give him a position as a driver. He was not entitled to it. [The manager's] opinion that plaintiff was too old to drive played no role in the decision to terminate him from the position of operations supervisor. The comment therefore was nothing more than a 'stray' remark . . . . Such 'stray' remarks do not establish discrimination." (*Id*. at 801, 4 Cal.Rptr.3d at 191).

F. Iqal's Attempt to Create Facts Suggesting that Stowers Was Responsible for Iqal's Discharge Properly Was Disregarded.

In his opposition to the summary judgment motion, Iqal presented new declaration testimony in an attempt to show that Regional Manager Patrick Stowers participated in the termination of Iqal's employment. The district court properly rejected that testimony because it contradicted Iqal's deposition and interrogatory answers, and Iqal was unable to explain the contradictions despite

having the opportunity to do so. ER:v.VII:t35:1843,1846,1851 [District Court's Order].

Before the summary judgment motion, Iqal admitted that he did not know who was responsible for his discharge (ER:v.II:t11:419 [Exh. 209, 123:8-15]), and his discharge "might not" have been because of his age. *Id.* at 422-423 [Exh. 209, 126:17-127:25].

After United filed its summary judgment motion, Iqal submitted a declaration that purported to establish that Stowers was responsible for his discharge. Iqal claimed that when he was in the hospital after August 1, 2002, his supervisor Joel Smith came to see him and told him that Stowers "was going to make sure that I got fired …. Smith told me that Stowers was attempting to use the incident involving Robik [Avakian] to get me fired." ER:v.III:t15:588 [Iqal Dec. ¶ 24].

Even if Stowers had tried to fire Iqal over the Avakian incident, there would have been no significance as a result because the decision was never acted upon.

Iqal claimed that what Smith told him about Stowers trying to fire him over the Avakian incident made him "anxious and depressed." ER:v.III:t15:589 [Iqal Dec. ¶ 29]. Iqal claimed further that before his disability leave expired, he had told a human resource employee, Shirley McKinney, that he wanted to return to work. According to Iqal, McKinney responded that Iqal could not return until "Pat

Stowers … approved [him] to return to [his job.]" *Id.* at 588 [Iqal Dec. ¶ 28].

These new alleged conversations flatly contradicted Iqal's prior sworn deposition testimony and interrogatory responses. As to the Joel Smith conversation, Iqal originally testified that he never met or spoke with Smith after August 1, 2002, other than conversations in the office that he did not recall:

> Q. Have you seen or talked to Joel Smith since August 1, 2002, other than the times you went to the office?
> A. Never. ER:v.VII:t.29:1766[Exh. 233, 38:12-15].
> …
>
> Q. Have you had any social encounters with Mr. Smith since August 1, 2002?
> A. No, sir. *Id.* at 1770 [Exh. 233, 232:22-24].
> …
>
> Q. So between Jan – between August 1, 2002 and January 31, 2003, although you went to the office of United a couple of times at least, you don't remember any of the conversations. Is that right?
> A. That's what I'm saying. *Id.* at 1767 [Exh. 233, 41:13-19].

Iqal also admitted that in December 2002, he was not afraid that United would terminate his employment over the Avakian incident or otherwise:

> "Q. In December 2002, were you afraid that United might terminate your employment?
> A. It never came into my mind. I was one of the best employee. Why should I have – why should I think that? *Id.* at 1782[Exh. 233, 398:15-19].
> . . . .
>
> Q. Did you ever think the company might terminate your employment?
> A. My employment?
>
> Q. Right.
> A. For doing what?

Q. Because of what happened with Avakian and Mrs. Foley [the United customer Avakian stole money from].
A. I got nothing to do with that.

Q. So you never thought that the company might terminate -.
A. No way.

Q. – your employment?
…
Q. You never thought the company would terminate your employment over the Avakian situation?
A. No, I never thought of that. ER:v.II:t11:430 [Exh. 209, 212:10-213:16].

