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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUAN GUILLEN, Plaintiff and Appellant, v. CITY OF GARDENA, et al., Defendants and Respondents.	B280154 (Los Angeles County Super. Ct. No. BC563899)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Lazarski Law Practice and Bryan J. Lazarski, for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Geoffrey S. Sheldon, David A. Urban, and Liara A. Silva, for Defendants and Respondents.

Appellant Juan Guillen challenges the trial court's grant of summary judgment in favor of respondents. He argues the court incorrectly ruled that the evidence compendium he submitted was untimely and refused to consider it. We conclude that, even considering the improperly excluded evidence, appellant has not made a prima facie showing of entitlement to relief; hence the court's error was harmless. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In November 2014, appellant, a bus driver employed by the City of Gardena (City), filed suit against respondents the City, John Gabig, and Paula Faust. Appellant's first amended complaint alleges six causes of action: disability discrimination under Government Code section 12940, subdivision (a);[1] disability-based harassment under section 12940, subdivision (j); failure to provide reasonable accommodation under section 12940, subdivision (m); failure to engage in the interactive process under section 12940, subdivision (n); retaliation for reporting illegal activities under Labor Code section 1102.5, subdivision (b); and failure to prevent harassment, discrimination, or retaliation under section 12940, subdivision (k).

The facts giving rise to appellant's lawsuit began in January 2012, when appellant was violently assaulted by a passenger while driving a bus for the City. Following this assault, appellant reported symptoms of acute stress disorder and received psychological care. After spending some time on medical leave, he returned to work in a modified duty position in

[1] Subsequent undesignated references are to the Government Code.

April 2012. In June 2012, a psychologist recommended that appellant be returned to work without restriction, concluding that he had "no permanent psychological disability whatsoever." Deborah Dixon, a human resources technician at the City, was informed that appellant had attended several psychotherapy sessions and was released from care with "[n]o further treatment needed." Appellant was returned to work without restriction in July 2012.

Appellant's complaint alleges that he has posttraumatic stress disorder (PTSD) as a result of the 2012 assault. It further alleges that during the 2013-2014 school year, he suffered repeated incidents of harassment from a group of students who were frequent passengers on his route. He alleges his coworkers ignored his radio calls for help during these incidents. He claims he made six to ten incident reports regarding harassment from passengers and complained to coworkers between twice a week to almost every day. He claims his coworkers mocked and derided his complaints regarding passenger behavior by telling him to take the situation less seriously, reminding him that the passengers were "kids," telling him to take a nap or sleeping pills, telling him to take karate lessons, or calling him racist due to a perception that many of the passengers he had issues with were African-American. Another coworker stated that appellant was perceived as oversensitive and that it was an "inside joke" among appellant's coworkers that he continually had issues with passengers, especially African-American passengers.

Appellant alleges that the claimed harassment by passengers in 2013 and 2014 caused him to experience symptoms such as anxiety attacks, depression, hypervigilance, difficulty sleeping, and flashbacks to the 2012 assault. He claims he

reported his symptoms to coworkers at the City, including operations superintendent Alicia Walker and route supervisors Oswaldo Tornero, Ramisi Watkins, Rheada Hampton, and Donny Harris. Each of these coworkers denies that appellant had "said anything that made [them] think that [appellant] suffered from stress, anxiety, depression or any other mental or physical conditions or disabilities, including PTSD." Appellant acknowledges he did not tell his coworkers that he had a disability or diagnosis, and reported only his symptoms.

In early 2014, appellant video-recorded some of his interactions with passengers. In May of that year, he showed these recordings to route supervisor Harris, who concluded that they depicted misconduct by appellant. Harris gave the video recordings to respondent Jack Gabig, the director of transportation.[2] Gabig directed respondent Paula Faust, the deputy director of transportation, and others, including route supervisor Harris and operations superintendent Walker, to review the video recordings for misconduct by appellant. Appellant was placed on paid administrative leave pending investigation of the video recordings. Respondents Gabig and Faust deny that appellant discussed his psychological symptoms or PTSD with them.

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[2] According to respondents, the video recordings depict appellant closing the door on a passenger's foot, leaving the driver's area to demand passengers throw away beverages, ignoring a request from a passenger that he stop the bus at a regular stop, and responding to threats from passengers by making provoking statements such as "'do it,' 'you are asking for it,' [and] 'if you're man enough come and tell me over here.'" According to appellant, the video recordings depict passengers threatening him and his radio calls for help being ignored.

In June 2014, Gabig issued a notice of intent to discipline appellant, which recommended his termination. On July 23, 2014, Gabig conducted a *Skelly*[3] hearing, at which appellant was represented by an attorney and a union representative. Following this hearing, on July 30, 2014, Gabig found that appellant had committed misconduct, and issued a final notice of disciplinary action, disciplining appellant by a five percent pay reduction for a period of 18 weeks. Appellant did not appeal this decision.

