Filed 10/31/06 Cal. Podiatric Medical Assn. v. Kaiser Health Foundation Plan CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA PODIATRIC MEDICAL ASSOCIATION et al., Plaintiffs and Appellants, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants and Respondents.	B184513 (Los Angeles County Super. Ct. No. BC274040)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward A. Ferns, Judge. Affirmed.

Law Offices of Greer & Associates, C. Keith Greer and Steven J. Roberts for Plaintiffs and Appellants.

Thelen Reid & Priest and Thomas E. Hill for Defendants and Respondents.

A podiatrist and the California Podiatric Medical Association sued the Kaiser Foundation Hospitals, Inc., the Southern California Permanente Medical Group, and the Kaiser Foundation Health Plan, Inc. for injunctive relief on the ground that the Kaiser entities discriminate against podiatrists. Following a bench trial based on stipulated facts, the court gave judgment to the Kaiser entities, finding there is no private right of action in this context, that an injunction would in any event be inappropriate, and that the plaintiffs had failed to prove their claims of discrimination. We affirm.

FACTS

A.

We begin with a brief description of the relevant statutes.

Health Facilities. Hospitals and other health facilities licensed and regulated by the State of California (such as the Kaiser Foundation Hospitals) must have rules providing "for use of the facility by, and staff privileges for, duly licensed podiatrists within the scope of their respective licensure, subject to rules and regulations governing such use or privileges established by the health facility. *Such rules and regulations shall not discriminate on the basis of whether the staff member holds a[n] M.D., D.O., or D.P.M. degree, within the scope of their respective licensure*. Each health facility shall establish a staff comprised of physicians and surgeons, podiatrists, or any combination thereof, which shall regulate the admission, conduct, suspension, or termination of the staff appointment of the podiatrists while using the facilities. . . . (Health & Saf. Code, § 1316, subd. (a), italics added.)[1]

---

[1] Subsequent undesignated section references are to the Health and Safety Code.

A health facility's rules that "include provisions for the use of the facility by, and staff privileges for, medical staff s*hall not discriminate on the basis of whether the staff member holds a[n] M.D., D.O., or D.P.M. degree, within the scope of their respective licensure*. The health facility staff processing, reviewing, evaluating, and determining qualifications for staff privileges for medical staff shall include, *if possible*, staff members that hold M.D., D.O., and D.P.M. degrees." (§ 1316, subd. (b), italics added.) A health facility's violation of section 1316 may be enjoined in an action brought by the District Attorney of the county in which the facility is located. (§ 1316, subd. (c).)

<u>Health Care Service Plans.</u> The Knox-Keene Health Care Service Plan Act of 1975 (§ 1340 et seq.), which licenses and regulates health care service plans (such as the Kaiser Foundation Health Plan), prohibits a health care service plan that offers podiatry services (as defined in section 2472 of the Business and Professions Code) from refusing "to give reasonable consideration to affiliation with podiatrists for the provision of service solely on the basis that they are podiatrists." (§ 1373.11.)[2]

---

[2] Business and Professions Code section 2472, subdivision (b), defines "'podiatric medicine'" as the "diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the ankle and tendons that insert into the foot and the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot." A person who holds himself out as a "doctor of podiatric medicine," "doctor of podiatry," "podiatric doctor," "D.P.M.," "podiatrist," "foot specialist," or other term implying that he is a doctor of podiatric medicine must be licensed by the State of California. (Bus. & Prof. Code, § 2472.) According to the opening brief on this appeal, podiatrists "are, for all intents and purposes, Medical Doctors whose scope of practice is limited to the lower extremity. . . . [¶] . . . Although it is not at issue here, the only difference in the medical education between D.P.M.s and M.D.s is that D.P.M.s have more classes focused on treatment of the foot and ankle, and forgo classes in subjects such as tropical medicine and opthomology [*sic*]. Thus, D.P.M.s compete directly with M.D.s for treating patients with foot problems."

B.

Kaiser Permanente Southern California (Kaiser Permanente) is the umbrella for (1) Kaiser Foundation Hospitals, Inc. (a nonprofit corporation operating Medical Centers that are health facilities within the meaning of section 1250), (2) Southern California Permanente Medical Group (SCPMG), a partnership of Doctors of Medicine and Doctors of Osteopathic Medicine (collectively, physicians) that employs healthcare professionals, including physicians, podiatrists, dentists, and ancillary personnel, and that has an exclusive relationship with the Plan to deliver covered healthcare services, including podiatry services, to Plan members, and (3) Kaiser Foundation Health Plan, Inc. (a nonprofit health maintenance organization and "health care service plan" within the meaning of section 1345, subdivision (f)(1)).[3] Pursuant to the terms of various contracts, including some between SCPMG and its physician employees, the Hospitals and SCPMG provide healthcare services to the Plan's members. SCPMG does not enter into contracts with the podiatrists it employs.

Glenn Weinraub, D.P.M., worked for SCPMG from July 1997 to February 2002, first at Kaiser's Fontana Medical Center, then at Kaiser's West Los Angeles Medical Center. First at Fontana and then at West Los Angeles, Weinraub reported to the Chiefs of the Department of Orthopedics, both of whom were physicians and SCPMG partners.

---

[3] "Kaiser Permanente" is a trademark for the system described in the text but is not a legal entity and (as now conceded) is not a proper party to this action.