Since Iqal did not disavow or explain his sworn testimony that he did not see Smith outside the office after August 1, 2002, and did not fear discharge due to the Avakian incident or otherwise, it was impossible for Iqal to have had a conversation with Smith in the hospital in which Smith told him that Stowers was going to get him fired over the Avakian incident. Thus, the district court properly disregarded this testimony. ER:v.VII:t35:1846-1851 [District Court Order, 8, 13].

The new alleged Smith and McKinney conversations also contradicted Iqal's deposition admissions and interrogatory responses in which he stated all of the facts which led him to believe that his employment was terminated due to age. Neither purported conversation was included. ER:v.II:t11:421-422, 432-433 [Exh. 209, 124:4-125:7, 223:6-224:13]; T11:357 [Exh. 207 [interrogatory No. 10]]; T11:367-368 [Exh. 208 [response thereto]].

Iqal did file a document entitled "Plaintiff Salim Iqal's Written Response to Defendant's Alleged Conflicts Between Plaintiff's Deposition Testimony and

Declaration Testimony" in which one might have expected to find an explanation of his contradictory testimony. ER:v.VIII:t.30:1793-1803. But that document did not contain a declaration from Iqal that reconciled his prior deposition and interrogatory responses. Nor did it demonstrate that Iqal lacked knowledge of material facts at the time of his prior testimony. Nor could Iqal have provided such a declaration because the deposition testimony was based entirely on facts Iqal personally experienced. Thus, Iqal's explanation did not satisfy the standard in *Kennedy*, *supra*, and the district court properly rejected Iqal's new testimony.

G. No Evidence Suggested that Stowers Knew that Iqal Was Supposedly Able to Return to Work

Iqal's declaration testimony about his alleged conversations with Smith and McKinney was insufficient to create a triable issue even if the district court had allowed it into evidence. The new testimony could have been relevant only if Stowers had become aware that Iqal had wanted to return to work. But Iqal offered no such evidence. Iqal admitted that he never told Stowers that he wanted to return to work, and there was no evidence that McKinney or anyone else ever told Stowers that Iqal wanted to return. ER:v.III:t15:588 [Iqal Dec. ¶¶ 27-28]; v.II:t11:398 [Exh. 209, 80:1-7 {Iqal never said anything to Stowers}; ER:v.VII:t29:1781 [Exh. 233, Iqal Depo., 393:2-7] {Iqal does not remember if he told anybody at United other than McKinney that he wanted to return to work}.

In *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453 (9th Cir. 1985), an

employer discharged a female employee when the employer lost a contract in Monterey, California. Thereafter, at the request of the CEO, a manager hired a male worker for a position in Nevada that the female employee claimed should have been offered to her, and she sued for age and sex discrimination.

The employer moved for summary judgment, claiming that the female employee had expressed in writing to the CEO that she refused to work outside Monterey. In opposition, the employee claimed she orally told two vice presidents that while she preferred to work in Monterey, she would have considered a position elsewhere. The Ninth Circuit affirmed summary judgment, holding that there was no evidence the employee's change of intent was ever communicated to the manager who hired the male worker in Nevada:

> "Appellant attempts to argue that since she told [the vice presidents] that she was available for work at Nellis [in Nevada], this communication was sufficient to create an inference that she was considered and rejected because of her age and sex. This argument fails, however, because appellant did not present facts showing that [the vice presidents] ever communicated this information to [the manager or the CEO]. Both [the manager and CEO] denied any knowledge of such information. Moreover, appellant produced no evidence to contradict the statements of [the CEO and the manager] that [the manager] and [he] alone, selected [the male employee for the job]." (*Id*. at 1463).

As in *Foster*, Iqal had no evidence to contradict Oehler's or Stowers' declaration that Stowers played no role in the termination of his employment ER:v.I:t10:136, 142-143 [Oehler Dec. ¶ 5; Stowers Dec.,¶¶ 2-5]. Iqal had no evidence to suggest that McKinney ever communicated Iqal's desire to return to

Stowers. Thus, as in *Foster*, the age discrimination claim failed.

