Filed 3/15/12 Holley v. W addington North America CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WILLIE HOLLEY, Plaintiff and Appellant, v. WADDINGTON NORTH AMERICA, INC., et al., Defendants and Respondents.	B225623 (Los Angeles County Super. Ct. No. BC411692)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of Gene Ramos and Gene M. Ramos for Plaintiff and Appellant.

Fisher & Phillips, James J. McDonald, Jr., Rafael G. Nendel-Flores, and Shaun J. Voigt for Defendants and Respondents.

Appellant Willie Holley was terminated from his employment as a warehouse supervisor at Waddington North America, Inc. and WNA Comet West, Inc. (collectively, the company) when he did not return to work after 14 months of medical leave. Holley requested a leave of absence from his position in February 2007 and received 12 weeks of medical leave under the Moore-Brown-Roberti Family Rights Act (Gov. Code, § 12945.2) (hereafter CFRA).[1] Holley requested and received additional medical leave. By January 2008, Holley was cleared to return to work, but instead of returning to work, he submitted a doctor's note stating he was "totally incapacitated" and unable to return to work until April 21, 2008. The company terminated Holley in early April 2008. Holley sued for violations of the CFRA, disability discrimination and related causes of action under the California Fair Employment and Housing Act (§ 12940 et seq.) (hereafter FEHA), and wrongful termination. The company successfully moved for summary judgment, contending Holley was "totally incapacitated," and therefore he could not perform any available job at the company with or without a reasonable accommodation. We affirm the trial court's order granting summary judgment.

BACKGROUND

Holley's complaint against the company is based upon his disability arising from a work-related knee injury, and the company's alleged failure to accommodate his disability. The following undisputed facts were presented in support of, and in opposition to, the summary judgment motion.

1. *Undisputed Facts*

a. *Holley's Requests for Leave (February 2007 through March 2007)*

On February 22, 2007, Holley submitted a doctor's note to the company, requesting leave until March 1, 2007. The company granted the request and sent Holley a Family Medical Leave Act/California Family Rights Act (hereafter FMLA/CFRA) designation letter informing him of his CFRA rights. The company granted Holley's two additional requests to extend his leave until March 29, 2007.

---

[1] All undesignated section references are to the Government Code.

b. *Holley's Return to Work in April 2007 Delayed by Additional Requests*

On March 29, 2007, Holley was released with restrictions to return to work the next day. Holley's doctor approved a transitional light duty assignment, and the company asked him to report to work on April 3, 2007. Holley did not return to work and was granted additional leave.

On April 16, 2007, a company representative presented Holley with a temporary transitional duty agreement, which set forth Holley's work restrictions, and offered him the position titled "Rework of China Thongs." Holley did not return to work, submitting a doctor's note stating he needed to remain off work until May 17, 2007. Holley was notified by the company that his FMLA/CFRA leave expired as of May 18, 2007.

Holley received additional leave through June 28, 2007.

c. *Holley's Return to Work in June 2007 Delayed By Additional Requests*

In July, Holley's doctor released him to return to work with certain medical restrictions. The company sent Holley a letter stating his physician had approved a light duty assignment and to report to work on July 2, 2007. Holley returned to work but left after four or five hours because he experienced knee pain. Holley remained off work through July 6, 2007. His doctor extended his leave until September 4, 2007. Before his leave expired, Holley submitted another request for leave, and thereafter submitted doctor's notes stating he was " 'totally incapacitated' " until January 8, 2008.

d. *Holley Does Not Return to Work in January 2008*

On January 8, 2008, the company received a note from Holley's doctor that he was "partially incapacitated" and could return to work on January 14, 2008 with certain restrictions. The restrictions included no repetitive bending or stooping, no ascending or descending stairs, and no heavy lifting.

Company representatives met with Holley and offered him three options for transitional jobs that accommodated his restrictions. But, Holley was not offered his former position. Holley did not believe his work restrictions would have prevented him from resuming his former position. Holley recalls that during the meeting, a company representative told him that his "regular job duties do not exist." Holley accepted one of

the three transitional assignments with the title of "Quality Control Inspector Level I," but he also admitted writing on the form: "I am signing this document without agreeing to the terms I was told . . . that I could not work unless I sign this document but I need my job so therefore I am signing[.]"

