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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

IRENE MADRID, Plaintiff and Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent.	B231139 (Los Angeles County Super. Ct. No. LC085446)

APPEAL from a judgment of the Superior Court of Los Angeles Frank Johnson, Judge. Affirmed.

Jones & Mayer and Harold W. Potter for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M.B. Fowler, Senior Assistant Attorney General, Michael E. Whitaker and Ernesto J. Fong, Deputy Attorneys General for Defendant and Respondent.

Appellant Irene L. Madrid contends that the trial court improperly granted summary judgment on the retaliation claim she brought against her employer, respondent the Department of Motor Vehicles (DMV). The trial court found appellant had failed to demonstrate an adverse employment action. We agree, and further conclude her claim was barred by the applicable statute of limitations. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Prior Lawsuit*

Madrid, who is Hispanic, has been employed by the DMV for almost 30 years. In a prior lawsuit, filed in November 2005, Madrid alleged discrimination by the DMV and certain employees under the California Fair Employment and Housing Act (FEHA, Govt. Code, § 12900 et seq.) (the prior lawsuit). Madrid contended that on multiple occasions she sought promotion to the position of Region Administrator (RA), that she met and exceeded the qualifications for the position, that from 1993 onward she served as the backup or acting RA in the absence of the person who held the position, and that less qualified individuals of different races and genders were selected to fill the openings for the position of permanent RA. She alleged that the failure to promote her was due to her race and gender and that there were no female Hispanic RA's at the DMV. [1] The prior lawsuit was dismissed by order dated February 2007.[2]

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[1] The prior lawsuit also contained a retaliation claim based on a July 2004 letter Madrid sent complaining of discrimination against Hispanics.

[2] The defendants had filed a motion for judgment on the pleadings based on the statute of limitations. Madrid filed no opposition and made no appearance at the hearing in December 2006.

B. *The Underlying Complaint*

In March 2009, Madrid filed an administrative complaint, contending that since the cessation of the prior lawsuit, her supervisor, Kathy Bibbs -- the RA for her region, Region V -- had retaliated against her by no longer assigning her to perform as acting RA when Bibbs was absent. Madrid stated that "[i]n order to be competitive for a [RA] position, one must be able to articulate current experience one has had in the acting capacity of said position" and that "those candidates that have more time performing, as an Acting [RA], would be more apprised of current issues impacting the division and department and thus be more likely to be hired [as the permanent RA]."

In May 2009, Madrid filed the underlying lawsuit. In her complaint, she asserted a FEHA retaliation claim, contending that her superiors retaliated against her for filing the prior lawsuit by no longer assigning her to serve as acting RA.[3] This allegedly "stripped her [of] higher level supervisory experience and excluded her from the flow of business information to aid her career enhancement and discouraged, if not threatened, her from seeking further promotion." She contended that as a result of the retaliation, she "has lost, and continues to lose, the opportunity [to be paid] at a higher pay scale within the DMV . . . ."[4]

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[3] Madrid's complaint stated that the retaliation began after she ceased prosecuting the prior lawsuit, effectively December 2006. However, she testified at her deposition that she was appointed acting RA for only two days in 2006, both in January, and that the retaliation began shortly thereafter.

[4] The complaint also asserted that after Madrid filed the prior lawsuit, the DMV for the first time, promoted female Hispanic employees to the position of RA.

C. *Motion for Summary Judgment*

In July 2010, the DMV moved for summary judgment, contending first, that Madrid had not suffered any materially adverse employment actions; second, that there was no causal link between the reduction in Madrid's role as acting RA and the prior lawsuit; third, that the evidence established a legitimate, non-retaliatory reason for the temporary reduction in Madrid's acting RA role; and finally, that the statute of limitations barred Madrid's claim, as the alleged retaliatory conduct began in January or February 2006 but her complaint was not filed until 2009, and the conduct on which her claim was based "acquired permanence or finality" by 2007, when "three positions for [RA] opened up at the DMV and she decided to not apply because she felt she had been 'put out to pasture.'"