H. Stowers' Alleged Conversations Did Not Indicate Age Bias.

Stowers' alleged conversations with Iqal, especially when considered in light of the context in which they were spoken, did not suggest discriminatory intent. The conversations Iqal originally attributed to Stowers did not even meet the standard of relevance in Federal Rule of Evidence 401, in that the conversations did not have any tendency to make the existence of age bias by Stowers more probable or less probable than it would have been without the conversations. Stowers' ritual question, while shaking Iqal's hand, "Sam, you are too old, when are you going to retire?", along with Iqal's invariable refrain, "The day I die," suggested only two people bantering and sharing their experience of the human condition. ER:v.I:t11:386-389 [Exh. 209, 52:24-55:7]. Iqal admitted that he liked Stowers as a person and as his superior at United and that Stowers was never mean to him. *Id.* at 390-391 [Exh. 209, 55:18-56:1]. Iqal never complained to Stowers or anyone else about what Stowers had said to Iqal. *Id.* at 412-413 [Exh. 209, 104:17-105:1]. Iqal never heard Stowers say anything to anyone else about their age. *Id.* at 417 [Exh. 209, 121:17-24]. Iqal also "didn't see a reason" to ask other agents who asked him when he was going to retire to not ask such questions. *Id.* at 413 [Exh. 209, 105:7-15].

In this context, it is most clear that the ritual monthly conversations with

Stowers was as consistent with friendly concern for Iqal as any actual interest in persuading Iqal to retire based on age bias. UF 10.

In addition, Iqal testified that in all the years he worked at United, he felt that United was a fair company; he never knew United to discriminate against anyone based on age or disability; and Iqal was proud of United for the diversity of its employees of every race and religion and the equal opportunity they receive. *Id.* at 417-419 [Exh. 209, 121:25-123:18]. Iqal testified that before August 1, 2002, he personally was always treated fairly at United. *Id.* at 386 [Exh. 209, 52:15-17]. Iqal never asked Stowers not to initiate their ritual conversations. *Id.* at 389 [Exh. 209, 55:5-7]. There was just nothing in what Stowers allegedly said that suggested that he would terminate Iqal's employment because of age.

In opposing United's summary judgment motion, Iqal submitted a declaration in which he changed his story and said that Stowers had referred to him as "old man" many times, said "You need to retire," and said he was "old and slow" and "too old" to be working. ER:v.II:t15:585 [Iqal Dec. ¶¶ 9, 10].

This new embellishment of Stowers' conversations contradicted Iqal's prior deposition testimony in which he testified that Stowers' question "When are you going to retire, Sam" was the only statement he recalls Stowers saying to him:

> "A. There was – usually, the only thing he say, 'When you going to retire, Sam?'
> Q. And you always said, 'The day I die'?
> A. 'The day I die.'

Q. And then what would Pat Stowers say?
A. That's it.
…
Q. Did he ask you the same way every time?
A. Yeah.
…
Q. Other than what you've already told us about what Pat Stowers used to say to you, asking you when are you going to retire, do you remember anything else Pat Stowers ever said to you?
A. I don't remember anything else." *Id.* at 386-387 397-398 [Exh. 209, 52:24-53:14, 54:20-22, 79:21-80:1].

Even if one disregarded the contradictions between Iqal's embellished new version of Stowers' conversations and his deposition testimony, the new version was insufficient to establish pretext. In *Young v. General Foods,* 840 F.2d 825 (11th Cir. 1988), a supervisor discharged an employee who he claimed "moved like he was in slow motion," "lacked the wherewithal to perform his job," was "not aggressive" and was about the same age as the supervisor's father. The trial court granted summary judgment in favor of the employer on the employee's age discrimination claim. The Eleventh Circuit affirmed, holding that the comments did not show age bias, but rather they simply suggested that the supervisor believed that the employee's ability to perform his job was declining due to age:

> "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." *Id.* at 829.

The Ninth Circuit is in accord. *See Nidds v. Schindler Elevator Corp.,* 113 F.3d 912 (9th Cir. 1997); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir.

1993). Iqal cannot attribute any more to Stowers' alleged conversations with Iqal than an alleged belief that Iqal's performance suffered due to age, injury, or both, and that Iqal should retire as a result.

