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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DIANE HAMPTON, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B276181 (Los Angeles County Super. Ct. No. BC566103)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Affirmed.

Law Offices of Levi Reuben Uku and Levi Reuben Uku for Plaintiff and Appellant.

Adam A. Grable for Defendant and Respondent.

Diane Hampton (appellant) appeals from a judgment entered after the trial court granted summary judgment in favor of Los Angeles Unified School District (LAUSD) on appellant's claims against LAUSD for discrimination based on race, discrimination based on national origin, and retaliation. Appellant has failed to establish error, therefore we affirm the judgment.

FACTUAL BACKGROUND

Appellant's employment history

Appellant is an African-American female, born on June 29, 1966, in Los Angeles, California. Appellant worked as a teacher for LAUSD from 1998 to 2013.

During the course of her employment at LAUSD, appellant engaged in repeated social confrontations with peers, emotional outbursts, and the belittling of her students. At one elementary school, the interim principal, Margaret B. Thomas, who is African-American, documented numerous inappropriate actions by appellant including reporting to work with a disheveled appearance; constantly yelling at students; not allowing students to drink water from the fountain; and directing students to go outside the classroom to sneeze or cough. Further, the students in appellant's classroom reported that appellant made odd sounds, ridiculed the children, and made faces at students and teachers after they left the room. After a conference with Principal Thomas, appellant reported "I am doing my best, it's the children; they want to take over."

At a different elementary school assignment, appellant had a severe outburst because one of the employees at the school was someone with whom she had previous confrontations. Appellant was referred to Employee Health Services due to concerns regarding her "ability to function in a classroom at any site."

There were problems wherever appellant was moved due to her "perceived persecution/harassment by other employees."

Appellant was first referred for a fitness for duty examination in 2007. In October 2007, appellant was physically escorted by her principal and the Local District School Services Director to LAUSD's physician due to concerns that she may be under the influence of drugs. During the interview by the physician, appellant was poorly focused, had difficulty answering pointed questions, and displayed poor hygiene. In addition, appellant carried on a one-sided conversation placing all blame on various circumstances or other people. Appellant claims that she had food poisoning on the day that she was sent to the LAUSD doctor, and that she has never used drugs.

A few days later, appellant had a breakdown, yelling at her class "I am sick of you, I am sick of you," repeatedly even after she was removed from the classroom and taken to the office. Appellant was again evaluated at Employee Health Services and was found to be highly anxious, paranoid and delusional. Appellant was referred to a psychiatric evaluation where a psychologist concluded that she had a "mixed personality disorder with passive-aggressive and paranoid personality features."

Appellant returned to work at a different elementary school but was again referred for a fitness for duty examination on March 4, 2009, due to chronic, severe, and pervasive emotional instabilities. The LAUSD physician concluded that appellant was not fit for duty due to her disheveled appearance, poor eye contact, pressured speech, and accusatory demeanor.

Appellant later returned to work at a new school where the principal continued to note problems, such as appellant yelling at her students while denying that she raised her voice; making inappropriate comments to students, staff, and parents about

students being homosexuals; and generally having a stained and soiled appearance. Upon being medically cleared to return, appellant was assigned to another classroom.

In September 2012, there was an incident in appellant's second grade classroom which she described as a riot. The principal observed appellant yelling at students. Appellant informed the principal in a raised voice that she wanted a student arrested for trying to hit her. Appellant alleged that a student was sexually assaulting other students. Appellant eventually grabbed her purse and left the classroom, closing the door very hard.

Administrative proceedings before the Commission on Professional Competence

On October 15, 2012, appellant was issued a Notice of Unsatisfactory Acts and Notice of Suspension. On February 11, 2013, appellant was issued a second Notice of Unsatisfactory Acts related to separate conduct.