To support that Madrid had suffered no adverse employment action, the DMV asserted that Madrid had not been demoted or suffered a salary decrease, was not denied a salary adjustment or raise, had never received discipline, and that the duties and responsibilities of her position -- Manager V -- had never been changed. Its moving papers established that during Madrid's lengthy career with the DMV, she had received outstanding performance evaluations and had handled many important assignments, including: *Skelly* officer beginning in 1993;[5] member of the budget committee from 1994 through 1999; workers' compensation coordinator beginning in 2000; member of the "Industry Service Center" committee in 2001; member of the "Achievement of Excellence" program beginning in 2001; and manager of the "File Building" program and "Adverse Action" module beginning in 2001. In addition, she served as acting RA on numerous occasions: nine days in 1993, five days in 1994, 13 days in 1995, 29 days in 1996, 17 days in 1997, 36 days in 1998, ten days in 1999, 20 days in 2000,

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

16 days in 2001, 16 days in 2002, 13 days in 2003, 15 days in 2004, 13 days in 2005 and two days in 2006. In 2009 and 2010, she served as acting RA for eight days and four days, respectively. The DMV conceded that Madrid did not serve as acting RA in 2007 and 2008, but contended that the reduction in Madrid's role as acting RA did not constitute an adverse employment action because it was not one of her regularly assigned functions but an extra opportunity she was sometimes offered, and she was assigned other high-level duties and responsibilities during the pertinent period which allowed her to maintain her competitiveness for promotion.

Bibbs, Madrid's supervisor and the RA for Madrid's region from August 2004 through April 2010, submitted a declaration in support of the motion. She denied basing any decisions or recommendations concerning Madrid on the prior lawsuit. Bibbs asserted that during the period she was Madrid's supervisor, she assigned "numerous high-level opportunities" to Madrid, including: (1) appointing her to the panel responsible for hiring a field office manager; (2) appointing her to the "Office Assessment Review" team, which was formed to assess morale and identify management/employee issues that needed correction; (3) appointing her to the "Fresh Eyes" team, which assessed ways for field offices to improve productivity and reduce wait times; (4) appointing her as the DMV representative to a group formed to develop an exam for manager trainees; (5) appointing her to the "Ignite Team," which reviewed field office operations, customer service and general practices; and (6) giving her the responsibility of writing program information reports for the director of the DMV.[6] Bibbs nominated Madrid for a

[6] The DMV set forth in its statement of undisputed facts -- and Madrid did not dispute -- that she held these positions, that she was appointed to them when Bibbs was her supervisor, and that the appointments/assignments were first made between 2005 and 2008.

"Supervisor Recognition Award" in 2008. In addition, she did nothing to interfere with Madrid's continued participation in her pre-existing notable functions, such as her positions as workers' compensation coordinator and departmental *Skelly* officer.[7]

To support the lack of causal link with the prior lawsuit and legitimate, nonretaliatory reason for the failure to appoint Madrid as acting RA from early 2006 through 2008, Bibbs stated that beginning in February 2005, Leroy Ramirez was assigned to work with her as her administrative assistant. She and Ramirez "worked closely on improving Region V's operations and customer service." Based on this work experience with Ramirez, Bibbs assigned Ramirez as acting RA on those occasions between December 2005 and November 2008 when she was absent. On the rare occasions when both she and Ramirez were absent, Bibbs appointed Billie Moritz to be acting RA. The practice ended in late 2008 because Ramirez was promoted to manager of the Glendale office. At that time, Bibbs began rotating the acting RA position between Madrid and two others. Bibbs stated that when she instituted the practice of using Ramirez as the sole acting RA,

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[7] Bibbs also pointed out that Madrid, unlike others who attained the promotion to RA, had never attended the DMV Executive Leadership Academy. The DMV submitted the declarations of other RA's, who discussed their qualifications prior to attaining the position. Rafaela Escalante, RA for Fresno since 2007, stated that prior to her promotion, she served as acting RA for only approximately 15 days over a period of several years and that she attended the DMV Leadership Development Academy. Gloria Rivera, RA for El Cajon since 2007, stated that prior to her promotion, she served as acting RA for only 25 days over a period of two years and that she attended the DMV Leadership Academy Mid-Manager Program. Babette Williams, RA for Sacramento since 2008, stated that prior to her promotion, she served as acting RA for eight months and that she attended the DMV Leadership Development Academy.

