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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARK BROOKS,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B280579

(Los Angeles County  
Super. Ct. No. BC582450)

APPEAL from the judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Irving Meyer for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Matthew A. Scherb, Deputy City Attorney for Defendant and Respondent.

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Plaintiff Mark Brooks had been employed as a police officer by defendant City of Los Angeles for over 20 years when he was diagnosed with prostate cancer. His cancer treatments required him to take medical leave a number of times between October 2009 and March 2013, but at times he was able to perform his job with work restrictions imposed by his doctor. Plaintiff retired in March 2013. Following his retirement, a workers' compensation qualified medical examiner determined that plaintiff was "not able to perform any of his . . . customary occupational duties" and was permanently disabled.

In September 2014, plaintiff sought to be "reactivated" as a police officer with the City, but he was not rehired. He sued the City, stating a single cause of action for disability discrimination, alleging that the City denied him a position because of his medical condition. The City moved for summary judgment on the basis that plaintiff was not qualified to serve as a police officer because he had been medically evaluated as permanently disabled.

On appeal, plaintiff contends that the City discriminated against him when it failed to perform a physical examination to determine his fitness for a position with the police department, failed to consider him for administrative positions in the police department, and failed to accommodate his disability and engage in the interactive process. He also contends the trial court improperly sustained the City's objections to his declaration.

We affirm.

### **BACKGROUND**

Plaintiff worked for the Los Angeles Police Department from November 1988 until his retirement in March 2013. For his last 13 years with the Department, he worked as a Senior Police Officer III.

In October 2009, plaintiff was diagnosed with prostate cancer. He underwent a number of treatments including hormone, proton, and radiation therapies. He experienced side effects from his

treatments, such as incontinence and sleep apnea, which required him to take medical leave from work. He was out on medical leave from October 2009 until March 2010, and again from June 2012 until March 2013. Between April 2010 and May 2012, he was able to return to work with restrictions imposed by his doctor. Plaintiff retired in March 2013, and in April 2013, he was assessed by a workers' compensation doctor and was determined to be totally disabled and unable to perform his job. According to the doctor's report, plaintiff suffered from incontinence, anxiety, depression, and a sleep disorder, which resulted in significant impairment. During his deposition in this case, plaintiff acknowledged he had been declared completely disabled.

In September 2014, plaintiff requested that he be "reactivate[d] as a Police Officer." At the time plaintiff sought reactivation, no doctor had informed him that he was able to perform the duties of a police officer, or released any of his work restrictions. When plaintiff sought reactivation, he did not provide the City with a doctor's note or report releasing his previous medical restrictions or providing an update about his condition.

The City reviewed plaintiff's request for reactivation. Plaintiff passed his criminal background check. However, plaintiff's personnel file reflected that he was completely disabled from performing his job as a police officer, and the Department received no additional information regarding plaintiff's ability to perform the essential functions of a police officer. The City determined that plaintiff was unable to perform the essential functions of a police officer because he had been deemed permanently disabled, and his work restrictions had not been lifted.

Following the City's denial of plaintiff's request for reactivation, plaintiff reported to workers' compensation doctors that his physical and mental condition were *worse* than at the time he retired. And in

2016, a workers' compensation doctor again determined that plaintiff remained unable to serve as a police officer.

Plaintiff sued the City. His operative complaint stated a single cause of action for disability discrimination.

The City moved for summary judgment, on the basis that plaintiff could not make a prima facie case of discrimination because he was not qualified to serve as a police officer due to his permanent disability. Plaintiff opposed the motion, arguing that his disability for workers' compensation purposes did not render him unqualified for a position with the police department, that the City never evaluated whether plaintiff could perform the job with or without accommodations, did not engage in the interactive process, and did not consider him for other available positions within the police department for which he was qualified, such as a position as a desk officer or other administrative positions. His declaration also averred that his only medical restriction was related to his incontinence, and could be accommodated with frequent restroom access or other means. Notably absent from his declaration was any evidence that he was qualified for the position for which he had applied, reinstatement as a police officer, the position from which he had retired after having been medically declared unable to perform the work.

The City objected to the portions of plaintiff's declaration describing his medical restrictions, and the vacant positions at the department for which plaintiff believed he was qualified.

The trial court granted the motion for summary judgment, and sustained the City's objections to plaintiff's declaration. This timely appeal followed.

## **DISCUSSION**

We review a trial court's order granting a motion for summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) To obtain summary judgment, a moving defendant has the “burden of showing that a cause of action has no merit” by showing that “[o]ne or more elements of the cause of action cannot be established,” or that there is a complete defense to the cause of action. (*Id.*, subds. (o), (p)(2); *Aguilar*, at p. 854.) “A ‘moving party need not “. . . refute liability on some theoretical possibility not included in the pleadings.” [Citation.]’ ” (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

If the moving defendant meets its burden, “the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action” or as to the defense proffered by the defendant. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 849.) A plaintiff “may not defeat a summary judgment motion by producing evidence to support claims that are outside the issues framed by the pleadings.” (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674, fn. 6 (*Vournas*).)

In California, the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) makes it unlawful for an employer to refuse to hire an applicant based on his disability or medical condition. (§ 12940, subd. (a).) To establish a prima facie case of discrimination in a failure to hire claim, a plaintiff has the burden to prove that he was qualified for the position sought. (*Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480.) An employer may move for summary judgment on the basis that the “plaintiff [cannot] establish one of the elements of the FEHA claim.” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247.)

Defendant met its burden in this case by showing that plaintiff was not qualified for reinstatement to his former position as a police officer. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.) For purposes of FEHA, a “qualified individual” is an individual who is

“qualified for the position sought or held in the sense that he or she is able to perform the essential duties of the position with or without reasonable accommodation.” (*Green v. State of California* (2007) 42 Cal.4th 254, 266-267.) Defendant provided evidence that plaintiff was permanently and totally disabled and unable to perform the essential functions of the position of police officer, the position for which he sought reinstatement.

Plaintiff's opposition evidence did not dispute that he was unqualified for the position for which he applied. Instead, plaintiff argued that defendant failed to accommodate him or engage in the interactive process by not considering him for other positions for which he was qualified. (Plaintiff's declaration described several alleged vacancies within the police department for positions he could have performed, such as work as a desk officer or community relations officer.) However, plaintiff did not allege causes of action for disability discrimination based on failure to accommodate or failure to engage in the interactive process, and thus evidence related to those unpled causes of action was irrelevant and could not defeat defendant's summary judgment motion. (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 963-964 [claims for discrimination, failure to accommodate, and failure to engage in the interactive process are separate and discrete causes of action]; *Vournas, supra*, 73 Cal.App.4th at p. 674, fn. 6 [a plaintiff “may not defeat a summary judgment motion by producing evidence to support claims that are outside the issues framed by the pleadings”].)

Plaintiff contends the trial court erroneously sustained defendant's objections to plaintiff's evidence of vacancies at the Department and his qualifications for those positions, as well as plaintiff's testimony that his only work restriction concerned his incontinence. Defendant objected on the basis of relevance, and on other grounds. Because plaintiff's complaint did not state claims for

failure to accommodate or engage in the interactive process, this evidence was irrelevant and was properly excluded.

**DISPOSITION**

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

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

SORTINO, J.\*

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