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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ERNEST SUMEN, Plaintiff and Appellant, v. SILVER STAR A.G., LTD., et al., Defendants and Respondents.	B280523 (Los Angeles County Super. Ct. No. BC563960)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

David M. Shaby & Associates, John J. Jackman for Plaintiff and Appellant.

Callahan, Thompson, Sherman & Caudill, Lee A. Sherman and Kyle R. DiNicola for Defendants and Respondents.

Ernest Sumen sued his former employer, Silver Star A.G., LTD., for wrongful termination, alleging Silver Star terminated his employment because he complained about unsafe working conditions. Silver Star moved for summary judgment or adjudication, asserting Sumen was discharged not because he complained about a safety concern but because his job performance was poor. The trial court found no triable issue existed as to whether Sumen either complained about a safety issue or was terminated because of a complaint, and granted Silver Star's motion for summary judgment.

We conclude no triable issues exist as to whether Silver Star retaliated against Sumen for reporting safety concerns. Accordingly, we affirm the judgment.

BACKGROUND

Silver Star Automotive Group, Silver Star A.G., LTD., and Silver Star Thousand Oaks (collectively Silver Star) operate automobile dealerships and service and parts facilities. Sumen worked at Silver Star as a service and parts director. His job duties included supervising approximately 30 employees, including a service manager, parts manager, and shop foreman. In the late summer of 2012, Sumen was informed by a shop foreman that an automobile hoist was defective and unsafe. Sumen had the hoist inspected and tagged as "out of service," instructed employees not to use it, and reported this development to Bill Little, the general manager, whose responsibility it was to see that the hoist was repaired, replaced, or discarded.

The hoist later went back into service before being repaired, still bearing the "out-of-service" tag.

About four months later, Shibolet Thomas, Silver Star's human resources director, notified Sumen that his employment

was being terminated because he had failed to remedy unsafe working conditions in the repair shop. When Sumen stated he was unaware of any unsafe working condition, Thomas specified that Sumen had failed to repair or replace the defective hoist. Sumen informed Thomas that the hoist presented no danger because it was not being used, whereupon Thomas stated that the hoist was, in fact, being used. Sumen responded, "Well, that's news to me, because I know that [the shop foreman] tagged the hoist out of service; and so I'm not really sure what happened there."

Sumen filed a complaint with the Department of Fair Employment and Housing (DFEH), wherein he declared that the proffered reason for his termination "was a pretext based of [*sic*] non-existent safety issues . . . ." He stated that "[c]ertain equipment used by shop employees had been tagged as unsafe for use by our staff. The equipment was not used and no one suffered any injury from the equipment. The equipment simply remained used [*sic*: unused] and unrepaired for a period of time that the HR representation [*sic*] decided was too long for her liking."

Sumen then sued Silver Star for, as alleged in the first amended complaint, wrongful termination in violation of Labor Code sections 6310 and 6311; wrongful termination in violation of public policy; breach of implied contract; and unfair competition in violation of Business and Professions Code section 17200, et seq.

Silver Star moved for summary judgment or adjudication, arguing Sumen had engaged in no protected activity, and even if he had, no causal link existed between any such activity and his termination, as he was discharged for failing to oversee repairs of

equipment at the shop, not because he had complained about a defective hoist four months prior to termination. In support of Silver Star's motion, Thomas declared that "[o]ne of the main reasons [Sumen] was terminated was due to the fact that he was failing to manage the safety and repairs of equipment in the shop. Simply put, I was informed and therefore reasonably believed that [Sumen] allowed a defective automobile hoist to remain in a defective condition in the shop for at least one year prior to his termination. When I learned that [Sumen] did not follow-up . . . to ensure the defective hoist was replaced, we decided to" terminate his employment.

In support of its motion, Silver Star offered the transcript of Sumen's deposition, wherein he testified that he had been unaware the hoist was being used after he had had it red-tagged. The employer also offered Sumen's DFEH complaint, in which he had declared under penalty of perjury that the defective hoist was a "non-existent safety issue[]," as it "was not used."

In opposition to summary judgment, Sumen declared he had had the hoist red-tagged, and was "not concerned that the technicians would use the hoist after they were told about it, because they were concerned about it as well." Sumen declared he had not been authorized to replace the defective hoist, but instead properly referred the matter to his supervisor, Bill Little, the general manager.

The trial court found no triable issue existed as to whether Sumen complained about an unsafe working condition before he was terminated. Even if he had complained, the court found no triable issue as to whether there was a causal connection between the complaint and the adverse employment action. Accordingly,

the court granted Silver Star's motion for summary judgment and denied his motion for new trial.

Sumen timely appealed.

DISCUSSION

Sumen contends the court erred in finding no triable issue as to whether he complained about an unsafe working condition or whether there was a causal connection between any such complaint and his termination.

I. Standard of Review

A defendant is entitled to summary judgment when it presents material facts sufficient to establish that one or more of the elements of a plaintiff's cause of action cannot be proved, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (c), (o)(1) & (o)(2).) If the defendant's motion makes such a showing, the plaintiff's opposition must demonstrate the existence of one or more disputed issues of material fact as to the cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Unless a triable issue of material fact exists, no trial is required and the defendant is entitled to judgment on that claim as a matter of law.

