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Superior Court of California
County of Los Angeles

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JANICE PAGE; DORENE HANSEN; LETICIA GONZALEZ, and SERVICE EMPLOYEES INTERNATIONAL UNION CALIFORNIA STATE COUNCIL, Plaintiffs, vs. ACTING ADMINISTRATIVE DIRECTOR OF THE DIVISION OF WORKERS' COMPENATION GEORGE PARISOTTO, in his official capacity; THE DIVISION OF WORKERS' COMPENSATION; DIRECTOR OF INDUSTRIAL RELATIONS CHRISTINE BAKER, in her official capacity; THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; THE WORKERS' COMPENSATION APPEALS BOARD; WORKERS' COMPENSATION APPEALS BOARD MEMBERS FRANK M. BRASS, DEIDRA E. LOWE, JOSE H. RAZO, MARGUERITE SWEENEY, AND KATHERINE SALEWSKI, in their official capacities; SECRETARY OF THE LABOR AND WORKFORCE DEVELOPMENT AGENCY DAVID LANIER, in his official capacity, and DOES 1-20, inclusive, Defendants.	CASE NO. BC625992 RULING RE DEMURRER

Defendants' Demurrer is sustained without leave to amend on grounds of Labor Code section 5955. Defendants' Motion to Strike is moot.

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations." (*Picton v. Anderson Union High Sch. Dist.* (1996) 50 Cal.App.4th 726, 732.) The court must treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id.* at 732–33.) The complaint is to be construed liberally to determine whether a cause of action has been stated. (*Id.* at 733.) A general demurrer lies where the allegations in a complaint or matters judicially noticed clearly disclose a defense or bar to recovery. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) It is proper to challenge subject matter jurisdiction by demurrer. (*Greener v. Workers' Compensation Appeals Board* (1993) 6 Cal.4th 1028, 1036.)

The three named individual plaintiffs, Janice Page, Dorene Hansen, and Leticia Gonzalez, each filed a claim for workers' compensation benefits that was eventually settled. (Complaint ¶22–24.) Plaintiff Service Employees International Union California State Council ("SEIU") represents approximately 700,000 California workers, including approximately 497,000 women workers. (*Id.* at ¶25.) Its mission is to improve the lives of working people and their families by advocating for fair compensation, benefits, and safe conditions for all workers. (*Id.*) The named defendants include Acting Administrative Director of the Division of Workers' Compensation ("DWC") George Parisotto, the DWC, Director of Industrial Relations Christine Baker, the California Department of Industrial Relations ("DIR"), the Workers' Compensation Appeals Board ("WCAB"), WCAB members Frank M. Brass, Deidra E. Lowe, Jose H. Razo, Marguerite Sweeney, and Katherine Zalewski, and Secretary of the California Labor and Workforce Development Agency David Lanier. Each named individual defendant is sued in his or her official capacity. (*Id.* at ¶¶27–33.)

Plaintiffs allege that California's workers' compensation system unlawfully discriminates on the basis of sex in the calculation of permanent disability benefits in two ways: (1) the permanent disability benefits to which injured women workers are entitled are reduced for no reason other than a worker's gender; and (2) women receive fewer permanent disability benefits than the extent of their injuries merit because harm unique to women is ignored. (Complaint ¶2.) The Complaint broadly alleges three claims: (1) that women have been discriminated against in "apportionment" determinations made by physicians in their workers' compensation cases because some medical reports have referred to the worker's female gender, gender-related conditions, or gender-based "risk factors" when apportioning causation of disability; (2) that the system discriminates against women because the disability rating assigned to breast cancer, which is alleged to be a harm "unique to women," is too low and "similar harms unique to men are not assigned a negligible rating;" and (3) that the system discriminates against women because defendants have not adequately supervised and trained workers' compensation administrative law judges ("ALJs"), Qualified Medical Evaluator physicians ("QMEs"), and other personnel so as to prevent discrimination against women. Plaintiffs allege that this discrimination is a direct result of policies and practices permitted and condoned by defendants. (*Id.* at ¶3.)

Plaintiffs filed a class action complaint against defendants on July 6, 2016, asserting causes of action for: (1) violation of Article 1, section 7(a) of the California Constitution; (2) violation of California Government Code section 11135; (3) violation of the Fourteenth Amendment of the U.S. Constitution, 42 U.S.C. §1983; (4) negligent training and/or supervision under California common law and Government Code section 815.2; and (5) violation of California Code of Civil Procedure section 526a. The first, second, and fifth causes of action are asserted against all defendants. The third cause of action is asserted against the individual defendants. The fourth cause of action is asserted against the DIR, the DWC, Parisotto, Baker, and Lanier.

Defendants demur to plaintiffs' complaint on several grounds. The court need only address one. Defendants' challenge to this court's subject matter jurisdiction is dispositive.

Labor Code section 5955 provides:

> No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

In various ways, all of plaintiffs' causes of action seek to eliminate what they allege to be gender bias in the decisions of the WCAB.