In May 2002, Weinraub and the California Podiatric Medical Association (collectively, Weinraub) filed this unfair competition class action against the Hospitals, SCPMG, and the Plan, alleging that each of them unlawfully discriminated against podiatrists in violation of sections 1316 and 1373.11 by (1) limiting the podiatrists' scope of practice, (2) paying podiatrists less than would be paid to physicians for the same services, (3) refusing to provide certain incentives and benefits to podiatrists, (4) refusing to permit podiatrists to serve on peer review and other committees, and (5) restricting podiatrists' authority to use physician's assistants, technicians, and nursing staff. In short, Weinraub's dissatisfaction arises from the undisputed facts that SCPMG's employees and partner physicians are compensated and afforded privileges and benefits that differ from those afforded to podiatrist employees, and that there are presently no podiatrists on any of the committees that make recommendations regarding the compensation paid to podiatrists.[4]

The Kaiser entities answered, and the case was ultimately tried to the court on stipulated facts, after which the court rendered its decision against Weinraub for three primary reasons -- first, that there is no private right of action for injunctive relief under section 1316; second, that injunctive relief would in any event be inappropriate because it would require the court to oversee matters under the primary jurisdiction of an administrative agency; and third, that

---

[4] State laws and their own accreditation standards impose upon the Hospitals, SCPMG, and the Plan independent and collective credentialing responsibilities. To eliminate duplicative efforts and establish uniform standards for all of its entities, Kaiser Permanente adopted a Credentialing and Privileging Policy that applies to the Hospitals, SCPMG, and the Plan. The Policy is implemented by the "Southern California Quality Committee" with the assistance of committees representing SCPMG, the Plan, and each of the Medical Centers.

Weinraub had in any event failed to prove his case. Weinraub appeals from the judgment thereafter entered.

DISCUSSION

I.

Weinraub contends his unfair competition claim (Bus. & Prof. Code, § 17200, the UCL) does not depend on the existence of a private right of action on the underlying statute, in this instance section 1316. His argument misses the point.

The decision whether to grant injunctive relief in an action asserting a UCL claim based on a statutory violation is entirely within the trial court's discretion. (See *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 794-796.) Because our trial courts cannot assume a regulatory power over a health maintenance organization through the guise of enforcing Business and Professions Code section 17200 (*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-1302), it would be a rare case indeed in which an individual could in this context persuade an appellate court that the trial court's refusal to grant injunctive relief constituted an abuse of discretion. This is not that rare case -- and Weinraub has made no effort to establish abused discretion.

II.

Weinraub contends that, in any event, he has a private right of action under section 1316. He does not.

By its plain language, subdivision (c) of section 1316 provides that a health facility's violation of section 1316 "may be enjoined in an action brought in the name of the people of the State of California by the district attorney of the county in which the health facility is located, upon receipt of a complaint by an aggrieved physician and surgeon or podiatrist."

To avoid this unambiguous limitation, Weinraub points to subdivision (j) of section 1317.6, which provides that "[a]ny person potentially harmed" by a violation of the licensing statute, or the local district attorney or the Attorney General, may bring a civil action against the responsible hospital to enjoin the violation. Assuming that section 1317.6, subdivision (j), could trump the more specific provision of section 1316, subdivision (c), Weinraub's argument fails because he did not present any evidence of harm (past, present, or potential) arising from the alleged violations (and he does not explain in his briefs on this appeal how he personally might have been harmed by the acts alleged in his complaint).[5]

---

[5] Our rejection of the contentions discussed in Parts I and II make it unnecessary to consider Weinraub's contention that the trial court erred in denying injunctive relief on the ground that it would require the court to oversee matters within the primary jurisdiction of an administrative agency. And although Weinraub does not discuss the merits of his section 1316 claim, we note that it would fail for essentially the same reasons as discussed in Part III, *post,* with regard to section 1373.11.

III.

Weinraub contends Kaiser failed to give "reasonable consideration to affiliation with podiatrists" as required by section 1373.11.[6] We disagree.

Weinraub's position at trial was that Kaiser is refusing to give reasonable consideration to affiliation with podiatrists. As he puts it in his opening brief, "[g]reed of the M.D.s in control of the captive Kaiser organization has resulted in blatant, rampant discrimination against a class of doctors that is expressly protected by statute." If we understand his position, it is that his allegation of discrimination was sufficient to shift the burden to Kaiser to present proof that it in fact gave reasonable consideration to allowing podiatrists to become partners in SCPMG, to have written contracts, to be on the Hospitals' credentialing committees, and to be paid at the same rates as physicians. Not surprisingly, he offers no authority for this proposition -- and we know of none.

As the trial court found, Weinraub failed to establish a violation of section 1373.11 because he did not give the court "a context which [would] enable [it] to adjudicate whether or not defendants have given 'reasonable consideration to affiliation with podiatrists . . . .' [Weinraub] asks the court to '[h]ypothetically presume [that] Kaiser decided to not allow women to be partners in the SCPMG partnership, and decided to not let them on any significant committees, etc.' The problem with asking the court to 'presume' what at first blush may appear

---

[6] Although Weinraub lumps the entities together, he fails to explain how a statute governing hospitals (section 1316) has anything to do with a partnership comprised of physicians (SCPMG) or a health maintenance organization (the Plan), or how a statute governing health maintenance organizations (section 1373.11) has anything to do with the other entities. Our rejection of his arguments makes it unnecessary to refine this point, which we resolve in this discussion by a blanket reference to Kaiser.

inequitable is that the court is not allowed to make such 'presumptions' without evidence of the context in which the seeming disparities exist.

"Defendants are only required to give 'reasonable consideration' to affiliation with podiatrist[s] and cannot discriminate 'solely on the basis that they are podiatrists.' [Weinraub] has listed a myriad of seeming inequities, but does not establish by a preponderance of the evidence that defendants have made their decisions concerning benefits and privileges based upon some basis other than the field of podiatry and that it was not reasonable to use other factors. Without an examination of the actual circumstances presented to the defendants in making past decisions and the reasoning defendants used [in] reaching their decisions, [the trial] court cannot make a determination as to reasonableness of their consideration or the bases of any past decisions."

We agree with the trial court.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

---

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.