On February 19, 2013, appellant was provided notice by LAUSD of its intent to dismiss her from her teaching position. A statement of charges was served on appellant, alleging unprofessional conduct (Educ. Code, § 44932, subd. (a)(1)); immoral conduct (§§ 44932, subd. (a)(1) & 44939); unsatisfactory performance (§ 44932, subd. (a)(4)); evident unfitness for service (§ 44932, subd. (a)(5)); persistent violation of or refusal to obey the school laws and regulations (§ 44932, subd. (a)(7)); and willful refusal to perform regular assignments without reasonable cause (§ 44939). The accusation set forth in detail the specific incidents supporting the allegations.

The hearing took place before the Commission on Professional Competence (the Commission) on April 1 through 4, and April 7 and 8, 2014. At the hearing, LAUSD presented numerous witnesses, including the principals of the various

schools where appellant worked, students, and a parent. All testified regarding their observations of appellant's inappropriate behavior. Student Damien B. testified that appellant called him "gay" in front of the entire class. A parent testified that appellant called her daughter a bum, dirty, and a lesbian. This testimony was confirmed by the student. LAUSD also provided evidence of below standards evaluations that appellant had received. Appellant never raised any issue regarding discrimination based on race or national origin, nor any issue regarding retaliation, at this proceeding.

The Commission found on behalf of LAUSD. The Commission made specific factual findings and sustained all of the charges in LAUSD's statement of charges. Appellant was dismissed as a teacher from LAUSD. Appellant did not appeal the Commission's decision to the Superior Court.

PROCEDURAL HISTORY

Following the administrative proceeding, appellant filed a complaint against LAUSD alleging (1) discrimination based on race; (2) discrimination based on national origin; (3) retaliation; and (4) constructive discharge. Following LAUSD's demurrer, the constructive discharge claim was dismissed.

LAUSD brought a motion for summary judgment as to the remaining three causes of action. LAUSD argued that appellant could not make a prima facie case of discrimination and that appellant was dismissed for cause. Further, LAUSD argued that the claims raised by appellant were subject to res judicata and collateral estoppel because appellant did not raise them in the administrative proceeding and did not appeal her dismissal. As to appellant's retaliation claim, LAUSD further argued that appellant did not engage in any protected activity and could not show retaliatory pretext.

Appellant opposed the motion. The trial court noted that a large portion of appellant's opposition discussed harassment and hostile work environment -- claims that appellant did not allege. Thus, these arguments were ignored. The court also noted that appellant's opposition was filed "in blatant disregard" of rule 3.1113(d) of the California Rules of Court, in that it was more than 30 pages long. Along with spacing and line issues, appellant failed to cite to the separate statement.

On May 27, 2016, the court issued a tentative ruling in favor of LAUSD. As to appellant's race and national origin discrimination claims, the court held that appellant could not establish these claims as a matter of law because she could not establish that she performed competently as a teacher. The court cited *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373 (*Miller*) for the proposition that "'when, as here, a pubic employee pursues administrative civil service remedies, receives an adverse finding, *and fails to have the finding set aside through judicial review procedures*, the adverse finding is binding on discrimination claims under the FEHA.'"[1] (*Id*. at p. 1382.) Thus, as in *Miller*, appellant was collaterally estopped from arguing that her termination was wrongful. Alternatively, the trial court noted that appellant could not establish that her termination was pretextual.

As to appellant's retaliation claim, the trial court held that appellant could not establish pretext. In addition, appellant could not establish retaliation because there was no evidence that she made any protected complaints.

The hearing on LAUSD's motion for summary judgment took place on May 27, 2016. Both parties had read the tentative

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[1] FEHA is the Fair Employment Practices Act (FEHA) (Gov. Code §§ 12900 et seq.)

decision and were willing to submit. The court adopted its tentative ruling as the final ruling on the motion. Judgment against appellant was entered on June 28, 2016.

On July 13, 2016, appellant filed her appeal from the judgment.