On appeal, we apply an independent standard of review to determine whether a trial is required—whether the evidence favoring and opposing the summary judgment motion would support a reasonable trier of fact's determination in the plaintiff's favor on the cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In doing so we view the evidence in the light most favorable to the party opposing summary judgment. (*Id.* at p. 843; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) We accept as true the facts shown by the evidence offered in opposition to

summary judgment and the reasonable inferences that can be drawn from them. (*Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385-1386.)

II. Labor Code Section 6310

An employer may presumptively terminate an employee at will and for no reason. (Lab. Code, § 2922.)[1] "A fortiori, the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment." (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 350 (*Guz*).) But the Labor Code makes it unlawful to discharge or discriminate against an employee for having "[m]ade any oral or written complaint to . . . his or her employer" about unsafe working conditions. (§ 6310, subd. (a)(1).)[2]

Because direct evidence of unlawful retaliation is seldom available, courts use a system of shifting burdens to aid in the presentation and resolution of such claims at trial. (*Guz*, *supra*, 24 Cal.4th at p. 354; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).) To establish a prima facie case of retaliation under section 6310 an employee must demonstrate that he engaged in protected activity and was

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

[2] Section 6310, subdivision (a)(1) provides: "No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: [¶] (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative."

subjected to an adverse employment action, and some causal link exists between the activity and the adverse action. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); see *Guz*, *supra*, at p. 355.) If the plaintiff establishes a prima facie case, a presumption of retaliation arises.

The employer may rebut the presumption by producing admissible evidence that it discharged the employee for a legitimate nonretaliatory reason. (See *Guz*, *supra*, 24 Cal.4th at pp. 355-356; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) A legitimate reason is one that is facially unrelated to any prohibited retaliation and which, if true, would preclude a finding of retaliation. (See also *Guz*, *supra*, at p. 358.) Making this showing is " 'not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision [citation].' " (*Swanson v. Morongo Unified School District* (2014) 232 Cal.App.4th 954, 965 (*Swanson*).)

If the employer carries its burden, the burden shifts back to the employee to produce substantial evidence that the employer's justification for its decision is either untrue or pretextual, or that the employer acted with retaliatory animus, or a combination of the two. (See *Guz*, *supra*, 24 Cal.4th at p. 356; *Hersant*, *supra*, 57 Cal.App.4th at pp. 1004-1005; *Swanson*, *supra*, 232 Cal.App.4th at p. 966 [employee burden to produce evidence from which " 'a reasonable trier of fact could conclude the employer engaged in intentional discrimination' "].)

To satisfy this burden, the employee may not simply deny the credibility of the employer's witnesses or speculate as to its motive. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862.) Nor is it enough to show that the employer's reasons

were unsound, wrong, or mistaken. (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005 ["What the employee has brought is not an action for general unfairness but for . . . discrimination"].) Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]' " (*Ibid*.) "[E]vidence that the employer's claimed reason is *false*—such as that it conflicts with other evidence, or appears to have been contrived after the fact—will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful. This does not mean that the factfinder can examine the employer's stated reasons and impose liability solely because they are found wanting. But it can take account of manifest weaknesses in the cited reasons in considering whether those reasons constituted the real motive for the employer's actions, or have instead been asserted to mask a more sinister reality." (*Mamou v. Trendwest Resorts, Inc*. (2008) 165 Cal.App.4th 686, 715.)

If, considering the employer's innocent explanation for its actions, the evidence as a whole permits no rational inference that the employer's actual motive was retaliatory, the employer is entitled to judgment. (See *Guz*, *supra*, 24 Cal.4th at p. 361.)

Here, Silver Star's human resources director declared in support of summary judgment that Sumen's employment was terminated because he neglected to manage safety issues in the workplace. Sumen's deposition testimony and declaration before

the DFEH established that approximately four months before his termination, Sumen directed that an unsafe vehicle hoist be tagged as out of service. He then reported the matter to Bill Little, his supervisor, and was thereafter unaware that during the next four months mechanics continued to use the hoist despite its being red-tagged.

Assuming for purposes of argument that a routine report about an unsafe condition, made by a supervisor in charge of safety, can constitute a "complaint" for purposes of the Labor Code, Silver Star's evidence showed that Sumen made no complaint about any unsafe condition. On the contrary, his report to Little that an unsafe hoist had been red-tagged constituted a report that an unsafe condition no longer existed. No evidence suggested that a defective hoist would be unsafe if no one used it, and Sumen himself declared before the DFEH that the hoist was a non-existent safety issue. That the unsafe condition had not in fact been remedied, because some mechanics continued to use the hoist, is irrelevant because it is undisputed that Sumen was unaware of any such use, and therefore could not have complained about it.

Silver Star's evidence also showed no causal link between Sumen's purported complaint and his termination, as he was fired for a different reason: He had failed to maintain safety in the workplace. The human resources director who fired him declared as much, and Sumen's own representations lend plausibility to the explanation because he admitted he was unaware that employees under his supervision were working under unsafe conditions.

