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EXAMINER

EGLOFF, PETER RICHARD

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHARON M. GUTEN, PATRICIA A. TAYLOR,
SONIA A. ALEMAGNO, BRUCE J. VAN DEMAN,
CHRISTOPHER B. GARGOLINE, and DENNIS L. GLADIN

Appeal 2011-001630
Application 11/146,575
Technology Center 3700

Before: PHILLIP J. KAUFFMAN, BRETT C. MARTIN, and
HYUN J. JUNG, *Administrative Patent Judges*.

KAUFFMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 9-14 and 21. Appellants' representative presented oral argument on January 24, 2013. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

The Invention

Appellants' claimed invention "relates to the establishment and maintenance of good hand hygiene practices in institutional environments." Spec. 1:7-9. Claim 21 is the sole independent claim on appeal, and is reproduced below:

21. A method for institutionally effecting good hand hygiene practices by improving usage of hand sanitizer dispensers within an institution, comprising:

staging specific actions in a specific sequence, at specific times and directed at specific individual, unit and organizational levels to effect culture change regarding the use of hand sanitizer dispensers within an institution, said stages comprising pre-launch, launch, culture change and maintenance stages;

employing stage-matched tools appropriate to each of the stages to obtain a desired result in each stage before proceeding to a next sequential stage, said tools comprising education, triggers to awareness, leadership development, engagement of employees, feedback and reinforcement, said triggers to awareness comprising installation of hand sanitizer dispensers at strategic locations within the institution;

assessing the effectiveness of the actions at each stage before proceeding to a next subsequent stage;

remaining in a given stage and undertaking the actions thereof until the assessment of the effectiveness of such actions satisfies a predetermined criteria;

wherein the culture change stage comprises the step of encouraging peer influence to establish a norm in an institution

that makes it acceptable for peers to cue each other prior to an opportunity to use a hand sanitizer dispenser by using preset gestures, slogans, and remarks which remind peers of the present opportunity for adherence to a standard for hand hygiene practices involving the use of a hand sanitizer dispenser, and the culture change stage further comprises the step of empowering each individual in a peer group to cue all others within that group, regardless of role and title; and monitoring the effectiveness of the method by assessing usage of the hand sanitizer dispensers.

Evidence Relied Upon

NHS National Patient Safety Agency, *Ready, steady, go! The full guide to implementing the cleanyourhands campaign in your trust*, 2004 (<http://www.npsa.nhs.uk/cleanyourhands>) (“NHS”).¹

Edna K. Kretzer et al., *Behavioral Interventions to Improve Infection Control Practices*, *American Journal of Infection Control*, Feb. 1997 (“Kretzer”).

Peter Snyder, A “*Safe Hands*” *Hand Wash Program for Retail Food Operations*, Aug. 16, 2000 (<http://www.hi-tm.com/Documents/Safehands.html>) (“Snyder”).

NHS National Patient Safety Agency, *The Full Guide to Implementing the Cleanyourhands Campaign in Your Trust*, Resource 11. 2004 (<http://www.npsa.nhs.uk/EasySiteWeb/GatewayLink.aspx/allid=5959>) (“Resource 11”).

¹ The Examiner’s Answer incorrectly states the title of this reference, and it is correctly identified here and in the Office Action that is the subject of this appeal. Ans. 3; Office Action mailed Nov. 20, 2009, at 3.

The Rejection

The rejection of claims 9-14 and 21 under 35 U.S.C. § 103(a) as unpatentable over NHS, Kretzer, Snyder, and Resource 11 is before us on appeal.

OPINION

*Claim 21*²

Appellants argue that the Examiner failed to recognize that the invention is directed to institutional culture change with regard to the usage of hand sanitizers, and that the Examiner misconstrued the term “culture change” in the context of the invention. Br. 8-9, 13. Further, according to Appellants, “culture change,” as called for in claim 21 when read in light of the disclosure, includes:

(1) shared learning and skill acquisition about how and when to practice good hand hygiene; (2) shared values about why good hand hygiene is important; (3) emergence of shared social norms that tacitly shape new hand hygiene behaviors through (a) peer modeling to comply with the new norms of good hand hygiene and (b) peer pressure, through means such as peer-to-peer cuing, to perform hand hygiene at appropriate times; (4) measurement and feedback information about performance of good hand hygiene; and (5) reinforcement of the desired hand hygiene behaviors through leader and/or peer coaching, social approval, and other rewards and/or incentives.

Br. 13-14.

Appellants go on to assert that “corporate culture change impacts ‘values,’ ‘beliefs,’ and ‘norms’ which influence the thoughts and actions

² For dependent claims 11-14, Appellants rely upon the arguments for claim 21, and therefore claims 11-14 stand or fall with claim 21. *See* Br. 16.

(behavior) of an organization by impacting those values, beliefs and norms at both the individual and aggregate levels.” Br. 14.

Based upon this claim interpretation, Appellants contend that the Examiner’s reliance on NHS is misplaced because it is not specifically defined as a culture change program since it is incapable of effecting culture change. *See* Br. 11-12; *see also* Br. 8.

