Filed 3/14/13 Davis v. City of Los Angeles CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LEON DAVIS, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B237760 (Los Angeles County Super. Ct. No. BC400913)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Reversed and remanded.

Law Offices of Alvin L. Pittman and Alvin L. Pittman for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Zna Portlock Houston, Assistant City Attorney, and Jennifer M. Handzlik, Deputy City Attorney, for Defendant and Respondent.

Leon Davis appeals from the trial court's summary judgment dismissing his complaint for employment discrimination based on age and race. Because the trial court erred in excluding evidence that created a triable issue of age animus, we reverse summary judgment and remand for further proceedings on appellant's cause of action for age discrimination.

FACTS AND PROCEEDINGS

Appellant Leon Davis, who is African-American, was born in January 1943. He began working for respondent City of Los Angeles in 1997, and at all relevant times has worked in the Los Angeles Housing Department. The Department has four bureaus, consisting of an Executive bureau and three working bureaus, one of which is the Development bureau. The Development bureau has a Homeownership Division, which implements and secures governmental funding for several of the city's middle and low-income housing programs.

In 2002, appellant was made the Community Housing Program Manager for the Homeownership Division. As a Community Housing Program Manager, appellant supervised 12 employees. In January 2006, the Department's General Manager, Mercedes Marquez, began to reorganize the Department in response to criticisms by independent auditors. In a meeting with senior managers, General Manager Marquez said the Department was "top heavy with older employees" for which she had a mandate to get rid of "dinosaurs" as part of the department's reorganization.[1] Two months later in March 2006, the Department transferred appellant from the Development Bureau's Homeownership Division to the Department's Executive Bureau and a Latino who was 20 years younger than appellant assumed appellant's former duties, although not his title, in the Homeownership Division. The parties dispute the effect of appellant's

---

[1] In moving for summary judgment or adjudication, respondent objected to appellant's evidence of Marquez's statement on the ground it was inadmissible hearsay. The trial court sustained respondent's objection. As we explain in the Discussion, the courts' ruling was error and requires reversal of the summary judgment.

reassignment on his job duties. Appellant claims his core duty as a Community Housing Program Manager was to supervise and manage staff, but his involuntary reassignment to the Executive Bureau stripped him of any supervisory responsibilities. According to appellant, his reassignment constituted a functional demotion as part of the Department's preemptive move to take him out of the running for promotion to upcoming Housing Director openings in the Department. According to respondent, a Community Housing Program Manager's duties include organizing and managing staff *and* preparing and presenting clear reports. Thus, respondent asserts, appellant's position as Community Housing Program Manager was unchanged following his reassignment to the Executive Bureau despite his having no one to supervise in his new position.

Upon appellant's transfer to the Executive Bureau, his former supervisor in the Homeownership Division, Yolanda Chavez, continued to supervise him. She directed him to prepare a written marketing plan for the Department's programs. She also ordered him to work by himself without consulting fellow employees who would implement the plan. According to appellant, working on the marketing plan, which was appellant's only assignment from March 2006 to August 2007, was not within the scope of duties of a Community Housing Project Manager as defined by Civil Service rules. Moreover, according to appellant, Yolanda Chavez set him up for failure on the project by denying him the staff, resources, and information he needed to prepare an adequate plan.

In October 2006, several months after appellant's March reassignment to the Executive Bureau, the Department had two vacancies for emergency temporary appointments for Directors of Housing, one of which was in appellant's former Homeownership Division. Appellant and four others, all of whom were at least 15 years younger than appellant, applied for the open positions. The Department ranked the applicants based on interview scores. Three of the candidates ranked higher than appellant and one ranked lower, but appellant asserts that his middling ranking was the

"fruit of the discriminatory poisonous tree."[2] The Department promoted the two top-ranked candidates, one of whom was white and the other African-American.

In the meantime, things were not going well for appellant in the Executive Bureau. In several meetings between August and December 2006, supervisors told him his written marketing plan was unacceptable and he received a disciplinary memorandum noting his need for excessive supervision. In the ensuing months, appellant continued to revise and resubmit his marketing plan, which his supervisors continued to claim was inadequate. In August 2007, he submitted his final draft to Supervisor Yolanda Chavez, who reported she remained unsatisfied with the plan. Appellant asserts, however, that Chavez doomed him to fail by denying him the resources and input from colleagues that he needed to prepare a proper plan.