Silver Star having carried its burden on summary judgment, the burden shifted to Sumen to show substantial

evidence that the employer's justification for its decision is either untrue or pretextual, or that Silver Star acted with retaliatory animus, or a combination of the two.

He made no such showing. In his declaration in opposition to summary judgment Sumen stated only that he reported the existence of a defective hoist. However, he also declared that he red-tagged the hoist, and was "not concerned that the technicians would use the hoist after they were told about it, because they were concerned about it as well." On appeal, Sumen maintains his theory that a defective hoist *is* a safety concern. But that is so only if the hoist was used, and Sumen has always admitted he was unaware the defective hoist was being used after he red-tagged it. Sumen could not have complained about an unsafe condition of which he was unaware.

Even if Sumen's reporting a defective hoist to his supervisor constituted a protected activity, he provides no evidence of a causal link between that report and his termination. For example, there is no evidence that anyone at Silver Star resisted his taking the hoist out of service, encouraged employees to use the hoist despite its being red-tagged, or complained that Sumen's overconcern for safety would cost the company too much money.

Sumen's only evidence of a causal connection between his complaint to Little and his termination by Thomas was that the termination came after the complaint. But temporal sequence does not itself establish causation. To infer from nothing more than the order of events that an earlier event caused a later one, the time between the two would have to be so short as to admit in a reasonable person's mind no possibility of an intervening explanation. (*Paluck v. Gooding Rubber Co.* (7th Cir. 2000) 221

F.3d 1003, 1009-1010 ["to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression' "]; see *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421 [a long period between protected activity and an adverse employment action may lead to the inference that the two events are unconnected]; *Kipp v. Missouri Highway and Transp. Com'n* (8th Cir. 2002) 280 F.3d 893, 897 [two months between protected activity and adverse employment action permits no inference of causation]; *Parkins v. Civil Constructors of Illinois, Inc.* (7th Cir. 1998) 163 F.3d 1027, 1039 [two and one-half months].) Here, Sumen was fired four months after he complained to Little about the hoist, a period amply long enough for any inference of causation to have dissipated.

Sumen argues that Thomas's justification for his termination was pretextual, as it was not his responsibility—and he had no power—to fix the defective hoist. But evidence that the parties disagreed about the scope of Sumen's responsibilities establishes only a disagreement, not a pretext. (*Serri v. Santa Clara University*, *supra*, 226 Cal.App.4th at p. 862 [the employee may not simply deny the credibility of the employer's witnesses or speculate as to its motive]; *Hersant*, *supra*, 57 Cal.App.4th at p. 1005 [insufficient to show that the employer's reasons were unsound, wrong, or mistaken].) Instead, Sumen " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]' " (*Hersant*, at p. 1005;

see *Mamou v. Trendwest Resorts, Inc.*, *supra*, 165 Cal.App.4th at p. 715 [a manifest weaknesses in the cited reason constitutes evidence the reason was "asserted to mask a more sinister reality"].) In any event, Thomas did not say she fired Sumen because he failed to fix the defective hoist, she fired him because he failed to ensure safety in the workplace, which he might have done by enforcing the hoist's decommission. Sumen essentially admitted to the failure when he admitted he was unaware employees continued to use the defective hoist. Silver Star's explanation was therefore not so weak, implausible, inconsistent, incoherent or contradictory as to permit an inference of pretext.

Because Sumen failed to establish two of the three elements of a prima facie case of retaliation—protected activity and a causal link between that activity and an adverse employment action—or to rebut Silver Star's explanation of a nonretaliatory motive for his termination, the trial court properly granted summary judgment as to his section 6310 claim.

III. Labor Code Section 6311

Section 6311 prohibits an employer from discharging an employee for refusing to perform work that would violate occupational safety or health standards, where the violation would create a real and apparent hazard to the employee or his or her fellow employees.[3] A prima facie claim of retaliation under

[3] Section 6311 provides in part: "No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees."

section 6311 requires a showing of protected activity (e.g., that an employee refused to work under unsafe conditions), an adverse employment action, and a causal link between the activity and the adverse action. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299.)

Here, Sumen produced no evidence that he refused to perform any work. On the contrary, he expressly denied ever refusing to perform his job duties. Sumen argues that his employment was terminated in retaliation for his preventing *others* from working with the defective automobile hoist, i.e., by red-tagging the hoist and reporting it to upper management. He argues that under section 6311, he may stand in the shoes of his fellow employees. We disagree. The plain language of section 6311 clearly requires that a plaintiff refuse to perform work, not that he prevent fellow employees from working. There is no evidence in the record that Sumen refused to work at any time, he merely prevented others from using unsafe equipment.

Because Sumen failed to establish that he engaged in a protected activity under section 6311, summary judgment was proper.

IV. Wrongful Termination in Violation of Public Policy

Sumen's claim for wrongful termination in violation of public policy was based on his allegations that Silver Star violated sections 6310 and 6311. Because summary judgment was proper as to Sumen's causes of action under sections 6310 and 6311, so too must it be affirmed as to his cause of action for wrongful termination in violation of public policy.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.