



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

BENJAMIN KOHN,

Plaintiff, v. STATE BAR OF CALIFORNIA, et al.,

Defendants.

Case No. 20-cv-04827-PJH

ORDER DENYING RENEWED MOTION FOR PRELIMINARY INJUNCTION Re: Dkt. No. 29

Before the court is plaintiff plaintiff renewed motion for preliminary injunction. The matter is fully briefed and suitable for resolution without oral argument. Having read the papers 1

filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court DENIES the motion, for the following reasons.

BACKGROUND On July 18, 2020, plaintiff filed a complaint against defendants the State Bar of

g violations of Cal. Civ. Code § 51(f). Dkt. 1. The same day, plaintiff filed a motion for preliminary injunction, (Dkt. 2), which the court denied on August 13, 2020,

1 25 pages for a motion and 15 pages for a reply for such filings. See Civ. L.R. 7-2(b), 7-3(c). The court admonishes plaintiff to adhere to the Civil Local Rules in any future filings or the court will strike such filings.

judication. Subsequent to this denying the motion for preliminary injunction, plaintiff filed a first amended that brings the same fourteen claims under the ADA and Unruh Act as the original complaint. Dkt. 32.

Plaintiff is a law school graduate who has registered to take the October 2020 sitting of the California Bar Examination. FAC ¶ 19. Plaintiff suffers from and has been diagnosed with several physical and psychological conditions including autism and neurological/attention disorders, digestive system conditions (gastroparesis, postoperative dysphagia, pelvic floor dyssynergia, and



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

irritable bowel syndrome with chronic constipation), and visual impairments (keratoconus, dry eye syndrome, uncorrectable astigmatism, floaters). Id. ¶¶ 8 14; Mtn. at 5 8.

Plaintiff has previously taken the California Bar Examination in July 2018, February 2019, and February 2020, but did not pass those three administrations. Mtn. at 5 6. For each sitting, plaintiff requested a series of accommodations from defendants, who administer the state bar examination and adjudicate requests for accommodation. For a more complete recitation of the testing accommodations that CBE previously granted and denied to plaintiff, the court refers readers to its prior order. Dkt. 26 at 2 3.

On March 19, 2020, plaintiff submitted a petition for testing accommodations for the July 2020 exam, which has since been rescheduled to October. The request sought all previously requested accommodations for pla examination. CBE informed p 21, 2020 meeting.

On August 27, 2020, CBE issued a letter to plaintiff notifying him that, in addition to affirming his previously granted requests, the Committee granted his request for double time and one half per section and his request for no more testing time per day than non-disabled students with a corresponding increase in the number of days to take the exam. Dkt. 29-1. T equests for: administration of the exam over weekend days only, testing in a private room, pre-scheduled breaks to be

workstation, committee to provide hotel room for plaintiffs, private room in which plaintiff is allowed to leave all equipment, and assignment to an experienced proctor. See id. The Committee noted that while it had not specifically granted his requested private room, that plaintiff would be assigned to a private room at the in-person test center because of the COVID-19 pandemic in which plaintiff could leave his equipment. Id. The Committee also noted that its proctors were trained and required to perform their service to the best of their abilities. Id.

Despite the accommodations granted by the CBE, plaintiff filed this renewed motion for preliminary injunction seeking additional accommodations. Dkt. 29.

DISCUSSION A. Legal Standard

Federal Rule of Civil Procedure 65 provides federal courts with the authority to issue preliminary injunctions. Fed. R. Civ. P. 65(a). Generally, the purpose of a prohibitory preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered. See U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010). In contrast to a prohibitory injunction, a nction orders a responsible party to take action Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996), quo . . . [and] is particularly disfavored, Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (second alteration in original) (quoting Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979)). In general, mandatory injunctions are



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages. Id. (quoting Anderson, 612 F.2d at 1115).

that may only be awarded upon a Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Munaf v. Geren,

553 U.S. 674, 689 Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam). tion must establish that [1] he is likely to succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in his favor, and that [4] an injunction is in the public inter Winter, 555 U.S. at 20.

tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter All. for the Wild Rockies v. Cottrell, 632

balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of Id. at 1135; see also Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017). B. Analysis

motion was not ripe because defendants had not issued a

August 27, 2020, requested testing accommodations, clarified other testing arrangements, and denied the remainder of his requests. Mtn. at 4; Dkt. 29-1. Plaintiff contends that his case is now ripe, (Mtn. at 4), 2

and defendants do not appear to contest this point. Because the CBE .