DISCUSSION

I. Standard of review

We review a grant of summary judgment de novo, deciding independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253 (*Nazir*).) The appellate court's task is to make "'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court . . . .' [Citations.]" (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 234-235.) We uphold the judgment if it is correct on any ground, regardless of the reasons given by the trial court. (*Bunnell v. Department of Corrections* (1998) 64 Cal.App.4th 1360, 1367 (*Bunnell*).)

II. Appellant is estopped from arguing that her termination was wrongful

"[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70, fn. omitted.) Thus, where a party fails to pursue an exclusive judicial remedy for reviewing administrative action, the administrative agency's decision achieves finality. (*Ibid.*)

In *Miller*, a city civil service employee appealed his dismissal to the Board of Civil Service Commissioners. (*Miller, supra*, 169 Cal.App.4th at p. 1376.) After the Board determined that that his discharge was appropriate, the employee failed to

challenge the Board's decision by administrative mandamus despite the Board's notice to the employee that he was entitled to seek "'judicial review of his discharge within the 90-day period specified in [Code of Civil Procedure] section 1094.6.'" The employee later filed a complaint against the City alleging six claims related to racial discrimination, harassment, and retaliation, among other things. (*Id.* at p. 1378.) The trial court properly sustained a demurrer to the employee's entire complaint. (*Id.* at p. 1379.) "Given the finality of the hearing examiner's determination, [the employee] was estopped from arguing in his complaint that his termination was wrongful. [Citation.]" (*Id.* at p. 1383.)

Similarly, here appellant did not seek judicial review of the Commission's decision, thus, it is final.

We reject appellant's argument that her failure to file a writ of administrative mandate was LAUSD's fault because LAUSD failed to provide the administrative record to appellant until after the 30-day deadline to file a writ of mandamus. Appellant claims that "[b]ut for the delay in turning over the record of the said proceedings until after the 30-days deadline to file a Writ of Mandamus, she would have timely prepared and filed" such a writ. Appellant cites no law suggesting that LAUSD was required to provide the administrative record to appellant. Further, appellant fails to explain how LAUSD interfered with her ability to file the petition. Appellant refers to an "Exhibit B," where LAUSD allegedly "feign[ed] inability to comply with [appellant's] request" but fails to provide a citation to the record allowing for review of the document.[2] In the absence of evidence

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[2] A party challenging a judgment has the burden of showing reversible error by an adequate record. Where a party fails to provide such a record, we need not consider the merits of her claims. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

to the contrary, we assume the trial court was correct in finding that "the document merely provides that records requests must be directed to the Office of Administrative Hearings rather than General Counsel."

LAUSD's failure to provide appellant with an administrative record does not excuse appellant's failure to file a writ of administrative mandamus. Under the circumstances, appellant is estopped from arguing that her termination was wrongful.

III. Summary judgment was properly granted as to appellant's discrimination claims

In order to establish a prima facie case of discrimination on the basis of race or national origin, appellant must establish four elements: (1) that she was a member of a protected class; (2) that she was qualified for the position sought, or was performing competently in the position held; (3) that she suffered an adverse employment action; and (4) some other circumstance suggests a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

Once a plaintiff establishes a prima facie case, the burden shifts to the employer to establish a legitimate reason for the adverse employment action. (*Guz, supra,* 24 Cal.4th at pp. 355-356.) If the employer carries its burden, the plaintiff must then prove that the employer's reasons were pretextual. (*Id.* at p. 356.)

The Commission's determination that appellant's termination was justified on the ground that she was unfit to teach is final and binding. Thus, appellant cannot, as a matter of law, establish the second required element of discrimination on the basis of race or national origin. Furthermore, appellant cannot, as a matter of law, establish that LAUSD's reasons for terminating her were pretextual. Because appellant cannot

establish her discrimination claims as a matter of law, summary judgment was properly granted as to these claims.