On appeal, Iqal relies on *Chuang v. Univ. of Cal. Davis Bd. of Trustees,* 225 F.3d 1115, 1127 (9th Cir. 2000) and *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997) where two decision-makers' comments of "two Chinks" and "dumb Mexican" were held sufficient evidence of improper bias. Those cases were correctly decided and do not assist Iqal for two reasons. First, in both cases, it was undisputed that the person who made the comments was the decision maker. Second, both of those comments are derogatory racial comments, which obviously showed improper bias. In contrast, Stowers' conversations with Iqal were not derogatory, were made in the confines of a friendly and professional environment, and could not reasonably be interpreted as indicating improper bias.

VIII.

IQAL WAS NOT SUBJECTED TO AGE HARASSMENT

Iqal based his age harassment claim entirely upon the conversation he testified he had each month while shaking hands with Stowers (Stowers: "Sam, you are too old, when are you going to retire?" Iqal: "The day I die.") ER:v.I:t8:121 [UF 17. This claim also failed because that ritualized conversation was patently insufficient to establish harassment. *Id.* [UF 18]. To establish a claim

of harassment based upon a hostile work environment, an employee must show that he or she was subjected to conduct so severe or abusive that it altered the conditions of employment, creating an abusive working environment:

> "The Supreme Court has described a hostile work environment . . . as a workplace 'permeated with discriminatory intimidation, ridicule and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment. [Harassment] creates a hostile, offensive, oppressive or intimidating work environment and deprives its victim of her statutory right to work in a place free of discrimination, when the . . . harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being." *See Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590, 609-610, 262 Cal.Rptr. 842, 852 (1990).[5]

The employee must prove that he actually suffered serious harm to his psychological well-being (subjective standard) and that a reasonable person in his position would have suffered harm as well (objective standard). *See Fisher, supra*, 214 Cal.App.3d at 609-610, 262 Cal.Rptr. at 852. Objectively, the Stowers conversations clearly cannot be harassment. On the face of it, one cannot conclude that Stowers was being anything other than friendly, shaking Iqal's hand and

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[5] Although *Fisher* is a sexual harassment case, the same legal standard for a hostile work environment exists for all types of improper harassment such as harassment based upon race, national origin and age. *See e.g.*, *Etter v. Veriflo Corp.*, 67 Cal.App.4th 457, 79 Cal.Rptr.2d 33 (1998) (racial harassment relying upon state and federal sexual harassment authorities); *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996); *Burns v. AAF-McQuay, Inc.*, 166 F.3d 292 (4th Cir. 1999) (age harassment relying on state and federal harassment authorities).

initiating the straight line for Iqal's monthly punch line. Anyone listening would hear what sounded like an inside joke between Stowers and Iqal. Even if one interpreted Stowers' side of the ritual as somehow untoward, it still cannot satisfy the legal test for harassment. ER:v.I:t.8:121-122 [UF 18]. "Simple teasing, off hand comments, and isolated incidents (unless extremely serious) will not amount to" discriminatory harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 2283 (1998). Occasional, isolated, sporadic, or trivial acts are not actionable. *Etter v. Veriflo Corp.,* 67 Cal.App.4th 457, 467, 79 Cal.Rptr.2d 33, 38 (1998).

As to the subjective standard, Iqal's own testimony proved that he did not take the Stowers conversation as harassment. Iqal never asked Stowers not to initiate their ritual conversation. ER:v.II:t11:389 [Exh. 209, 55:5-7]. On the ultimate fact to be decided (the existence of harassment), when specifically asked in his deposition in this case whether anybody at United harassed him, Iqal responded, "I don't remember." *Id.* at 415 [Exh. 209, 116:3-4]. Iqal admitted in his worker's compensation deposition that no supervisor ever did anything "harmful or unpleasant" to him:

> Q. "[D]id any individual at work either a supervisor or working under you or with you cause you any difficulty or anything that you felt was harmful or unpleasant?

