Filed 10/14/14 Kibe v. Kaiser Permanente Hosp. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VANESSA KIBE, Plaintiff and Appellant, v. KAISER PERMANENTE HOSPITAL, et al., Defendants and Respondents.	B248758 (Los Angeles County Super. Ct. No. BC471325)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald Sohigian, Judge. Affirmed.

Law Offices of Robin D. Perry & Associates and Robin D. Perry for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport for Defendants and Respondents.

Vanessa Kibe appeals the summary judgment granted in favor of her employer, Kaiser Foundation Hospitals, and her supervisor, Agnes Aquino. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kibe, a nurse in Kaiser's stepdown cardiac surgery unit, sued Kaiser Foundation Hospitals and her supervisor, alleging employment discrimination. The trial court granted the defendants' motion for summary judgment. Kibe appeals.

DISCUSSION

I. Forfeiture

Kibe failed to provide this court with the evidence the defendants submitted to the trial court in support of the motion for summary judgment. The party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Kaiser and Aquino contend that Kibe's claims should be resolved against her because "the record in this case is wholly inadequate to provide a basis on which the Court can consider plaintiff's contentions on appeal." Kaiser and Aquino, however, augmented the record with the documents that Kibe omitted. As a result, the record is no longer inadequate and we may consider Kibe's contentions on appeal.

II. Summary Judgment Standard of Review

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc.,[1] § 437c, subd. (c).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the

---

[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

[movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material fact exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "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*, at p. 850.)

We review the trial court's ruling granting summary judgment de novo and independently examine the record to determine whether there is a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 860.) In performing our de novo review, we consider all evidence presented by the parties in connection with the motion (except that which the trial court properly excluded) and all uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the papers and pleadings show that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

III. Racial Discrimination and Harassment Claims

Kibe contends that a triable issue of material fact exists as to whether she experienced "discriminatory racial harassment." Specifically, she contends in her opening brief that: she is Black and therefore part of a protected class; one co-worker called her a monkey; another co-worker said that all Black persons have big buttocks; and a third pinched her muscle to demonstrate that Black people have good muscle tone. She also states in her brief that as a result of harassment, she sought psychiatric care and missed time from work. Kibe asserts that Kaiser and Aquino failed to formally investigate the incidents she alleged, did not "write-up" those involved, and did not direct the participants to undergo sensitivity training; and that to the extent that Kaiser investigated, no written finding was made. Kibe fails to cite evidence in the record supporting these factual assertions. "Any reference in an appellate brief to matter in the record must be supported by a citation to the volume and page number of the record where that matter may be found. (Cal. Rules of Court, rule 8.204(a)(1)(C).) This rule

applies to matter referenced at any point in the brief, not just in the statement of facts. [Citation.]" (*Sky River LLC v. Kern County* (2013) 214 Cal.App.4th 720, 741 (*Sky River*).)

Kibe next asserts that "[n]o report was prepared for human resources." This statement is supported by a reference to seven pages of Aquino's deposition transcript. In those pages of transcript, however, Aquino testified that she reported the incident (in which a co-worker allegedly used the term "chimpanzee" to refer to her) in writing, via e-mail, to human resources. The record provided by Kibe, therefore, contradicts her assertion. Kibe next states, "In fact, Aquino never even reported the Chimpanzee incident to human resources." The portion of the record she cited immediately preceding this sentence, as we have noted, appears to contradict this assertion; and she provides no citation to the record to support her statement. Kibe then states, again without support in the record, that "Kaiser and Aquino failed to remedy the problem and by doing so, encouraged it." She concludes that a triable issue of fact exists relating to racial discrimination and harassment in the workplace.

Kibe's appellate briefing is insufficient to demonstrate any error by the trial court or that a triable issue of material fact precluded summary judgment here. None of Kibe's contentions of fact were supported by citations to evidence in the record that supported her assertions: in most instances no citations were provided at all, and in the one instance in which she provided a record citation, the evidence contradicted Kibe's assertion. Kibe, therefore, has not demonstrated on appeal that a triable issue of material fact exists as to her harassment and discrimination claims. (See *Aguilar*, *supra*, 25 Cal.4th at p. 850 [triable issue of material fact exists when "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"].)