The California Supreme Court interpreted Labor Code section 5955 in a case involving a challenge similar to the one at issue here. In *Greener v. Workers' Compensation Appeals Board* (1993) 6 Cal.4th 1028, the California Supreme Court concluded that a Superior Court lacks subject matter jurisdiction over an action to declare provisions of the Workers' Compensation Act invalid and to enjoin their enforcement. (*Id.* at 1032–33.) Plaintiffs in the Superior Court action were law school graduates who were not members of the State Bar. The Legislature had amended sections 4903 and 5710 of the Labor Code, terminating the power of the WCAB to make awards of, and allow liens for, attorney fees to non-attorneys and unlicensed attorneys. Plaintiffs filed an action in the Sacramento Superior Court naming the WCAB as defendant. The complaint sought a declaration that the bills were invalid because they had been adopted in violation of the open and public hearing requirements of Government Code sections 9029, *et seq.*; denied equal protection in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision

(a) of the California Constitution; and violated the separation of powers provisions of article III, section 3 of the California Constitution. A separate count sought an injunction "prohibiting the amendment from taking effect."

The California Supreme Court found that if the Superior Court granted the relief sought by plaintiffs, the effect would be to interfere with the WCAB in carrying out the duty imposed on it by the statutes restricting fee awards. (*Id.* at 1042–43.) Drawing on its decision in *Sexton v. Atchison, T. & S.F. Ry. Co.* (1916) 173 Cal. 760 construing section 67 of the Public Utilities Act, which the court noted is almost identical to section 5955 of the Labor Code, the California Supreme Court explained that no review of any order or decision of the WCAB on any ground is permitted to any court except as provided in the Workers' Compensation Act. *Greener* states that the Legislature clearly intended for the WCAB to be free from interference by any court and limited state court jurisdiction to accomplish this. The Superior Court has no power to render any judgment that would interfere with the performance of official duties of the WCAB prescribed by the Workers' Compensation Act. (*Greener,* 6 Cal.4th at 1042.)

Thus the California Supreme Court concluded that plaintiffs' challenge to the validity of sections 4903 and 5710 was not within the subject matter jurisdiction of the Superior Court. (*Id.* at 1044.) Plaintiffs' remedies were limited to "(1) a petition for review if the Board fails to award fees for their representation of an applicant and/or a lien for such fees, or (2) if they are able to satisfy the Court of Appeal that mandamus is appropriate under Code of Civil Procedure section 1085, a petition for writ of mandate." (*Id.* at 1046.)

The Court of Appeal recently examined the *Greener* and *Sexton* decisions in *PegaStaff v. California Public Utilities Commission* (2015) 236 Cal.App.4th 374. Like *Sexton*, *PegaStaff* addresses a provision in the Public Utilities Code that is virtually identical to Labor Code section 5955. Plaintiff brought an action in Superior Court alleging that a general order of the Public Utilities Commission was unconstitutional. The Court of Appeal rejected the argument

that the jurisdictional limitation in the Public Utilities Code applied only to review of orders of the California Public Utilities Commission, finding instead that the Superior Court was barred from suits that would directly interfere with or undermine policies or regulatory programs of the commission. (*Id.* at 391.)

Section 5955 does not completely insulate the workers' compensation system from judicial review of constitutional challenges. If a plaintiff can satisfy the requirements for writ review in the Court of Appeal, that remedy is available. (*Chorn v. Workers' Compensation Appeals Board* (2016) 245 Cal.App.4th 1370, 1379–80, as modified on denial of reh'g (Apr. 20, 2016), review denied (July 13, 2016).) Insofar as section 5955 may limit the feasibility of class actions and require plaintiffs to seek individual relief, such an inequity does not provide a basis for the Court to refuse to apply section 5955. (See *Koszdin v. State Compensation Ins. Fund* (2010) 186 Cal.App.4th 480, 496 (finding that "[a]ny inequities that Appellants believe may exist in the limited superior court jurisdiction mandated by the Workers' Compensation Act must be addressed to the Legislature, not the Court of Appeal.").)

Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund (2001) 24 Cal.4th 800, relied on heavily by plaintiffs, is not on point. Indeed, it does not even cite section 5955. The case addresses workers' compensation exclusivity, an aspect of the workers' compensation system that limits the remedies available against an employer or insurer for injuries covered by the Workers' Compensation Act. (*Id.* at 811.) This is part of the "compensation bargain" on which the workers' compensation system is premised. (*Id.*) Employees give up certain remedies in exchange for quick and definite payment without proof of fault for industrial injuries. (*Id.*) The California Supreme Court granted review in *Vacanti* to determine whether the claims asserted by a group of medical providers against a group of workers' compensation insurers were barred by workers' compensation exclusivity. (*Id.* at 810.) Plaintiffs in this case are not asserting claims against employers or insurers, and the jurisdictional issue before this Court does not concern the nature of the substantive claims that may be asserted against employers or insurers. Plaintiffs here are asserting claims against state agencies and officials that

administer the workers' compensation system. What we are called upon to interpret is the subject matter jurisdiction of the Superior Court.