A. "No."
ER:v.I:t11:250 [Exh. 116, Iqal Worker's Compensation Depo. Vol. II 132:6-12].

Iqal could not even remember if he had an emotional reaction to the Stowers conversations, "I don't remember what reaction I had." ER:v.II:t11:449 [Exh. 209, 283:3-7]. In his Complaint, Iqal also alleged as part of his harassment claim that United shunned him and failed to involve him in certain projects. ER:v.I:t1:6 [First Amend. Comp. ¶ 30]. But he admitted in deposition that this conduct did not occur (ER:v.II:t11:414 [Exh. 209, 115:19-116:4]), and Iqal did not contend in his summary judgment or appellate briefs that this conduct actually occurred.

In sum, Iqal's testimony demonstrated no emotional harm from the Stowers conversations, much less the "serious harm to his psychological well-being" that is required for a harassment claim. ER:v.I:t8:121 [UF 18].

On appeal, Iqal ignores the legal standard necessary for harassment. He incorrectly asserts that harassment is actionable as long as a "reasonable person would be affected." *See* Iqal's Opening Brief 48:6-10. But Iqal himself must have suffered actual harm in order to state a claim; it is not sufficient merely to show that a reasonable person would have suffered harm. Merely being "affected" is not enough; the conduct must be so severe and pervasive as to alter the conditions of employment to be actionable. *See Fisher*, *supra*.

Iqal also apparently contends that it is never appropriate to summarily

adjudicate a harassment claim due to the factual nature of the claim. *See* Iqal's Opening Brief 48:4-6. That is not the law. When the undisputed facts show that the alleged conduct is not severe enough to constitute harassment, summary judgment must be granted. *See e.g Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996) [upholding summary judgment of age harassment claim because alleged conduct was merely offensive, not harassing]; *Manatt v. Bank of America,* 339 F.3d 792 (9th Cir. 2003) [upholding summary judgment of national origin harassment claim despite numerous "offensive and inappropriate" racial epithets and jokes since the conduct was not sufficiently severe]; *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871 (5th Cir. 1999) [upholding summary judgment of sex harassment claim despite "boorish and offensive" comments].

The benign conversations attributed to Stowers, with no actual harm or emotional distress suffered by Iqal, could not have created a hostile work environment.

IX.

UNITED DID NOT ENGAGE IN DISABILITY DISCRIMINATION

A. Iqal Has No Failure to Accommodate Claim.

Iqal cannot recover on a disability discrimination theory based upon a failure to accommodate because: (1) Iqal never requested United to provide an accommodation, (2) employers are not required to provide leaves of absence of

indefinite duration, (3) a leave of absence for Iqal would have been futile because he has remained unable to work, and thus (4) Iqal suffered no damage.

i. Iqal Did Not Request an Accommodation, and Thus United Was Not Required to Provide an Accommodation.

Iqal cannot recover for disability discrimination because he never requested a leave of absence beyond the six-month leave of absence provided by United. UF 21. Iqal consistently sent to United doctor reports stating that he was "totally disabled" for an undetermined period of time. ER:v.I:t8:125, 126 [UF 24, 26]; ER:v.II:t11:228, 255, 258 [Exhs. 115, 117, 118, 200]. Nothing Iqal communicated to United indicated that he would be able to return to work soon or ever.

An employer's obligation to provide an accommodation does not arise unless and until triggered by a request by an employee. *See Brown v. Lucky Stores*, 246 F.3d 1182 (9th Cir. 2001), where an employee sued for disability discrimination based on an employer's failure to excuse an absence while the employee attended a rehabilitation program. The Ninth Circuit affirmed summary judgment in favor of the employer on the ground that the employee had failed to request an accommodation. *Id*., at 1188. *See also*, *Summers v. A. Teichert*, 127 F.3d 1150, 1153 (9th Cir. 1997). The only exception is not applicable here, where an employee is unable by reason of his disability to request an accommodation. *Brown*, *supra*, 246 F.3d at 1188-89.

ii. United Was Not Required to Offer an Indefinite Leave of Absence.

Iqal now claims that he was entitled to a leave of absence, but he did not say at the time, and he does not say now, how long of a leave of absence he wanted. ER:v.I:t8:123 [UF 20].