she was unaware of Madrid's prior lawsuit, which she did not hear about until May 2006.[8]

To support the statute of limitations defense, the DMV presented evidence that in the summer of 2007, three RA positions came open and that Madrid did not apply for any of the positions. Asked at her deposition why she did not apply for any of the 2007 openings or for RA positions that opened in 2008 and 2009, Madrid responded: "[O]nce I filed [the prior lawsuit], that was it for me; being used in that capacity [or] position of confidence and trust, of being given that level [of] hands-on experience in the regional level. So I was being already retaliated against at the local level. I really didn't see that there would be any hope as far as competing for any position until this lawsuit was resolved." She further stated that she was sure the retaliation she was "already experiencing . . . at the local level" would "just continue" at the executive level and that she was "being put out to pasture for being a whistleblower."

In her opposing papers, Madrid sought to establish the importance of having experience as acting RA when seeking a promotion to RA. Madrid submitted excerpts from Bibbs's deposition in which she testified that she had performed as acting RA prior to her promotion to the position and that she had discussed her experience as acting RA in her statement of qualifications when seeking the RA

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[8] Leroy Ramirez's declaration in support of the motion repeated some of the facts set forth in Bibbs's declaration. Ramirez stated that beginning in December 2005, Bibbs used him as the primary acting RA whenever she was out of the office and that he made decisions concerning the region on her behalf. Ramirez also stated that when both he and Bibbs were absent, the acting RA was Billie Moritz. Lidia Markiz, who held the same position as Madrid (Office Manager V), stated in her declaration that prior to December 2005, she worked as acting RA for approximately five days and that when Ramirez became primary acting RA, her experience in the role was "substantially reduced."

position she ultimately achieved. Bibbs testified that serving as acting RA enhanced her "desirable qualifications" and her ability to obtain the promotion.[9]

Madrid also sought to raise issues of fact concerning the truth of Bibbs's assertion that Ramirez -- and occasionally Moritz -- were the only persons assigned as acting RA between 2006 and 2008. She presented the declaration of William Lynn Watkins, a former Manager V in Glendale, who stated that the primary acting RA's through April 2007 were Lidia Markiz and Marc Bailey. After April 2007, when Watkins receive his promotion to Manager V, he "shared the primary duties as the [RA] back up or Acting [RA] with Lidia Markiz" in Bibbs's absence. When Watkins submitted his statement of qualifications for an RA position in 2007, he noted his experience as acting RA. Bibbs reviewed the statement of qualifications and did not challenge Watkins's assertion that he had been performing as acting RA.[10]

With respect to the statute of limitations, Madrid did not dispute any of the facts set forth in the DMV's statement of disputed facts pertinent to this defense, but argued that because the "adverse" action of failing to assign her as acting RA

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[9] The DMV pointed out in its reply memorandum and in its brief on appeal that in the excerpts of Bibbs's deposition submitted by Madrid, Bibbs also testified that she was aware of at least one person who attained the position of RA without ever having served as acting RA and others who became RA's after having little or no acting RA experience, and that there were other opportunities for employees to demonstrate their qualifications for the position.

[10] Madrid submitted other evidence to dispute Bibbs's testimony that Ramirez was the sole acting RA from early 2006 through 2008. Cynthia Chavez-Alvarado, Palmdale office manager from December 2005 through November 2008, stated in a declaration that to her knowledge the primary acting RA during this period was Lidia Markiz. Joanne Mitchell, former manager of the Newhall office, stated that Ramirez, Markiz and Watkins all held the position of acting RA from December 2005 through November 2008. Gilbert Aragon, who began working in the regional office in 2004 and was promoted to manager of the Glendale office in early 2007, recalled that Markiz was "frequently" the acting RA in Bibbs's absence during the period from December 2005 through January 2007.

continued through 2008, the administrative complaint and lawsuit were timely filed within the applicable one-year limitations period.