After appellant submitted his final draft of the marketing plan in August 2007, Chavez ordered him to prepare a Request for Proposal for a Departmental Housing Assistance Program. Appellant contends that writing the Request for Proposal required technical expertise beyond his job description. After appellant worked for more than one year on the proposal without completing it, Chavez assigned it to another staff member to finish. In the interim, the emergency temporary appointments for Directors of Housing, including the director in appellant's former Homeownership Division, expired. In August 2007, a committee interviewed appellant and three other applicants for the positions. Appellant scored third in the interviews. The Department filled the positions with the two highest scoring candidates (a White and an African-American) who had been the two interim directors by emergency appointment.

In 2008, appellant filed his complaint against respondent, alleging causes of action for employment discrimination based on race and age. (Appellant continued to work for

---

[2] Appellant asserts he ranked first in pre-interview assessments, but the court sustained respondent's objection to appellant's evidence in support of that assertion. On appeal, appellant notes the court's ruling but does not offer argument supported by citation to authority demonstrating that the court erred. Accordingly, the point is waived. (*Landry v. Berryessa Union Sch. Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

respondent until he retired in 2009.) Respondent moved for summary judgment or adjudication on the ground that appellant offered no admissible evidence that any claimed adverse employment action – whether removal of his supervisory duties, transfer to the Executive Bureau, unsatisfactory performance evaluations, or two failures to promote – was the result of his age or race. Respondent objected to much of appellant's evidence, including General Manager Marquez's statement that she had a mandate as she reorganized the Department to get rid of "dinosaurs." The trial court sustained most of respondent's objections, including respondent's hearsay objection to Marquez's dinosaur comment. During the hearing on respondent's motion, the court found no evidence that respondent had discriminated against appellant because of race. But the court observed that a triable issue of fact could, in principle, exist as to whether calling an employee a dinosaur was evidence of age animus, or merely meant the employee was set in his ways. The court said "dinosaurs, I guess you could say that it connotes old age, but really I think it connotes a failure to adapt." But whichever the meaning, the court found Marquez's comment was inadmissible hearsay and therefore was not evidence creating a triable issue of fact. Thus, the court found that appellant's age discrimination claim also failed. The court therefore entered summary judgment for respondent. This appeal followed.

STANDARD OF REVIEW

" 'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) "From commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the

party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

California courts have adopted in employment discrimination cases the three-part burden-shifting analysis established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354.) Under that analysis, the employee has the initial burden of establishing a prima facie case to raise the presumption of discrimination; the employer must then offer legitimate, nondiscriminatory reasons for the adverse employment action at issue to dispel the presumption; once the employer has done so, the burden shifts back to the employee to produce evidence that the employer's stated reason was a mere pretext for discrimination. (*Id.* at pp. 354-356.) Applying this analysis to summary judgment or adjudication, the defendant employer can prevail by "present[ing] admissible evidence . . . that the adverse employment action was based on legitimate, nondiscriminatory factors . . . unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

DISCUSSION

1. *Triable Issues of Age Discrimination Exist*

To prove age discrimination an employee "must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National Inc.*, *supra*, 24 Cal.4th at p. 355.) An employer's reassignment of an employee into a position that limits the employee's possibility for career advancement and promotion can be an adverse employment action even if the reassignment does not reduce the employee's pay or rank. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054.) Appellant

contends he suffered an adverse employment action when the Department shunted him to the Executive Bureau where, stripped of his supervisorial authority and resources, he received assignments for which the Department was setting him up to fail, an outcome that would undermine his applications for promotion to Housing Director.[3] As evidence of the Department's age animus, he points to the dinosaur comment by General Manager Marquez, who was the Department's final authority in personnel decisions involving job duties, reassignments, and discipline.