As a matter of law, FEHA does not require employers to allow disabled employees to take leaves of absence of indefinite duration. *See Hansen v. Lucky Stores, Inc*., 74 Cal.App.4th at 226-227, 87 Cal.Rptr.2d 487, 494 (1999), where a meat cutter was offered a part-time job at one-half pay but not a leave of absence of indefinite duration. Affirming summary judgment in favor of the employer, the court of appeal held that "reasonable accommodation" does not require the employer to wait indefinitely for an employee's medical condition to be corrected. *Accord*, applying the identical ADA rule, *Myers v. Hose*, 50 F.3d 278, 282-3 (4th Cir. 1995) ("Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect"); *Walsh v. United Parcel Service*, 201 F.3d 718, 727-728 (6th Cir. 2000); *Monette v. Electronic Data Systems, Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 526, (7th Cir. 1996); *Wood v. Green,* 323 F.3d 1309, 1314 (11th Cir. 2003); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997).

Throughout Iqal's six-month leave of absence, neither he nor his doctors ever determined when he would be able to return to work. *Id.* at 126 [UF 26]; ER:v.I:t11:208-223 [Exh. 109 (monthly reports by Iqal's psychotherapist, Dr. Angsten, reporting each month that Iqal was temporarily totally disabled and would remain off work for an "undetermined" period of time.]. At least through October 7, 2004, Iqal continued to be disabled and unable to work. ER:v.I:t8:125-126 [UF 3, 25-26].

Thus, even if Iqal had requested a leave of absence of indefinite duration, United was not legally obligated to provide it.

Iqal erroneously relies on *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 263, 102 Cal.Rptr.2d 55, 68 (2000), which correctly stated that a reasonable accommodation of a disability may include holding a person's job open if it appears likely that the employee will be able to return to work within a reasonable period of time. *Jensen* does not assist Iqal because, as shown above, Iqal's doctors were never able to predict when, if ever, Iqal would be able to return to work. *Jensen* does not hold, as Iqal seeks here, that an indefinite leave of absence may constitute a reasonable accommodation. *Jensen* is entirely consistent with the authorities that have considered that question and have held to the contrary, including *Hansen v. Lucky Stores*, *supra*, which *Jensen* cited with approval. *Id.* at 263.

iii. An Indefinite Leave of Absence Would Have Been Futile Because Iqal Has Been Unable to Return to Work at United, and Thus Iqal Suffered No Damages.

Iqal's disability discrimination claim also failed because a further leave of absence would have been futile since he could not have taken advantage of it. *Id.* at 125 [UF 25]. Iqal was totally disabled and unable to work, and his doctor had imposed a work restriction that prevented Iqal from returning to work at United. Iqal's internal medicine specialist, Dr. Burstein, found that "cumulative stress" from Iqal's tenure at United, coupled with the "overwhelmingly stressful incident" of August 1, 2002, aggravated Iqal's condition and resulted in a permanent work preclusion order of no "undue stress."

> "... Mr. Iqal worked under conditions of severe emotional stress and tension in the course of his employment with United Insurance Company ... which aggravated his atherosclerotic cardiovascular disease, triggered the coronary syndrome of August 1, 2002, necessitating hospitalization, angioplasty and stent placement." ER:v.II:t11:332 [Exh. 203, Burstein report, March 4, 2003, p. 4, ¶ 1].

Accordingly, since Iqal could not have taken advantage of a leave of absence, he could have suffered no damages by any breach of duty to provide such a leave. *See Jackson v. County of Los Angeles*, 60 Cal.App.4th 171, 70 Cal.Rptr.2d 96 (1997) [permanent work preclusion of "no stress" prevented employee from alleging that employer committed disability discrimination by refusing to allow employee to work in job employee admitted was stressful].