On January 25, 2008, Holley wrote the company a letter stating his desire to return to work. The company responded by again offering the three transitional positions. The letter also informed Holley that the company could not offer him any other position without a certification from his doctor indicating he could perform other job duties. Holley wrote the company a letter on February 5, 2008, but the company did not respond.

On February 19, 2008, Holley submitted a doctor's note to the company stating he could return to work the next day and was restricted to "self-limiting duties." Holley told a company representative that he would have no medical restrictions when he reported to work on the following day. Holley stated in his declaration that his doctor told him he was capable of returning to work and would have to use his "judgment." Holley, however, did not report to work on February 20, 2008.

e. *Holley is "Totally Incapacitated"*

On February 25, 2008, Holley submitted a doctor's note to the company stating he was " 'totally incapacitated' " until April 21, 2008.

Holley was terminated on April 2, 2008. He testified that "at the time I was terminated . . . I was really unable to work." Holley was invited to apply for any open position when he was medically released to return to work. Holley was medically released in November or December 2008, but did not apply to the company.

2. *Summary Judgment Proceedings*

a. *Holley's Complaint*

Following his termination, Holley filed this action alleging eight causes of action: (1) wrongful termination in violation of public policy; (2) retaliation (§ 12940, subd. (h)); (3) violation of CFRA (§ 12945.2); (4) interference with CFRA leave (§ 12945.2); (5) retaliation in violation of CFRA (§ 12945.2); (6) disability discrimination (§ 12940, subd. (a)); (7) failure to make a reasonable accommodation (§ 12940, subd. (m)); and

(8) failure to engage in an interactive process to find a reasonable accommodation (§ 12940, subd. (n)).

Holley's CFRA claims allege the company denied him FMLA/CFRA leave, failed to designate his CFRA leave, failed to notify him of his CFRA rights, and denied him reinstatement and terminated him in retaliation for requesting CFRA leave. Holley's disability discrimination claim, and his claims for failure to accommodate and failure to engage in an interactive process to determine a reasonable accommodation, are based upon the company's failure to accommodate his disability, which led to his termination. Holley's retaliation claim is based upon his protected activity seeking medical leave and requesting a reasonable accommodation. The wrongful termination in violation of public policy claim depends on the alleged violations of the CFRA and the FEHA.

b. *Motion for Summary Judgment*

The company moved for summary judgment, or in the alternative summary adjudication of issues. As to the CFRA claims, the company argued Holley was given the requisite 12-week leave under the CFRA and an additional 11 months of leave before he was terminated. As to Holley's disability discrimination claim, it failed because Holley was "totally incapacitated," and he could not perform any job at the company with or without a reasonable accommodation. To defeat Holley's claims for failure to accommodate and failure to engage in an interactive process, the company repeated its argument that Holley was "totally incapacitated," at the time of his termination. The company also argued it had accommodated Holley by providing him 11 months of leave in addition to his CFRA leave, and offered him transitional positions. Regarding the retaliation claim, the company argued there was no nexus between any protected activity and Holley's termination. Since the FEHA and the CFRA claims failed, Holley's wrongful termination claim also could not stand.

Before submitting his opposition, Holley's counsel filed an ex parte application to continue the hearing on the motion for summary judgment pursuant to Code of Civil

Procedure section 437c, subdivision (h).[2] The trial court reviewed counsel's declaration in support of the application, finding that it contained conclusory statements rather than specifically stating what facts he believed could be obtained in discovery that were necessary to oppose the summary judgment. The trial court denied the ex parte application but invited Holley's counsel to raise the issue in his opposition. Holley did not oppose the summary judgment motion on this ground.

In opposition to the summary judgment motion, Holley submitted his declaration in which he stated that he accepted the temporary job on February 5, 2008, and even though his physician stated on February 25, 2008, that he was "totally incapacitated," he was not "physically limited as the term suggests." He states that "from February 5, 2008 to April 21, 2008, my knee condition did not prevent me from walking, driving and lifting." Holley testified that he believed he was retaliated against because he requested a reasonable accommodation. "And reasonable accommodation to my belief is doing whatever they can to get me back at work. And at the time I was terminated, and it will show later, I was really unable to work."