Respondent contends Marquez's dinosaur comment was inadmissible double hearsay because appellant was not at the meeting where Marquez purportedly made the remark, and appellant heard about the remark only from others. But one person who heard Marquez's comment and repeated it to appellant was Alfonso Perez, the Department's Personnel Director. Appellant contends the statement was thus admissible under Evidence Code section 1222 as an authorized admission. Section 1222 states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if . . . The statement was made by a person authorized by the party to make . . . statements . . . concerning the subject matter of the statement . . . ." (See also *O'Mary v. Mitsubishi Electronics America, Inc*. (1997) 59 Cal.App.4th 563, 570 (*O'Mary*) [an employee's authority to make a statement for employer "requires an examination of the nature of the employee's usual and customary authority, the nature of the statement in relation to that authority, and the particular relevance or purpose of the statement"].)

The record contains no apparent dispute over Marquez's authority to speak about matters involving reassignment of Department employees, so we do not address Marquez's authority as an exception to the first stage of double hearsay. And the record contains undisputed evidence within Perez's own declaration in support of respondent's motion for summary judgment of Perez's authority over the Department's personnel and

---

[3] The parties do not argue on appeal whether Davis's transfer from one division to another and the concomitant changes in his responsibilities constituted an adverse employment action, apparently in recognition of the conflicting evidence on the point. Because the parties do not address it, neither do we.

anti-discrimination policies. In his declaration, Perez stated: "As Personnel Director, I am responsible for directing, developing, implementing, and managing a comprehensive personnel and human resources program for the [Los Angeles Housing Department], including developing, interpreting, implementing and enforcing policies, procedures and systems to ensure compliance with municipal, state, and federal laws. [¶] During the times alleged in this action, I was entirely familiar with LAHD's personnel policies, employment classifications, job restructuring and reassignment, promotional processes and procedures, Equal Employment Opportunity guidelines and procedures, and applicable Civil Service Rules and City Charter provisions pertaining to City employment." Plainly, Perez had authority to make statements to employees about respondent's employment policies and allegations of employment discrimination. (Cf. *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216-217, overruled on another point by *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [statement attributed to company's president by vice president of human resources not authorized admission because plaintiff did not offer any foundational evidence that vice president authorized to speak for company or president].) The court thus erred in not admitting Perez's repetition of Marquez's dinosaur remark as an authorized admission.

The court's exclusion of Marquez's remark prejudiced appellant. During the summary judgment hearing, the court found appellant had established a prima facie case of age discrimination. The record included substantial evidence of respondent's legitimate reasons for appellant's transfer, so the burden shifted back to appellant to demonstrate unlawful discrimination. The court noted that, if admitted, Marquez's dinosaur remark created a triable issue of discriminatory intent, but nevertheless excluded the remark as inadmissible hearsay, thus leaving appellant with no evidence to refute respondent's evidence of legitimate business purposes.

Respondent asserts we must review the court's exclusion of Marquez's comment for abuse of discretion. But we disagree because Marquez's authority, as final decision maker in personnel matters, and of Perez's authority as stated in his declaration, are undisputed. Because their authority is undisputed, the admissibility of Perez's repetition

of Marquez's statement as an authorized admission becomes a question of law which we independently review and, by that standard of review, we conclude the court erred in excluding the statement. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1202; *Pasternak v. Boutris* (2002) 99 Cal.App.4th 907, 918.) But even if we were to review the trial court's ruling for abuse of discretion, we would find abuse here because the trial court either apparently misapprehended, or possibly overlooked, Evidence Code section 1222's applicability to Marquez's and Perez's authority over personnel decisions and policies as revealed in respondent's own evidence in support of summary judgment. A court abuses its discretion when it fails to follow applicable legal principles. (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, _____.)