Kibe's challenge also fails because she has not met her burden of establishing any error in the ruling of the trial court on the motion for summary judgment with respect to these claims. "[A]lthough we use a de novo standard of review here, we do not transform into a trial court." (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892,

913.) "'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. [Citation.] . . . . "[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.]' [Citation.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

A review of the trial court's ruling reveals that Kibe's claims of racial discrimination failed because she presented no evidence that she suffered an adverse employment action, and because they were time-barred to the extent that they relied on conduct occurring before April 3, 2009. Yet Kibe has not acknowledged that this was the basis of the court's ruling, demonstrated in her briefing any adverse employment action, addressed the question of a time bar, or identified any legal or factual error in the court's conclusions. Similarly, the trial court summarily adjudicated Kibe's claims of racial harassment because she lacked evidence that she experienced severe or pervasive harassment: "The evidence shows that Plaintiff identified only two isolated incidents which were separated by over one year. In each of these instances, Ms. Aquino investigated and Plaintiff admits that following those investigations, she never experienced similar incidents again from the individuals she had accused of harassment. As a matter of law, these two incidents fail to rise to the level of 'severe or pervasive.'" Kibe has not mentioned this ruling or established any flaws in the court's conclusion, nor did she demonstrate that the evidence presented in the trial court established a triable issue of material fact as to whether severe or pervasive harassment occurred. Finally, the court summarily adjudicated all of Kibe's claims against Aquino because she lacked evidence that Aquino engaged in any conduct that could support individual liability. Here again, Kibe has not shown by argument and evidence that Aquino that properly could be held personally liable.

Ultimately, Kibe has disregarded the trial court's rulings with respect to these claims instead of demonstrating by argument and evidence that they were erroneous, and as such, she has failed to meet her burden on appeal. "'"'Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right.'"' [Citation.] Therefore, plaintiff's contention that the trial court erred by granting defendants' motion for summary judgment is deemed waived." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.)

IV. Family and Medical Leave Act Denial Claim

Kibe alleged that she was wrongfully denied leave to care for her ailing father under the Family and Medical Leave Act (29 U.S.C. § 2601 et seq., "FMLA"). The trial court concluded that Kibe's "claims for violation of the FMLA fail because Plaintiff lacks evidence that she was denied the right to have the leave she took designated as FMLA leave. In particular, Plaintiff presented no evidence that there was a leave that she should have been granted but was denied or that when her one request for leave was denied, it was denied for an unlawful reason."

Kibe contends that the summary judgment should be reversed with respect to this claim because the defendants "present[ed] no evidence to support the denial of FMLA." This is not an accurate representation. As Kibe acknowledges in her briefing, the defendants presented evidence in the form of a declaration by Aquino that Kibe's request for FMLA leave was denied because she was ineligible for leave, as she had already exhausted her leave bank and exceeded the annual amount of allowed sick leave for the relevant period. Once the defendants made an evidentiary showing that the leave was not denied for an unlawful reason, the burden shifted to Kibe to show by admissible evidence that the leave was in fact denied for an unlawful reason (§ 437c, subd. (p)(2)), and the trial court concluded that she lacked such evidence.

On appeal, Kibe does not identify any evidence of an unlawful reason for the denial of leave. Instead, she asserts that declarant Aquino revealed at a deposition taken

approximately two months after Aquino signed her declaration that she actually had what Kibe terms "no personal knowledge" of why it was denied, and Kibe argues that this creates a triable issue of material fact as to whether the leave was wrongfully denied. Kibe has inaccurately characterized the deposition testimony, in which Aquino repeatedly expressed that she could not remember why the request was denied. Aquino said that she thought the denial had something to do with Kibe failing to provide documentation, although she did not know details; then, when asked if the denial had anything to do with the consumption of leave time responded, "I really, really cannot recall, you know, why it was denied." Moreover, the fact that as of January 2013 Aquino no longer recalled why the leave was denied is not evidence that Kibe's request for leave was denied for an unlawful reason. Kibe has not identified any evidence in the record that she was denied FMLA leave for an unlawful reason; indeed, she has not discussed any other evidence in the record in this argument. Accordingly, Kibe has not demonstrated that a triable issue of material fact exists with respect to her FMLA claim.