B. United Is Not Liable for Failing to Engage in an Interactive Process with Iqal.

Iqal's claim that United is liable for "failing to engage in an interactive process" with him fails for two reasons. First, an employer is not required to engage in an interactive process with an employee unless the employee first asks for an accommodation. *Brown v. Lucky Stores, Inc.,* 246 F.3d 1182 (9th Cir. 2001); *Taylor v. Principal Financial Group,* 93 F.3d 155, 165 (5th Cir. 1996) ["it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in an interactive process of determining one."].

Second, failure to engage in an interactive process, by itself, does not constitute disability discrimination. Rather, Iqal must also identify a reasonable accommodation that could have been provided to him had United engaged in an interactive process with him to determine a reasonable accommodation. *Willis v. Conopco, Inc.,* 108 F.3d 282 (11th Cir. 1997) [affirming summary judgment of employee's disability discrimination claim predicated upon failure to engage in an interactive process because employee failed to identify any reasonable accommodation that could have been provided]. An indefinite leave is not a reasonable accommodation, as a matter of law. *Hansen v. Lucky Stores, supra*.

On appeal, Iqal relies on a number of cases that correctly state that an employer has a duty to engage in an interactive process with an employee, but he does not challenge the central premise that the employer's duty to engage in an

interactive process is triggered by the employee's request – a request that Iqal never made. Indeed, Iqal's own citations prove this point. Iqal Opening Brief 55:21-56:1 [citing *Taylor v. Principle Fin. Group* 93 F.3d 115, 165 (5th Cir. 1996) ("Once an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employer and employee …") (emphasis added).

C. Iqal's Employment Terminated Because He Failed to Return to Work, Not Because of Disability Discrimination.

Iqal's theory that his employment was terminated due to his disability failed because the undisputed relevant evidence is to the contrary. Iqal did not contend that Stowers or anybody else made anti-disability comments. Rather, he claims that an intent to discriminate can be inferred due to "suspect timing." Iqal Opening Brief 50:14-15. In other words, since he became disabled and then his employment terminated, he argued that this temporal juxtaposition was by itself evidence of discrimination. There is no authority for this improbable position. Every case Iqal relied upon to support this proposition was a retaliation case that sensibly holds that when a good employee makes a legally protected complaint to an employer (for alleged discrimination, for example) and the employer suddenly either discharges the employee or clamps down on rules that were previously loosely

enforced, an intent to retaliate can be inferred.[6] Those cases have no application here.

There are no cases that apply a "suspect timing" rule in the context of any type of discrimination case other than retaliation. It would be absurd to apply such a rule in the context of an employee who was discharged for failing to return to work after the expiration of a disability leave. If there were such a rule, employers could never discharge an employee for failing to return to work after a finite leave has expired because the employee would always be able to claim that discriminatory intent could be inferred from "suspect timing." As shown above, *Gantt v. Wilson Sporting Goods Co.* 143 F.3d 1042 (6th Cir. 1998) holds that finite disability leave policies like the one United employs is perfectly legitimate and does not constitute age or disability discrimination.

As in *Gantt*, United's finite leave policy does not discriminate between disabled and non-disabled employees. Thus, United's compliance with that policy does not suggest "suspect timing" and cannot constitute disability or age discrimination.

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[6] Iqal's Opening Brief 50:14-51:1[citing *Colarossi v. Coty U.S. Inc.*, 97 Cal.App.4th 1142, 1153, 119 Cal.Rptr.2d 131, 138-139 (2002); *Sada v. Robert F. Kennedy Medical Center*, 56 Cal.App.4th 138, 156, 65 Cal.Rptr.2d 112, 123-124 (1997); *Flait v. North American Watch Corp.*, 3 Cal.App.4th 467, 479, 4 Cal.Rptr.2d 522, 530 (1992); *Passantino v. Johnson & Johnson*, 212 F.3d 493, 507

Although Iqal claims that the "inflexible application" of United's finite leave policy is improper (Iqal Opening Brief 41:17-19), he cites no authority striking down such a policy. He incorrectly relies on *Cripe v. City of San Jose* 261 F.3d 877, 895 (9th Cir. 2001) which held that a police force could not arbitrarily assign officers who suffered from minor physical injuries to menial jobs without making a determination as to whether their disabilities required that they be removed from the possibility of physical confrontation. *Cripe* did not involve a finite leave policy and thus has no application here.