Plaintiff moves for a preliminary injunction that would order defendants to grant the disability accommodations he has requested in his testing accommodations petition and

2 and reply briefs are to the CM/ECF page numbers electronically stamped on his filing. In any future filings, plaintiff should include page numbers in the footer of his documents, include a table of contents, table of authorities, and proposed orders as required by the Civil Local Rules.

appeal to the CBE as well as in his FAC. Id. at 5. Rather than listing his requested relief in his motion, plaintiff cross references Appendix C to his motion that purports to summarize his requested relief. 3

Plaintiff clarifies that he is no longer requesting testing only on weekend days. Id. corresponding requests associated with each issue. Id. at 32 33. Many of these requests are related to COVID-19 concerns. For example, plaintiff requests taking the test at home while receiving approved



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

accommodations, instructions to onsite staff not to -based supervision of plaintiff during meal breaks, and all proctors and staff wear facial masks and keep appropriate physical distance. Id. at 32. As defendants point out, several of these requests are raised for the first time in the current motion and plaintiff did not include them in his initial petition to CBE, his follow up submissions in June and July, (Dkt. 11 at 49 56 (June 4, 2020 submission), 102 09 (July 13, 2020 submission), 203 10 (July 14, 2020 submission)), or in his prior motion for preliminary injunction, (Dkt. 2 at 2).

In support of his requested relief, plaintiff asserts that he is likely to succeed on the merits of his ADA claim. Mtn. at 8. Title II of the ADA, the title applicable to public services, provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity . . . K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1096 (9th Cir. 2013).

3 requested relief violates Civil Local Rule 7-2(b)(3) requiring a concise statement of what relief the movant seeks. Opp. at 8. Plaintiff responds that Appendix C, attached to his motion, contains the full list of his requested accommodations. Reply at 5. The court agrees withsted relief, even reviewing Appendix C, is confusing and violates the spirit if not the letter of Civil Local Rule 7-2(b)(3). Because the court can resolve the motion on its merits, the court does not deny the motion on this procedural defect. For the sa the procedures by which plaintiff purports to submit evidence in support of his motion.

participat or was otherwise discriminated against by the public entity; and (3) such exclusion, denial Weinreich v. L.A. Cty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (citing 42 U.S.C. § 12132; and Does 1 5 v. Chandler, 83 F.3d 1150, 1154 1155 (9th Cir. 1996)).

Plaintiff asserts that he is disabled, (Mtn. at 9 14), and defendants do not challenge the substance of his assertion. Indeed, the CBE has already granted plaintiff testing accommodations in connection with his petition belief that plaintiff is disabled. Rather, the parties dispute whether the CBE has failed to provide reasonable accommodations. Plaintiff contends that his requests are reasonable on their face since they would allow him to illustrate his intellectual abilities and mastery of the subject. Id. at 14 15. Defendants respond that plaintiff has already been granted substantial accommodations for the October 2020 exam. Opp. at 19. They further argue

(as opposed to those already granted) are reasonable. Id. at 20. According to defendants, plaintiff s remaining requested accommodations are so expansive and inconsistent that they raise questions concerning whether they are reasonable or whether they fundamentally alter the administration of the Bar Exam.

The court agrees with defendants. As the court observed in its prior order, the



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

consultations to evaluate medical claims. Dkt. 26 at 7. Now, plaintiff seeks an end run around the normal State Bar petition and appeal process and further urges this court to essentially overrule medical experts by parsing the evidence that he has submitted in support of his prior motion for preliminary injunction. Moreover, he seeks a mandatory injunction on an abbreviated timeline prior to the October Bar Exam. To top it off, plaintiff requests accommodations that he apparently has not submitted to the CBE. All this is not to say that injunctive relief is never warranted in an ADA testing accommodation case, but plaintiff has a high bar to clear

required to grant mandatory relief. *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993); see also *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party (quoting *Anderson*, 612 F.2d at 1114)).

Plaintiff has not met this heightened burden. P

to a computer, a private room, provision of nonportable ergonomic equipment, permission to eat and drink food and beverages in the exam room and remain in the exam room subject to proctor supervision, use of a larger external monitor, and no in-person testing due to COVID-19. See Mtn. 15 18. Yet, CBE has already granted several accommodations including: double and one-half time for each session, total testing per day not to exceed 6.5 hours, testing in a semi-private room, permission to bring own laptop and backup computer, permission to bring food and drink into the testing room, permission to remain in the examination room during lunch breaks, and permission to bring own ergonomic equipment. Opp. at 5; Ex. 29-1 at 2. Further, the CBE also explained tha -19 protocols mean that plaintiff will be tested in a private room with a locking door, plaintiff would be free to use additional total testing time to take breaks at his discretion, and all proctors are trained to perform their services to the best of their abilities. Ex. 29-1 at 2.

Thus, it is not clear based on the present factual record whether the multiple accommodations already granted by the CBE are in reasonable accommodation standard. Given the standard required to enter a mandatory injunction, the facts do not clearly favor plaintiff and he has not established that he is likely to succeed on the merits of his Title II ADA claim. Because the law and facts do not clearly favor plaintiff, the court must deny the mandatory preliminary injunction. *Anderson*, 612 F.2d at 1114.

Because plaintiff has not demonstrated he is likely to succeed on the merits, the court does not reach the remaining factors. See *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 has failed to satisfy its burden of demonstrating it has met the first element, we need not

CONCLUSION For the foregoing reasons, the renewed motion for preliminary injunction. IT IS SO ORDERED. Dated: September 25, 2020



Kohn v. State Bar of California et al

2020 | Cited 0 times | N.D. California | September 25, 2020

/s/ Phyllis J. Hamilton PHYLLIS J. HAMILTON United States District Judge