Contrary to Appellants’ assertion, claim 21 is not directed to institutional cultural change. Rather, independent claim 21 is directed to a method for institutionally effecting good hand hygiene practices by improving usage of hand sanitizers within an institution. The “culture change stage” of claim 21 is but one of several stages within the claimed method. The culture change stage comprises two steps: encouraging peer influence, and empowering individuals in a peer group.³ Further, the Specification does not provide a lexicographical definition of the claim term “culture change stage.”

In light of this, we agree with the Examiner that Appellants’ argument is unpersuasive because it is not commensurate in scope with claim 21. *See* Ans. 10.

In addition to Appellants’ argument not being commensurate in scope with the claimed subject matter, Appellants’ argument is unpersuasive because it asserts that NHS does not disclose culture change as claimed

³ Specifically, claim 21 recites, “encouraging peer influence to establish a norm in an institution that makes it acceptable for peers to cue each other prior to an opportunity to use a hand sanitizer dispenser by using preset gestures, slogans, and remarks which remind peers of the present opportunity for adherence to a standard for hand hygiene practices involving the use of a hand sanitizer dispenser, and “empowering each individual in a peer group to cue all others within that group, regardless of role and title.”

when the rejection is based upon a combination of the references as disclosing the limitation at issue. *See* Ans. 6 (modifying NHS in view of Snyder and Resource 11 as disclosing the culture change stage); *see also In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) citing *In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references).

Appellants also argue that, “the Examiner expressly admits that NHS, the primary reference, is substantially totally devoid of the steps of the claimed method.” Br. 12. Appellants provide no citation to such admission by the Examiner, nor do we locate such a statement in the Examiner’s Answer.

Appellants argue that “the prior art has, for decades, taught away from any methodology capable of achieving a culture change, and has repeatedly fallen short - - because culture change was never recognized as a goal.” Br. 12. This argument is also not commensurate in scope with claim 21, which, as explained *supra*, is not directed to culture change. Rather, claim 21 is a method that includes a culture change stage comprised of two enumerated steps. Appellants’ argument does not cogently explain how the prior art teaches away from the two steps of the culture change stage as claimed. Additionally, Appellants’ assertion does not point to any disclosure in any of the references that would have led a person of ordinary skill in the art in a direction divergent from that chosen by Appellants.

Appellants argue that “leadership development” as claimed calls for more than “merely securing top management commitment to better hand hygiene compliance throughout the facility.” Br. 12. Rather, according to

Appellants, “leadership development” as claimed, calls for ongoing management involvement. Br. 13.

Claim 21 calls for the step of applying stage-matched tools appropriate to each of the stages to obtain a desired result including the stage-matched tool of leadership development. Claim 21 does not specify that leadership development includes ongoing management involvement. Nor does the Specification provide a lexicographical definition of “leadership development” that would incorporate such a requirement. Consequently, we agree with the Examiner that Appellants’ argument is unpersuasive because it is not commensurate in scope with claim 21. *See* Ans. 11

Accordingly, we sustain the rejection of claim 21, and claims 11-14 fall with claim 21.

Claim 9

Claim 9 depends from claim 21 and recites, “wherein the culture change stage comprises the steps of training and empowering peers to recognize circumstances giving rise to the need to cue others of the immediate need for good hand hygiene practices through the use of hand sanitizer dispensers.”

Appellants additionally argue that with regard to the culture change stage, Synder is as deficient as NHS, because Synder’s use of peer influence is to punish non-compliant behavior after failure rather than to induce the desired behavior in a supportive way before the fact. Br. 15.

Appellants’ illustration does not support their contention, because if a person fails to use good hand hygiene followed by a cue from a peer to use

good hand hygiene, this cue is before the fact with regard to a future opportunity to use good hand hygiene. More importantly, we agree with the Examiner that nothing in claim 9 requires that peers cue others before any specified event. *See* Ans. 12.

As such, we sustain the rejection of claim 9.

Claim 10

Claim 10 depends from claim 21 and recites,

wherein each of the launch, culture change, and maintenance stages comprises coaching of employees for reinforcement and encouragement to effect behavior change and maintenance regarding hand hygiene in association with usage of hand sanitizer dispensers, and receiving and responding to feedback from such employees with prepared statements and presentations.

Appellants present two additional arguments with respect to claim 10. First, Appellants argue that, “Kretzer simply teaches awareness building through the use of mission statements and a desire to maintain such awareness, but offers nothing to attain behavior modification to effect institutional cultural change.” Br. 16. As the Examiner correctly points out, such argument is an unpersuasive individual attack in that the rejection relies upon a combination of Kretzer and NHS for the limitation at issue and not upon Kretzer alone. *See* Ans. 12-13; *see also* Ans. 7-8.

Second, Appellants argue that “the Examiner has simply employed applicants’ specification as a blueprint for a shopping list to put together features for which there is no rational underpinning - - as the law requires.” Br. 16. However, the Examiner proposed to combine NHS and Kretzer, “in order to provide the additional feature of employee coaching that respects

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individuality of the employees.” Ans. 13. Appellants’ mischaracterization that no rationale was provided fails to demonstrate error in the rationale that was provided.

Accordingly, we sustain the rejection of claim 10.

DECISION

We affirm the Examiner’s decision to reject claims 9-14 and 21.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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