X.

THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS' FEES

Labor Code Section 218.5 authorized the district court to award attorneys' fees in the amount of $20,185 because Iqal sought past wages as damages pursuant to his breach of contract claims. Labor Code Sect. 218.5 states:

> "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys' fees and costs to the prevailing party if any party to the action requests attorneys' fees and costs upon the initiation of the action."

Iqal requested attorneys' fees in his complaint upon initiation of the action. ER:v.1:t1:7 [prayer, item 5]. If an employee claims that he suffered damages in the

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(9th Cir. 2000); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) – all retaliation cases].

form of lost wages in a breach of contract action, Section 218.5 authorizes an award of attorneys' fees to the prevailing party.

The district court correctly adopted the reasoning of *Drake v. Lowe's Cos., Inc.*, 2005 WL 2562653 (E.D. Cal. 2005) in which an employee had filed a breach of contract action against an employer, seeking lost wages as damages. The employer won summary judgment and the district court awarded fees, holding that Section 218.5 was meant to be broadly applied and thus authorized an award of fees. The employee in *Drake* argued, as Iqal does here, that he was not seeking "unpaid wages." The district court rejected this argument because his complaint expressly sought wages as damages.

An award of fees under Section 218.5 is even more justified here than in *Drake*. Iqal not only sought as damages unpaid wages from the date he claimed he was wrongfully discharged (ER:v.I:t1:3-4 [First Amend. Comp. ¶¶ 11, 15]), but he also sought past loss wages that he claims should have been paid to him during the time he was on leave. SER:114 [line 23].

Iqal's reliance on *DeCordova v. Winterland Concessions Co.,* 1992 U.S. Dist. LEXIS (ND. Cal. 1992) is unavailing for two reasons. First, the employee there had been paid all wages up through the date of discharge, whereas Iqal sought wages both before and after employment terminated. Second, the employee in *DeCordova* did not challenge the conclusion that Section 218.5 did

not apply. Cases are not considered authority for legal propositions that were not contested. *See Sorenson v. Mink*, 239 F.3d 1140, 1149 ["unstated assumptions and non-litigated issues are not precedential holdings."]

Iqal also incorrectly contends that the district court's award of attorneys' fees must be reversed because the award was ancillary to the award of summary judgment. The district court's award of attorneys' fees was predicated solely upon Iqal's abandoned breach of contract claims.

XI.

CONCLUSION

Summary judgment must be affirmed because the undisputed facts show that United did nothing wrong and caused Iqal no harm. The central fact is that Iqal became totally disabled on August 1, 2002, and remained totally disabled at least through October 7, 2004. United had no power to change that fact, and United's policy of terminating employment after affording a six-month leave of absence policy to disabled workers did not constitute age discrimination, age harassment, or disability discrimination.

The trial court's grant of partial attorneys' fees to United must also be affirmed because there was express statutory authority to award the fees, and the district court did not abuse its discretion in determining the appropriate amount to award.

Dated: February 3, 2006

Respectfully submitted,

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_____
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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, Appellee hereby certifies that the text of this Brief is double spaced, uses a proportionately spaced typeface of 14 points, and does not exceed 14,000 words.

Dated: February 3, 2006

Respectfully submitted,

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_____

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee is not aware of any related case pending before this Court.

Dated: February 3, 2006

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States, is over 18 years of age, and is not a party to this action.

The foregoing BRIEF OF APPELLEE UNITED INSURANCE COMPANY OF AMERICA in *Salim Iqal v. United Insurance Company of America,* Nos. 05-55624/05-56647/05-56760, was served on February 3, 2006, by placing a copy in the United States mail, with postage prepaid thereon, addressed to:

Carney R. Shegerian
Donald Conway
Shegerian & Associates, Inc.
499 North Canon Drive, Suite 201
Beverly Hills, California 90210

I declare under penalty of perjury that the foregoing is true and correct and that this Certificate was executed in Los Angeles, California on February 3, 2006.

_____

Shirley Shamdas