The trial court's minute order granting summary judgment reads, in relevant part as follows: "In response to the Court's question as to the real factual issues in dispute, plaintiff's counsel at oral argument indicated that the 'perhaps material' issues were numbers 59 and 71. But the evidence does not support counsel's assertion. As to issue 59, there is no *genuine* issue of fact as to whether plaintiff accepted defendants' offer of other positions. His written statement on January 14, 2008 and his deposition testimony contradict his later prepared declaration. As to issue 71, plaintiff's deposition testimony

---

[2] Section 437c, subdivision (h) of the Code of Civil Procedure states: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

is as defendants indicate." Fact 59, as set forth in the company's separate statement states: "Plaintiff did not communicate to Defendants that he would accept any of the offered positions."[3] Fact 71 states: "Plaintiff admits at the time of his termination he was 'unable to work.' " The trial court reviewed the remainder of plaintiff's separate statement, concluding there were no material facts in dispute.

On appeal, Holley contends the trial court erred in not granting his request for a continuance to obtain additional evidence to oppose the summary judgment motion. He also contends that his declaration and testimony create triable issues of fact, focusing primarily on his ability to return to work in February 2008.[4] We address each argument in turn.

DISCUSSION

Summary judgment is properly granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) On appeal after a summary judgment has been granted, we independently review the record to determine whether Holley's CFRA, FEHA, and related claims fail as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

1. *The Trial Court Did Not Abuse its Discretion in Denying Holley's Request to Continue the Summary Judgment Hearing*

Holley contends the trial court should have granted his ex parte application for a continuance to conduct additional discovery necessary to oppose the summary judgment

---

[3] Holley's separate statement does not track the company's separate statement. Fact 59 in Holley's separate statement states: "Instead, Plaintiff sent Defendants another letter on February 5, 2008 again requesting Defendants to revise the language of the Temporary Transitional Duty Agreement Defendants provided on January 14, 2008."

[4] Holley also contends that the trial court erred in its evidentiary rulings. The court's written order states: "The Court has ruled on the written evidentiary objections submitted by the parties." We find no record of the rulings, therefore our recitation of the undisputed facts assumes the parties' objections were overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 534.)

motion. Holley maintains he met the necessary showing because the case was not even a year old, and he had not completed the company representatives' depositions. His counsel stated the depositions would reveal the company's belief regarding Holley's ability to perform a specific job with or without accommodations, and their failure to engage in the interactive process after February 5, 2008.

The motion for a continuance must be supported by affidavits stating "that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" to the court. (Code Civ. Proc., § 437c, subd. (h).) When a party makes a good faith showing by affidavit demonstrating that a continuance is necessary to obtain essential facts to oppose a motion for summary judgment, the trial court must grant the continuance request. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395-396.) "Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under [Code of Civil Procedure] section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Holley contends that his counsel's declaration met the statutory requirements. A declaration in support of a request for continuance under Code of Civil Procedure section 437c, subdivision (h) must show "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623, abrogated on other grounds in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 987 & fn. 6.) In his appellate brief, Holley's counsel characterizes his declaration as "sufficient," citing to three pages of his eight-page declaration. Upon our review of these cited pages, the trial court did not abuse its discretion in concluding the declaration did not make the necessary showing.

Holley's counsel states in his declaration "[t]here are additional facts that exist[] that show after February 5, 2008, Defendants did not communicate with Plaintiff's

physician nor the Plaintiff himself, to determine if he was capable of performing his former job or alternative jobs." Holley's counsel also states "[t]here may be facts that exist[] that show Plaintiff's supervisors and the Human Resource Manager did not ask Plaintiff if he could perform the essential functions of his job, or the alternative jobs which Defendants offered him." Aside from being speculative and conclusory, these statements fail to show why Holley was not able to provide this information to his counsel. As the trial court noted, Code of Civil Procedure section 437c, subdivision (h), requires more than conclusory statements.

We reject Holley's contention that diligence may not be considered as a factor. (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 257.) Equally unavailing is Holley's contention that the trial court only considered diligence. Upon our review of the record, the trial court did not abuse its discretion in denying the ex parte application to continue the summary judgment hearing.