The first, second, and fifth causes of action are asserted against all defendants. The third cause of action for violation of the federal equal protection clause is asserted against the individual defendants. The WCAB and a number of its members are defendants in this case and plaintiffs are seeking declaratory relief that their actions, omissions, policies, and procedures violate the equal protection clauses of the state and federal constitutions and violate Government Code section 11135 because they result in decisions of the WCAB that discriminate against women. Such a declaration will, and is intended to, compel defendants, including the WCAB and its named members, to reevaluate and revise their policies and procedures so as to eliminate alleged gender bias in the decisions of the WCAB. Thus, the relief sought would "restrain, enjoin or interfere with the appeals board in the performance of its duties . . . ." (Lab. Code, § 5955.) Accordingly, the Superior Court is deprived of jurisdiction by section 5955 and the demurrer must be sustained with respect to the first, second, third, and fifth causes of action.

The fourth cause of action alleges negligent training and/or supervision of Disability Evaluation Unit employees, ALJs, and QMEs. It is asserted only against the DIR, the DWC, Parisotto (Acting Administrative Director of the DWC), Baker (Director of Industrial Relations), and Lanier (Secretary of the Labor and Workforce Development Agency). Plaintiffs seek a declaration that these defendants, through their negligent training and/or supervision, violate California common law and California Government Code §815.2. Plaintiffs also seek injunctive relief requiring these defendants to take reasonable and effective steps to eliminate the apportionment of permanent disability awards to risk factors of gender or female reproductive biology.

Although the fourth cause of action is not asserted against the WCAB or its members, the declaratory and injunctive relief sought by plaintiffs will interfere with the WCAB due to the broad scope of the WCAB's duties under the Workers' Compensation Act. The WCAB is empowered to regulate the nature and extent of proofs and evidence, and to adopt rules of practice and procedure. (Lab. Code, § 5307.) Such regulations and rules encompass the work of QMEs and ALJs.

Title 8 of the California Code of Regulations, Chapter 1 is devoted to regulations of QMEs, including, in Article 4, specification of procedures for QMEs' evaluation of particular disability conditions, and, in Article 6, procedures for disciplining QMEs.

The WCAB is expressly empowered to formulate rules governing the powers, jurisdiction, and authority of ALJs. (Lab. Code, § 5310.) The WCAB also has the power to appoint ALJs in any proceeding, and may refer, remove to itself, or transfer to an ALJ the proceedings on any claim. (*Id.*) The WCAB is authorized to direct ALJs to try the issues in any proceeding before the WCAB and make and file a finding, order, decision, or award based thereon. (Lab. Code, §§ 27, 5309.) The WCAB may direct ALJs to hold hearings and ascertain facts necessary to enable the WCAB to determine any proceeding or to make any order, decision, or award that the WCAB is authorized to make under Divisions 4 and 5 of the Labor Code, or necessary for the information of the WCAB. (*Id.*) Orders, findings, decisions, and awards of ALJs become those of the WCAB unless reconsideration is granted. (Cal. Code Regs., tit. 8, § 10348.) Thus, the direction of ALJs is statutorily committed to the WCAB, and decisions of ALJs become the decisions of the WCAB unless further review is sought.

Accordingly, the requested declaratory and injunctive relief directed to the training and supervision of QMEs and ALJs in an attempt to direct their evaluations and decisions would interfere with the WCAB in the performance of its duties. Therefore, this Court has no

jurisdiction to issue the relief sought in plaintiffs' fourth cause of action. The demurrer to the fourth cause of action is sustained for lack of subject matter jurisdiction.

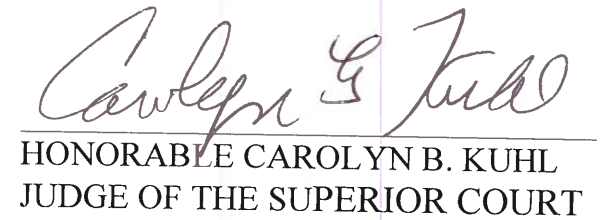
Plaintiffs do not suggest any amendment that would cure the jurisdictional defect of their complaint and it does not appear to this Court that any amendment would permit this Court to maintain jurisdiction over the plaintiffs' claims. For the reasons stated above, the demurrer is sustained without leave to amend.

The Motion to Strike is therefore moot.

With respect to the parties' respective requests for judicial notice, this Court has not considered any of the documents proffered by defendants and therefore need not rule on defendants' requests for judicial notice. Plaintiffs' requests for judicial notice are granted as to Exhibits A, E, F and G and are denied as to Exhibits B, C and D.

IT IS SO ORDERED.

Dated: March 21, 2017



HONORABLE CAROLYN B. KUHL
JUDGE OF THE SUPERIOR COURT