The court granted the motion for summary judgment. At the hearing, the court explained: "I really don't see how [Madrid] has met the prima facie burden of proof. [¶] Clearly, she did engage in a protective activity, but I see no evidence whatsoever that she suffered any adverse employment action other than a relatively routine change in her duties. [¶] She had no reduction in salary, no loss of any promotion that she applied for because she didn't apply for any; and really, there's just no evidence whatsoever to suggest that she suffered any adverse employment action. [¶] As far as her concerns about [Bibbs] [¶] . . . [¶] [a]nd generally, the policies of her supervisors in giving her slightly different duties than that which she would have preferred to have had, I think, really, that the court has to defer to a certain extent to the employer's actions. [¶] I think the case of [*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 100] clearly stands for the proposition that an employer has wide latitude in making good faith judgment about its business decisions." The court made a number of specific findings in its order, including that the reduction in Madrid's role as acting RA began in February 2006; that Madrid did not apply for any of the RA positions that came open in 2007 because she felt "'put out to pasture'"; and that Bibbs assigned Madrid to "many new high-level opportunities after 2005."[11] Judgment was entered in favor of the DMV. This appeal followed.

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[11] The trial court also found that "Bibbs selected Leroy Ramirez as her Acting [RA] from December 2005 through November 2008 based on [his] work experience." Madrid contends the trial court erred in finding that the DMV established this as an undisputed fact. Because we find Madrid's claim fails on other grounds, we need not address this finding.

DISCUSSION

A. *Burden of Proof and Standard of Review*

"The elements of a claim for retaliation in violation of section 12940, subdivision (h), are . . . : (1) the employee's engagement in a protected activity, i.e., 'oppos[ing] any practices forbidden under this part'; (2) retaliatory animus on the part of the employer; (3) an adverse action by the employer; (4) a causal link between the retaliatory animus and the adverse action; (5) damages; and (6) causation." (*Mamou v. Trendwest Resorts, Inc*. (2008) 165 Cal.App.4th 686, 713.) "Proof of two of these elements -- the second and fourth -- is likely to depend on circumstantial evidence, since they consist of subjective matters only the employer can directly know, i.e., his attitude toward the plaintiff and his reasons for taking a particular adverse action. Given the resulting difficulties of proof, the courts have fashioned a special presumption shifting the burden of production -- but not persuasion -- to the employer upon a prescribed showing by the plaintiff." (*Ibid*.) "To establish a prima facie case of retaliation under the FEHA, a plaintiff must show '(1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.'" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1020.)

When an employer moves for summary judgment in an employment discrimination case, "the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of the plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors." (*Hicks v. KNTV Television, Inc*. (2008) 160 Cal.App.4th 994, 1003.) "If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory

factors, the employer will be entitled to summary judgment 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.)

Following a grant of summary judgment, an appellate court reviews the record de novo. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue. [Citation.]" (*Silva v. Lucky Stores, Inc*. (1998) 65 Cal.App.4th 256, 261.) "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." (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

B. *Adverse Action*

To support a claim for retaliation under the FEHA, the employee must demonstrate that he or she has been subjected to an adverse employment action. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1049.) An "adverse employment action" is one that "materially affects the terms, conditions, or privileges of employment." (*Id*. at p. 1051.) "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id*. at p. 1054.) "[A]dverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination [and

anti-retaliation] provisions of [FEHA]." (*Id*. at pp. 1054-1055.) In considering whether an employee has been subjected to adverse treatment, "it is appropriate to consider the totality of the circumstances . . . ." (*Id*. at p. 1036.)