Upon his return from paid administrative leave, appellant was required to submit to a fitness for duty examination. The examination was conducted by Keith Lawrence, a licensed marriage and family therapist. Appellant claims Lawrence diagnosed him with PTSD during the examination and stated he would inform the City of the diagnosis. Lawrence's clinical notes from the examination state that appellant was "experiencing anxiety attacks and depression due to the trauma that he alleges he experienced from multiple work incidents of client bus riders and gang members that have physically and verbally assaulted him." Lawrence stated that he is not qualified to diagnose employees, that the fitness evaluation he conducted with appellant does not include any tests or diagnoses, and that he did not communicate any diagnosis of appellant to the City.

Respondents moved for summary judgment in February 2016. Their motion was scheduled to be heard in May 2016. In April 2016, appellant's attorney became ill and was hospitalized. The court granted two continuances during this hospitalization and the hearing date was moved to August 18, 2016.

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[3] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

On August 17, 2016, appellant's attorney filed a brief in opposition to respondents' motion for summary judgment and a statement of disputed facts. That same day, opposing counsel informed him that the court had continued the hearing to October 25, 2016 on its own motion. In its minute order issued August 18, 2016, the court continued the hearing without mentioning deadlines.

On October 7, 2016, appellant's attorney filed a "compendium" of evidence. At the October 25, 2016 hearing on respondent's motion for summary judgment, the court refused to consider the compendium, ruling that it was untimely. The court granted respondents' motion for summary judgment on the basis that appellant had failed to provide evidence, rendering the facts asserted by respondents undisputed. The court entered judgment in favor of respondents.

This appeal followed.

DISCUSSION

I

Appellant argues the court erred in concluding the compendium was untimely.

Code of Civil Procedure section 437c, subdivision (b)(2) provides that: "An opposition to the motion [for summary judgment] shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken."

The application of law to undisputed facts is reviewed de novo. (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1464.) It is undisputed that appellant filed the compendium on October 7, 2016, which was more than 14 days before the continued hearing date of October 25, 2016. The trial court did not change the deadline for filing opposition in its sua sponte order continuing the hearing. The plain language of Code of Civil Procedure section 437c, subdivision (b)(2) provides that an opposition filed 14 or more days in advance of a continued hearing date is timely. Thus, the compendium of evidence was timely filed and the trial court erred in finding otherwise.

II

The grant of a motion for summary judgment is subject to de novo review. (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 876.) Although the parties do not cite, and we have not found a reported case that addresses whether a trial court's error in deeming a filing untimely is subject to independent review for harmless error, our Supreme Court has made clear that "'it will be the rare case'" in which a nonstructural error "'will not be subject to harmless error analysis.'" (*F.P. v. Monier* (Nov. 27, 2017, S216566) ___ Cal.4th ___ [p. 16].)

Because we must affirm a grant of summary judgment on any correct legal theory, we have conducted an independent review to determine whether the court's judgment was justified on the merits.[4] (*California School of Culinary Arts v. Lujan*

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[4] Respondents argue appellant failed to address the merits in his opening brief and hence has waived the argument that triable issues of material fact exist. In fact, appellant argues in his opening brief that his compendium creates disputed issues of

(2003) 112 Cal.App.4th 16, 22.) Our doing so also is supported by the principle that, in reviewing a grant of summary judgment, it is the validity of the judgment which we review and not the reasons therefore. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.) For these reasons, it is unnecessary to remand this case to the trial court for it to render an initial determination with consideration of all timely evidence.

To determine whether appellant's claims can survive summary judgment, we assess whether he has made a prima facie case of entitlement to relief or, alternatively, whether respondents have demonstrated that appellant's claims lack merit. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 143 [at summary judgment in discrimination case under FEHA, plaintiff must first make prima facie case of entitlement to relief]; but see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [some California courts require defendant to make initial showing that plaintiff's claims lack merit].) Under either test, appellant's claims do not survive.

A. *Fair Employment and Housing Act (FEHA)*[5] *Claims*

Under each of the disability discrimination provisions of FEHA cited in appellant's complaint, there is a requirement that the employer have actual or imputed knowledge of the employee's

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material fact precluding summary judgment. While points raised for the first time in a reply brief ordinarily are not considered because such consideration would deprive the respondent of an opportunity to counter the argument, *American Drug Stores, Inc. v. Stroh* (1992)10 Cal.App.4th 1446, 1453, in this case, respondents anticipated appellant's argument in reply and fully addressed it in their brief.

[5] § 12900, et. seq.

disability. Under section 12940, subdivision (m), it is an unlawful employment practice for an employer to fail to make a reasonable accommodation for an employee's "*known* . . . disability." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166-1167 (*Featherstone*), italics added.) Similarly, the duty to engage in the interactive process under section 12940, subdivision (n) arises following a "request for reasonable accommodation by an employee . . . with a *known* physical or mental disability." (Italics added.)

Section 12940, subdivision (a) provides that it is an unlawful employment practice for an employer to discriminate against a person "because of" his or her disability. In order for an employer to discriminate against an employee "because of" his or her disability, the employer must know that the person is disabled. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 (*Scotch*) ["'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer"] quoting *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236-237 [applying federal Americans with Disabilities Act].) Unlawful harassment under section 12940, subdivision (j) likewise is defined as occurring "because of" an employee's disability.