IV. Summary judgment was properly granted as to appellant's retaliation claim

To make out a prima facie case for retaliation, an employee must show: (1) that she engaged in a "protected activity;" (2) that her employer subjected her to an "adverse employment action," and (3) that there is a causal link between the protected activity and the employer's action. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 (*Flait*).) A retaliation claim is subject to the same burden shifting analysis as a discrimination claim. (*Ibid.*) If a plaintiff can establish a prima facie case, the employer must set forth a legitimate reason for the adverse action. The plaintiff must then show that the employer's proffered explanation was merely pretext. (*Ibid.*)

Appellant's retaliation claim fails for two reasons. First, she did not provide evidence that she engaged in a protected activity.[3] Second, even if she had been so engaged, LAUSD

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[3] The complaint alleged that appellant complained to the superintendent and area director that "Mr. Rios and Ms. Miranda were harassing [her] and that Ms. Miranda was 'attempting to teach a concept to the class Ms. Miranda had no knowledge of.'" However, the court noted that "during deposition, [appellant] testified that she did not recall speaking to [the superintendent] regarding the allegations in the Complaint." "Following an emergency, off-the-record aside with counsel, [appellant] suddenly recalled meeting with [the superintendent] and discussing race. . . . [Appellant] was unable to provide any additional information." The trial court was entitled to disregard appellant's sudden recollection of her conversation with the superintendent since it conflicted with her earlier deposition testimony. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 ["Admissions or concessions made during the course of discovery govern and control over contrary

terminated appellant for legitimate reasons. Given the binding nature of the Commission's decision, appellant cannot, as a matter of law, show pretext.

V. Sanctions

LAUSD seeks sanctions on the ground that appellant's appeal is frivolous. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a).) In addition, LAUSD seeks an award of its attorney fees under Government Code section 12965, subdivision (b). This provision permits a court, in its discretion, to award to the prevailing party in a FEHA action reasonable attorney fees and costs. A prevailing defendant may be entitled to attorney fees where the plaintiff's lawsuit was "'unreasonable, frivolous, meritless or vexatious'" or if "plaintiff continued to litigate after it clearly became so." (*Christiansburg Garment Co v. Equal Employment Opportunity Comm'n* (1978) 434 U.S. 412, 422.)

LAUSD points out that after the trial court properly concluded that appellant's lawsuit was subject to res judicata and collateral estoppel based on the administrative proceedings, no reasonable attorney could have pursued the matter on appeal. Appellant requests that we remand the matter to the superior court for a determination of attorney fees for LAUSD.

Respondent cites *Sui v. Landi* (1985) 163 Cal.App.3d 383 (*Sui*) in support of its position that sanctions are warranted. In *Sui,* the appellant presented no coherent argument. In addition, she appealed on the basis of factual arguments but only provided a partial clerk's transcript.[4] Thus, the Court of appeal was

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declarations lodged at a hearing on a motion for summary judgment"].)

[4] In this matter appellant has failed to provide an adequate record. She did not provide a reporter's transcript, or a suitable substitute. Nor did she provide copies of the complaint, motion

prevented from reviewing the evidence and evaluating her arguments. The court noted that the appellant's failure to request preparation of a reporter's transcript was "deliberate, not accidental, probably to reduce her costs of appeal." (*Id.* at p. 386.) Further, her appeal was "unquestionably frivolous, vexatious and without merit," and "unjustly imposed a waste of public funds upon the taxpayers of California." Under the circumstances, the court imposed a penalty of $5,000. (*Ibid.*)

Appellant argues that sanctions should not be imposed because her appeal presents a novel question: whether the doctrine of res judicata should bar the case when the district did not timely turn over the administrative hearing records until after appellant's time to file a writ had passed.

Although appellant provided no legal support for this novel issue, we find that appellant raised an arguable issue, thus the appeal was not frivolous. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1204.) LAUSD's request for sanctions is denied.

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for summary judgment, declarations and separate statement of undisputed facts in support of the motion. Respondent provided the missing documents in a motion to augment the record, which was granted.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs of appeal.

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_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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