2. *The Trial Court Did Not Err in Determining Holley Failed to Show the Existence of any Triable Issue of Material Fact*

a. *The CFRA Claims Fail Because Holley was Granted Leave*

Holley's third, fourth, and fifth causes of action alleged violations of the CFRA (§ 12945.2). Under the CFRA, an eligible employee who suffers from a serious health condition that makes the employee unable to perform at least one essential job function is entitled to unpaid medical leave of up to 12 workweeks during a 12-month period. (§ 12945.2, subd. (a).) Upon granting the request, the employer must guarantee "employment in the same or a comparable position upon the termination of the leave." (*Ibid*.; see *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 516-517.) An employee who takes CFRA leave also is guaranteed that taking leave will not result in a loss of job security or in any other adverse employment action. (§ 12945.2, subd. (*l*)(1).) "While an employer's duties under the FEHA include extending reasonable accommodations to an employee if reasonable accommodations will enable the employee to perform his or her essential duties (Gov. Code, § 12940, subd. (a)(1), (2)), there is no similar provision in the CFRA requiring an employer to provide reasonable

accommodation to an employee returning from CFRA leave." (*Neisendorf v. Levi Strauss & Co.*, *supra*, at p. 517.)

Holley received 12 weeks of CFRA leave. The company informed Holley of his CFRA rights, including reinstatement to the same or equivalent job with the same pay, benefits, and terms and conditions of employment upon his return from leave. The company also notified Holley that his CFRA leave expired as of May 18, 2007. Holley did not return to work following the exhaustion of his CFRA leave. Therefore, on this ground alone, his claims for violation of the CFRA fail because the company had no obligation to hold his former position open during his extended leave.

Holley does not cite to any conflict in the evidence that he did not receive notice of his CFRA rights, or that he was denied his CFRA leave. Instead, he contends that there is a triable issue as to whether the company took adverse action against him for requesting and taking medical leave. At the conclusion of his CFRA leave, the company approved an additional 11 months of leave, and attempted on at least three occasions to accommodate Holley's work restrictions by offering him transitional positions. Holley's termination almost a year after his CFRA leave expired is too remote to establish retaliation for asserting CFRA rights. Thus, the CFRA claims were properly adjudicated in favor of the company.

b. *Disability Discrimination Claim Fails because Holley was "Totally Incapacitated" and Could Not Return to Work*

Holley's disability discrimination claim (sixth cause of action) is based upon his termination. Section 12940, subdivision (a) prohibits employers from discharging an employee because of a physical disability. In order to prevail on this claim, Holley bears the initial burden of showing he was terminated because of a disability, and he could perform the essential functions of the job with or without a reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 257-258; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 962-963.) Summary adjudication

turned on whether Holley could perform the essential functions of the job with or without a reasonable accommodation.[5]

The company presented evidence that it offered Holley a transitional position to accommodate his work restrictions. Although Holley maintains he accepted one of the positions, it is indisputable that he did not return to work and instead submitted a doctor's note stating he was "totally incapacitated," which the company argued established he could not perform any job at the company.

Holley attempts to raise a triable issue of fact by citing to his declaration, which states he "was not physically limited as the term suggests," and he was capable of performing his former position as a warehouse supervisor. These assertions establish only that Holley believed he could perform the essential functions of a particular job. Holley's belief, however, does not dispute the medical evidence that he was "totally incapacitated," at the time he was terminated. Rather, Holley asks the court to "weigh" the credibility of his doctor's diagnosis because his doctor had previously determined Holley was totally incapacitated, and then later released him to return to work. For purposes of summary judgment we do not weigh the evidence.

Holley next contends the company should have known that his doctor's use of the term "totally incapacitated," was a "prophylactic term [and not] conclusive of a person's ability to work." In other words, the company should not have relied upon his doctor's diagnosis. To support this assertion, Holley quotes *Gelfo v. Lockheed Martin Corp.*

---

5 In disability discrimination claims brought under the FEHA, California courts employ a three-stage burden shifting test. (*Guz*, *supra*, 24 Cal.4th at p. 354.) After the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact that the employer took its actions for a legitimate, nondiscriminatory reason. (*Id*. at pp. 355-356.) If the employer meets the burden, the presumption of discrimination disappears, and the plaintiff must establish that the proffered reason is a pretext for discrimination or offer some other evidence of a discriminatory motive. (*Id*. at p. 356.) Since the company has presented undisputed evidence that Holley cannot establish a prima facie case of disability discrimination, we need not consider the other two steps in the burden-shifting analysis.

(2006) 140 Cal.App.4th 34, 46, which states: " '[A]n employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions.' " (*Id*. at p. 49, fn. 11.) *Gelfo* is distinguishable because in that case both the employee's doctor and the employee testified the employee had no medical restrictions. (*Id*. at p. 49.) The employer, however, relied on medical restrictions from the employee's workers compensation case to conclude the employee could not perform the essential functions of the job offered. (*Ibid*.)