Under these FEHA provisions, "the employee bears the burden of giving the employer notice of his or her disability." (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1167.) Where an employee fails to give notice, knowledge of an employee's disability will be imputed to an employer when "the fact of disability is the only reasonable interpretation of the known facts." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1008; see also *Faust*

v. California Portland Cement Co. (2007) 150 Cal.App.4th 864, 887 ["an employer 'knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. . . .'"].)

For purposes of this review we assume without deciding that appellant has PTSD and that PTSD is a disability under FEHA. Appellant acknowledges that he did not tell anyone at the City that he had PTSD or any psychological disorder, instead reporting only his symptoms. Knowledge of the claimed disorder cannot be imputed to respondents based on appellant's reports of his symptoms to coworkers. All of appellant's coworkers deny that appellant discussed his psychological symptoms with them. Even assuming otherwise for the purposes of this review, the conclusion that appellant had PTSD is not the "only reasonable interpretation" of the information he shared with them. Appellant has not claimed that his coworkers possess psychological expertise or that he reported receiving a diagnosis from a psychological professional. Where an employee's purported disability is not readily observable, the employee cannot claim that the only reasonable conclusion the employer could have drawn from reports of symptoms is that the employee is disabled, absent evidence that the symptoms of the disability are common knowledge or that the employee reported that he had been diagnosed by a professional. (Compare *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 593 [employee's claim she told employer she "had been diagnosed with a potentially cancerous tumor" was enough, if true, to place employer on notice of her disability].)

Because actual or imputed knowledge is an element of appellant's claims for disability discrimination, harassment, failure to accommodate, and failure to engage in the interactive process, appellant has failed to make a prima facie showing of entitlement to relief.

Appellant also argues respondents failed to prevent discrimination and harassment against him. A claim of failure to prevent discrimination or harassment under section 12940, subdivision (k) is dependent upon an underlying claim of discrimination or harassment. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1315.) Since appellant's claims of harassment and discrimination fail, his claim for failure to prevent must also fail.

B. *Retaliation Claim*

Appellant also argues he was subject to unlawful retaliation under Labor Code section 1102.5 as a result of reporting unsafe work conditions under Labor Code section 6403, which provides that: "[n]o employer shall fail or neglect to . . . [¶] . . . [¶] . . . adopt and use methods and processes reasonably adequate to render the employment and place of employment safe . . . [¶] [and] do every other thing reasonably necessary to protect the life, safety, and health of employees."

Appellant claims he repeatedly reported unsafe conditions caused by passengers on his bus route, and that he did so by making six to ten incident reports, calling in for help on his radio, and showing his supervisor video recordings, which allegedly depicted passengers threatening him. He claims that respondents retaliated against him by ignoring his radio calls and complaints, mocking and deriding his complaints, initiating disciplinary proceedings against him, suspending him,

threatening to terminate him and subjecting him to psychological examination.

A prima facie case of retaliation, requires a showing that appellant engaged in a protected activity, that he experienced an adverse employment action, and that the adverse employment action was caused by his engagement in protected activity. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) Protected activity under Labor Code section 1102.5, subdivision (a) includes disclosing information to superiors which an employee has reasonable cause to believe demonstrates a violation of federal or state law. We assume for purpose of argument that appellant's reports of alleged violations of Labor Code section 6403 were protected activity.

An adverse employment action is one that has a material adverse "affect [on] the terms and conditions of employment." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1036.) Most of the putative adverse employment actions appellant puts forward are insufficient under this standard. His "suspension" was a paid administrative leave pending an investigation. We do not consider this "adverse" to appellant, as he received full pay during his leave. The statement of respondents' intent to terminate appellant is not an adverse employment action as it was never effectuated and therefore had no practical consequences for appellant. For the same reason, the mere initiation of disciplinary proceedings was not an adverse employment action. The requirement of a fitness for duty examination was not an adverse employment action because appellant was not harmed by being evaluated. The comments coworkers made regarding appellant's alleged oversensitivity and racism also do not rise to the level of an adverse employment

action. (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1052-1053, 1054 [insults must be "'"sufficiently severe or pervasive to alter the conditions of the victim's employment . . . ."'"; "[A] pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment"].)

The only putative adverse employment action that appellant alleges which may pass muster is respondents' alleged ignoring of his radio calls and complaints reporting unsafe work conditions. Appellant alleges that the failure to respond to his requests was severe and pervasive, since he claims that he complained between two times a week and almost every day, and received few responses. If true, this would materially and adversely impact the conditions of appellant's employment. But appellant provides no evidence to suggest that the motivation for the alleged refusal to respond to his calls for help was out of a desire to retaliate against him for engaging in a protected activity. Although he makes a bald assertion to that effect in his complaint, the assertion is not enough to survive summary judgment.

In sum, appellant has failed to make a prima facie showing of entitlement to relief on any of his claims. Respondents have demonstrated that appellant's claims lack merit. The court's error in deeming appellant's evidence compendium untimely was harmless, and its judgment is affirmed.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.