

FILED January 23, 2017

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 13-O-14697
)	
ROBERT HOWARD SACK,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 165033.)	
_____)	

THE COURT.*

After a four-day trial, a hearing judge found Robert Howard Sack culpable of committing an act of moral turpitude by making false statements in connection with his personal application for unemployment mortgage assistance benefits. The judge recommended that Sack be disbarred, given his disciplinary history.

Sack seeks review, arguing that the Office of the Chief Trial Counsel of the State Bar (OCTC) did not prove he was culpable of making the specific misrepresentations charged in the Notice of Disciplinary Charges (NDC). OCTC does not appeal.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we conclude the evidence falls short of establishing that Sack committed the charged misconduct. We therefore dismiss this case with prejudice.¹

*Before Purcell, P. J., Honn, J., and McGill, J.

¹ Neither party challenges the hearing judge’s dismissal of Count Two, which alleged misrepresentations to the State Bar Court. We affirm the dismissal, as supported by the record.

I. SACK DID NOT MAKE THE MISREPRESENTATIONS ALLEGED IN THE NDC

In a narrowly drawn Count One of the NDC, OCTC alleged that Sack violated Business and Professions Code section 6106.² It charged that he misrepresented he was “unemployed” and that “his only source of income was [California Employment Development Department (EDD)] benefits” in an application for personal mortgage assistance with a program called Keep Your Home California (KYHC). In finding culpability, the hearing judge found that “the record clearly establishes” that Sack “deliberately” made the alleged misrepresentations. Specifically, the judge found that Sack “applied for KYHC benefits based only on his being unemployed and not on his being underemployed.” We find, however, that the evidence does not support either the allegation or the hearing judge’s finding, as analyzed below.³

Sack was admitted to practice law in California on June 15, 1993. In late July 2012, he and his wife lost their jobs. Sack contacted KYHC to inquire about its programs for financially distressed homeowners, including the federally funded Unemployment Mortgage Assistance Program (UMA). To qualify, a homeowner had to be: (1) underemployed or unemployed; and (2) currently receiving EDD unemployment benefits. On September 9, 2012, Sack signed a three-year agreement to work at a law firm for a starting salary of \$3,000 per month, but he was

² All further references to sections are to this source. Under section 6106, “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension.”

³ Count One of the operative First Amended NDC reads in full: “On or about September 25, 2013, Respondent submitted his application for unemployment mortgage assistance benefits to the Keep Your Home California program, and represented that he was unemployed and that his only source of income was EDD benefits, when Respondent knew or was grossly negligent in not knowing the statements he made to the Keep Your Home California program were false, and thereby committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code section 6106.”

The First Amended NDC incorrectly alleged that Sack submitted this application on or about September 25, 2013, instead of September 25, 2012. This typographical error is immaterial. Though the NDC was amended shortly after it was filed, Count One was not changed.

actually paid less. Sack also applied for EDD benefits, which EDD notified him via letter were awarded on September 21, 2012. He then applied for the UMA.

On September 24, 2012, Sack completed KYHC's required telephonic counseling session during which a KYHC staff member asked him questions to determine his eligibility, and entered the information Sack provided into KYHC's online system. KYHC later emailed Sack the UMA application form, which was pre-populated with the information he had given on the telephone. Under the statement "My/Our household income has been/was reduced due to one or more of the following," two boxes were checked: "Unemployment" and "Reduced pay or hours."

Sack submitted the application on September 25, 2012. He believed that the checked box for "Unemployment" related to his wife and the checked box for "Reduced pay or hours" related to him, given his part-time employment at the law firm. He and his wife were separately identified on the application and signed it as "Homeowner" and "Co-Homeowner," respectively.

OCTC's key witness, KYHC processing specialist Kathy Wendorf, testified that the application form that KYHC staff filled out, and that Sack and his wife signed, reflected that Sack's wife was the *unemployed* party and that Sack was the *underemployed* party, as of September 25, 2012. Nowhere on the UMA application did it state that Sack's only source of income was EDD benefits. Wendorf testified that, while the application was pending, Sack informed her that he received income other than EDD benefits, but she failed to input that information in KYHC's records. She also repeatedly testified that Sack's eligibility was based on the EDD award letter and that his partial employment did not disqualify him from receiving either EDD or KYHC benefits.