V. Family and Medical Leave Act Retaliation Claim

Kibe contends that the defendants retaliated against her for seeking FMLA leave. Her entire argument on this issue consists of two sentences concerning the legal principle that employers may not discriminate against employees who request FMLA leave, and the following paragraph: "Here, defendants have provided no admissible explanation for his [*sic*] denial of Ms. Kibe's FMLA leave. Yet, defendants concede, that they disciplined her for tardies and absences after she applied to leave. Plaintiff was disciplined after applying for leave to care for her medically incapacitated father. Bylaw, [*sic*] defendants retaliated against her. At a minimum, a triable issue exists."

Kibe's briefing is insufficient to present an argument on appeal. Her assertions of fact are not supported by any references to the record, in violation of the California Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Sky River*, *supra*, 214 Cal.App.4th at p. 741.) "It is an appellant's duty to direct the court to evidence that supports his arguments. [Citation.]. . . . Moreover, an appellant is required to not only cite to valid

legal authority, but also explain how it applies in his case. [Citation.] It is not the court's duty to attempt to resurrect an appellant's case or comb through the record for evidentiary items to create a disputed issue of material fact. [Citation.]" (*Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1, 10 (*Hodjat*).) Kibe has failed to demonstrate any error (*Bains v. Moores*, *supra*, 172 Cal.App.4th at p. 455) or to demonstrate the existence of a triable issue of material fact as to this claim.

VI. Exhaustion of Administrative Remedies

Although the trial court did not address the subject of exhaustion of remedies in its order granting summary judgment, Kibe argues on appeal that she exhausted her administrative remedies. As with her other arguments on appeal, Kibe's argument on this issue contains factual assertions unsupported by any references to the record, in violation of her obligation under the California Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Sky River*, *supra*, 214 Cal.App.4th at p. 741.) She offers sweeping and broad characterizations of the record and the legal effect of that record without offering any page references, substantive analysis, or explanation of how the legal authority she cites applies in this case. Specifically, she describes her complaint to the Department of Fair Education and Housing without identifying where in the record that complaint can be found and without discussing its allegations with any particularity, then asserts without explanation, "Plainly all of the allegations alleged in the complaint and uncovered in discovery are like or related to the DFEH complaint." She is similarly conclusory in her next assertion, "A reasonable investigation would have certainly covered [*sic*] such racial animus." Kibe then ends her argument with the pronouncement, "Thus Kibe has exhausted her administrative remedies and the action is not time barred because it resulted from a continual course of conduct." "It is not our place to comb the record seeking support for assertions parties fail to substantiate" (*Howard v. American National Fire Ins. Co*. (2010) 187 Cal.App.4th 498, 534), nor is it "our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) This conclusory argument is unsupported by legal and

factual analysis and is therefore forfeited. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).)

VII. Punitive Damages

Kibe claims that the trial court should not have summarily adjudicated her request for punitive damages. Our conclusion that Kibe has not demonstrated any triable issues of material fact or any error in granting the summary judgment with respect to her substantive causes of action is fatal to any claim for punitive damages. This argument is also forfeited because Kibe has failed to present any legally cognizable argument on appeal. Kibe has again set forth a series of general statements of law—in this instance concerning punitive damages and their availability in civil actions under the Fair Employment and Housing Act—followed by a few sentences of unsupported factual assertions and the conclusion that a triable issue of material fact existed. Her failure to identify, with citations to the record, any admissible evidence demonstrating a triable issue of material fact, as well as the absence of reasoned argument applying the relevant law to the evidence, constitutes a forfeiture of the issue on appeal. (See *Hodjat*, *supra*, 211 Cal.App.4th at p. 10; *Benach*, *supra*, 149 Cal.App.4th at p. 852.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J. SEGAL, J.*

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