We conclude that under the totality of the circumstances, the reduction in Madrid's assignment to the position of acting RA, standing alone, did not constitute an adverse employment action. The evidence established that serving as acting RA was not part of Madrid's job responsibilities. Nor was she guaranteed an assignment to serve in that capacity. Nonetheless, she was periodically selected to serve as acting RA over a lengthy span of time, for periods that varied from year to year. At the time of the alleged retaliation, Madrid's experience as acting RA already exceeded that of others who had attained the position of RA. At the same time, other opportunities regularly arose for managerial employees to prove their value to the organization and their ability to assume a leadership role. Madrid did not dispute that during the same period Bibbs was allegedly "retaliating" against her and "putting her out to pasture" by utilizing others as acting RA, Bibbs appointed her to: the panel responsible for hiring a field office manager; the team designed to assess and improve morale among employees; the team assigned the task of improving productivity and wait times at DMV field offices; the team created to visit field offices and improve operations, customer services and general practices; and a group formed to develop an exam for manager trainees. Bibbs also gave her the responsibility of writing program information reports sent to the director of the DMV, nominated her for a "Supervisor Recognition Award" in 2008, and undertook no effort to remove Madrid from the important committees and positions to which she had already been assigned prior to Bibbs's tenure as RA. Under these circumstances, the fact that Bibbs was unable or unwilling to accommodate Madrid's aspirations by also appointing her to fill in as RA does not constitute the type of adverse action needed to support a retaliation claim.

Moreover, as the DMV pointed out, there was no actual change in Madrid's pay, benefits, status, or job responsibilities. No one suggested or even implied that Madrid could or should not seek higher office. An employee such as Madrid who seeks to pursue a retaliation claim on the basis that her promotional aspirations are being thwarted must be able to do more than identify a single potentially advantageous position that was denied her when the evidence also clearly shows that she was assigned to a multitude of other important roles that enhanced her promotability by the very supervisor whom she accuses of improper motives. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454 [employer's action must be "'"more disruptive than a mere inconvenience or an alteration of job responsibilities,"'" to rise to the level of adverse employment action].)

C. *Statute of Limitations*

Although raised in the DMV's motion for summary judgment and again on appeal, the trial court did not address the argument that Madrid's retaliation claim was barred by the statute of limitations. We conclude it provides an alternative ground for affirming the trial court's grant of summary judgment.[12]

Before filing a lawsuit for harassment or retaliation, a party must file an administrative complaint, which must be filed within one year of the date on which the unlawful practice occurred. (*Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319, 323.) Madrid filed her administrative complaint in March 2009. According to Madrid, the statute had not run because the practice of which she complained continued through the end of 2008. The continuing violation doctrine

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[12] (See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878 ["The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale."].)

"allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period." (*Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 802 (*Richards*).) In *Richards*, the court held that a continuing violation may exist if "the employer's unlawful actions are (1) sufficiently similar in kind -- recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]" (*Id*. at p. 823.) "[I]n a retaliation case . . . the FEHA statute of limitations begins to run when an alleged adverse employment action acquires some degree of permanence or finality." (*Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at p. 1059.) An action achieves permanence when it "'trigger[s] an employee's awareness of and duty to assert his or her rights,'" or "'indicate[s] to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.'" (*Richards*, *supra*, at p. 814, quoting *Berry v. Board of Sup'rs of L.S.U*. (5th Cir. 1983) 715 F.2d 971, 981.) The permanence factor "is akin to equitable tolling, focusing on when the employee was put on notice that his or her rights had been violated." (*Richards*, *supra*, at p. 814.)

Madrid's administrative complaint was filed in March 2009, over three years after the practice of which she complains began, which according to Madrid's own testimony was in January or February 2006.[13] The undisputed evidence also established that by the middle of 2007, she was so sure that the practice had

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[13] As noted above, Madrid's complaint alleged the discrimination commenced after the dismissal of her first lawsuit in December 2006. Even using this later date, her suit is time-barred.

rendered her unpromotable, that she did not even apply for any of the three RA positions that opened that year. By her own account, as of the summer of 2007, she had concluded that she had been "put out to pasture," and that any attempt to seek promotion would be futile. Although the failure to assign her as acting RA may have continued for another year, it is clear that under Madrid's own version of events, she was fully aware of what she believed was the adverse consequence of the alleged retaliation and thus had no reason to further delay asserting her complaint. (See *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042 ["[W]hen the situation reach[es] a state of permanence, then the plaintiff no longer has any reason to delay filing."].) Madrid was "put on notice" by mid-2007 at the latest and provided no justification for waiting more than a year after she had allegedly been rendered unpromotable to file the administrative complaint and the underlying lawsuit. (*Richards*, *supra*, 26 Cal.4th at p. 814.)

DISPOSITION

The judgment is affirmed. The DMV is awarded its costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.