We find that this record fails to establish by clear and convincing evidence⁴ that Sack made the misrepresentations alleged in the NDC—that he was unemployed and that his only source of income was EDD benefits. Accordingly, Count One is dismissed with prejudice.

We also acknowledge that our finding runs contrary to that of the hearing judge. We conclude, however, that the judge overlooked Wendorf’s credible testimony that the “Unemployment” box checked on the UMA application referred to Sack’s wife, not Sack, and that Sack had income other than EDD benefits from his part-time work as a paralegal. Further, some of the judge’s other findings were not supported by clear and convincing evidence. For example, the judge found that “KYHC’s record of an October 15, 2012 telephone conversation with [Sack] . . . supports a finding that [Sack] affirmatively misrepresented his employment status and the sources of his income to KYHC” In fact, no such call occurred, as shown in the KYHC record. Instead, this record merely indicated the date on which Wendorf entered information gleaned from Sack’s EDD file, including his award letter, into KYHC’s client notes.

II. OCTC DID NOT CHARGE AN ALTERNATE THEORY OF CULPABILITY

Count One was limited to two specific misstatements Sack allegedly made on his application for mortgage assistance. In support of this charge, OCTC argued at trial that Sack had a continuing duty to inform KYHC about his employment status. It presented evidence that Sack did not conform to this duty, including that he failed to mention his later full-time employment and his resulting ineligibility for EDD benefits in communications with KYHC in January and April 2013. OCTC contends that his concealment of facts from KYHC is evidence

⁴ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

of his culpability under Count One.⁵ Sack, on the other hand, argues that we “must stick to the language” in Count One.

Because OCTC offered this evidence in support of Count One, it was properly admitted and considered by the hearing judge and by us on review. But we differ from the hearing judge in that we find Sack did not make the misrepresentations charged in Count One. Likewise, we do not adopt the judge’s view that any failure by Sack to later notify KYHC of his full-time employment or the termination of his EDD benefits establishes culpability for the misconduct charged in Count One.

The Supreme Court has made it clear that “the State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. [Citation.]” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928; see also *Read v. State Bar* (1991) 53 Cal.3d 394, 409 [due process mandates attorney be disciplined only for violations charged in original notice].) In fact, “[i]f the evidence produced before the hearing [judge] shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing.” (*Van Sloten v. State Bar, supra*, 48 Cal.3d at pp. 928-929 [adequate notice requires being fairly apprised of precise nature of charges before proceedings commence]; see also Rules Proc. of State Bar, rule 5.44(C); *Read v. State Bar, supra*, 53 Cal.3d at p. 410 [where OCTC failed to amend notice prior to decision, and nothing in pleadings and papers sent to attorney gave attorney notice, misappropriation finding struck].) OCTC did not amend its pleadings during or at the close of trial to charge additional misconduct.

At oral argument, OCTC urged us not to be constrained by the NDC’s precise language, but instead to view its contents broadly. For example, OCTC argued that even if we found that the box checked “Reduced pay or hours” related to Sack, and not his wife, such statement would

⁵ We note that EDD concluded Sack did not commit fraud.

still constitute a misrepresentation because Sack was actually working full time. First, we cannot reasonably read the NDC, which charges two distinct misrepresentations, to include an additional one. Second, even if we considered the NDC to incorporate this statement, the record does not establish that Sack was working full time. EDD documents show that he disclosed in October 2012 that he worked and received part-time pay in September 2012, and then received a payment of \$4,000 in early October 2012. Itemized payroll and expense sheets from Sack's employer establish that, overall, Sack received only part-time wages from October 8, 2012 to December 31, 2012.

In sum, OCTC failed to prove the specific misconduct alleged in the NDC. Count One charged that Sack made two misrepresentations on September 25, 2012 in his UMA application. OCTC did not amend the NDC to assert a new theory of professional liability. (See Rules Proc. of State Bar, rule 5.44(C) [court may permit amendment, but respondent entitled to reasonable time to respond and to prepare defense if he objects to evidence].) We must determine Sack's culpability based on the allegations before us. Given the trial evidence, and resolving all reasonable doubts in Sack's favor (*Alberston v. State Bar* (1984) 37 Cal.3d 1, 11), we find he is not culpable of making the misrepresentations charged in Count One. Accordingly, we dismiss this case with prejudice for lack of evidence.

III. ORDER

We have found Sack not culpable of all charges. Therefore, we do not address the parties' issues involving aggravation and mitigation, and order this case dismissed with prejudice. Sack may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.