Respondent's reliance on *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 is misplaced. Respondent cites it for the proposition that *O'Mary, supra,* 59 Cal.App.4th 563 establishes that authorized admissions under Evidence Code section 1222 apply only to statements of "high-ranking organizational agents" of which, respondent seems to imply, Perez was not one.[4] (*Snider*, at p. 1203.) But respondent cites dicta. The issue in *Snider* involved rules of professional conduct governing a lawyer who contacts a represented party. (*Id.* at pp. 1192-1193.) *Snider*'s reference to *O'Mary* was only in passing as *Snider* canvassed laws applicable to a lawyer's ethical obligations toward employees of a represented party. (*Snider,* at pp. 1198-1207.) Rather than rely on what *Snider* says about *O'Mary* in dealing with an issue not before us, we rely directly on *O'Mary* itself. *O'Mary* did not hold that authorized admissions apply only to "high-

---

[4] The soundness of respondent's implication is questionable given that Perez was the Department's Personnel Director responsible for "directing, developing, implementing, and managing a comprehensive personnel and human resources program" that complied with legal requirements, including equal employment opportunity guidelines and procedures.

ranking" agents. *O'Mary* instead explained that "[i]n general . . . the determination requires an examination of the nature of the employee's usual and customary authority, the nature of the statement in relation to that authority, and the particular relevance or purpose of the statement." (*O'Mary*, at p. 570.) An employee's high place in an organization's hierarchy is a factor tending to show the employee has authority to speak, but it is neither necessary nor dispositive, because it is the "connection between the duties of the employee and the nature of the statement" that matters. (*Id.* at pp. 570-572.)

Respondent also contends that Marquez's dinosaur comment is a "stray" remark too insubstantial to support appellant's age discrimination claim. But the trial court did not think so, and neither do we. If believed by a trier of fact, the remark supports appellant's claim that the Department shunted him to the Executive Bureau because he was an older worker. As the Supreme Court noted in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 541, "Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered."

Respondent states that appellant offered no evidence in opposition to summary judgment that Perez was present when Marquez uttered her dinosaur comment. Respondent misreads the record. In his pre-summary judgment deposition, appellant testified that he heard about Marquez's dinosaur remark from an employee who attended the meeting where Marquez made the comment, but appellant could not remember during his deposition the name of that employee. By the time appellant filed his declaration in opposition to summary judgment, he had recalled that one of the people who told him about the remark was Alfonso Perez. Appellant told the court during the summary judgment hearing that he remembered Perez's name after his deposition, an explanation that apparently satisfied the court. (Accord, *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522-1523, citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22 [generally a party opposing summary judgment may not create

triable issue of fact by contradicting deposition testimony, but court may accept party's explanation why evidence opposing summary judgment does not contradict deposition].)[5]

Finally, respondent contends it had legitimate business reasons for its actions against appellant. According to respondent, appellant's work quality and quantity were poor, he did not meet deadlines, he lacked organizational skills, he used time inefficiently, and he required excessive supervision. The reasons respondent cites for its treatment of appellant create triable issues of fact, however, which we may not resolve on summary judgment. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 553-554 ["trier of fact could properly take into account . . . statement that [employer wanted] 'somebody younger, maybe in their 40's' " as evidence creating a triable fact sufficient to defeat summary judgment despite employer's purportedly legitimate reasons for adverse action].)

2. *Race Discrimination Claim Fails*

Appellant's opening brief contains less than one page of legal discussion of his claim for race discrimination, and his reply brief contains even less. He notes that he was one of four Community Housing Program Managers. He also notes that he was the only Community Housing Program Manager reassigned to the Executive Bureau, a reassignment he attributes to age discrimination. The three other Community Housing Program Managers were white or Latino. He argues that because he was the only African-American Community Housing Program Manager, his suffering age discrimination also constituted race discrimination. Appellant's argument does not, however, create a triable issue of race discrimination. The mere difference in race among the four Community Housing Program Managers does not by itself establish racial discrimination. To prevail on an appeal from summary judgment, appellant must offer a reasoned argument supported by citation to admissible evidence and legal authority

---

[5] Perez's 13-page declaration filed in support of respondent's motion does not discuss the meeting one way or the other. Marquez's nine-page declaration does not mention the dinosaur remark.

showing a triable issue exists. Appellant's discussion of his race discrimination claim fails to do so. " 'On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' " (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

DISPOSITION

The judgment is reversed and the court is directed to enter a new order denying respondent's motion for summary judgment and respondent's motion for summary adjudication of appellant's cause of action for employment discrimination based on age, and granting respondent's motion for summary adjudication of appellant's cause of action for employment discrimination based on race. The matter is remanded for further proceedings. Appellant to recover his costs on appeal.

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.