In this case, unlike *Gelfo v. Lockheed Martin Corp., supra*, 140 Cal.App.4th 34, Holley's doctor determined Holley was totally incapacitated, Holley presented his doctor's note to the company to extend his leave, and Holley testified he was unable to work. Retrospectively, Holley stated in his declaration that he could have resumed his former position as a warehouse supervisor. *Gelfo*, however, does not hold that a company must defer to an employee's opinion of his own medical condition, especially when the employee's opinion contradicts his doctor's opinion. Given the medical evidence presented, Holley's subjective opinion is facially insufficient to create a triable issue of material fact.

There also is nothing in the record to show Holley's doctor's diagnosis was objectively unreasonable. Holley was off work for 14 months, and ultimately was not released to return to work until November 2008. Thus, there is no factual dispute as to whether at the time of his termination Holley could perform any available position at the company with or without a reasonable accommodation. The trial court did not err.

c. *The Accommodation Claims Fail Because Holley was "Totally Incapacitated" and Could Not Return to Work*

Holley contends he has raised a triable issue of fact to pursue his FEHA claims for failure to reasonably accommodate his disability (seventh cause of action) and failure to engage in the interactive process to find a reasonable accommodation (eighth cause of action). His failure to accommodate claim is based upon his contention that the company should have reinstated him to his former position or granted him additional leave.

Holley's failure to engage in the interactive process claim is based upon his contention that the company did not respond to his letter dated February 5, 2008.

These related accommodation claims are statutory and distinct from Holley's disability discrimination claim. Section 12940, subdivision (m) makes it an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee." Subdivision (n) of section 12940 makes it an unlawful employment practice "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition."

Claims for a failure to make a reasonable accommodation in violation of section 12940, subdivision (m) and failure to engage in the interactive process in violation of section 12940, subdivision (n) require that the plaintiff show he or she is qualified to perform the essential functions of the position held or desired with the accommodation. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010, 1014-1019; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at pp. 977-978, 982.)

The company presented evidence that because Holley was "totally incapacitated," he could not perform any available position with or without a reasonable accommodation.

Holley contends it is disputed whether a reasonable accommodation existed, which included reinstating him to his former position or waiting 19 days for him to be medically cleared to return to work. The FEHA does not obligate an employer to choose the specific accommodation a disabled employee seeks. (See *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228-229.) Moreover, it was not a reasonable accommodation to require the company to wait indefinitely for Holley to return to work given his poor prognosis during the 14-month period he was granted medical leave. (*Id.* at pp. 225-226.)

Holley nevertheless contends the company had to show that these requested accommodations would have been an undue hardship to the company. (§ 12940,

subd. (m); see also *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1227.) The focus of our inquiry is on the accommodation, and whether the accommodation requested is a reasonable one. Based upon the indisputable evidence, Holley was unable to work with or without a reasonable accommodation.

The company also presented indisputable evidence that it engaged in the interactive process to determine a reasonable accommodation. After extending Holley's leave until January 2008, the company offered Holley three options for a transitional assignment. Although Holley focuses on the company's failure to respond to his February 5, 2008 letter, it is indisputable that he interacted with the company after February 5th, submitting additional medical information to enable him to return to work. Holley, however, did not return to work and instead submitted his doctor's note stating he was "totally incapacitated." Based upon the undisputed evidence, Holley's accommodation claims fail as a matter of law. Thus, the trial court did not err.

d. *Retaliation Claim Fails Because There is No Causal Link Between Holley's Termination and His Request for an Accommodation*

Holley's retaliation claim (second cause of action) is based upon his request for an accommodation to return to his former position. To establish a prima facie case of retaliation under the FEHA, Holley must show he engaged in a protected activity, the employer subjected him to an adverse employment action, and a causal link exists between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Holley cannot establish the third element of his prima facie case.

As stated, although Holley expressed his interest in returning to his former position, he was not terminated for requesting that accommodation. Holley submitted his doctor's diagnosis that he was totally incapacitated and unable to work at any position. Holley was terminated because no reasonable accommodation was available at the company.

Since Holley's FEHA and CFRA claims fail as a matter of law, his claim for wrongful termination in violation of public policy (first cause of action) also fails.

(*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 229.) Summary judgment was properly granted.

DISPOSITION

Judgment affirmed. Each party to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.