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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

DAVID CROCKETT,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Appellant;

ROBERT SILSBEE et al.,

Defendants and Respondents.

2d Civil No. B264678
(Super. Ct. No. 1440438)
(Santa Barbara County)

David Crockett brought this action for whistleblower retaliation and disability and age discrimination against his former employer, the Regents of the University of California (the University) and others. The trial court granted summary judgment for all defendants. Crockett filed a motion for new

trial, which the court partially granted, reviving the age discrimination claim. The University cross-appeals. We affirm.

FACTS

The University hired Crockett and Chris Zbinden as parking enforcement supervisors in the office of Transportation and Parking Services (TPS). Crockett is over 40 years old and declares he suffers from epilepsy. Crockett and Zbinden reported to manager Jason Ziebarth. Ziebarth reported to the director of TPS.

Whistleblower Complaint

In January 2011, Crockett attended TPS meetings regarding a "dismissal-with-fee" proposal. The proposal would allow uncollected parking citations to be dismissed in exchange for a fee. Crockett believed the proposal was illegal, and he voiced his concerns at the meetings.

Three months later, Crockett called the University's whistleblowing hotline to report the mismanagement of uncollected parking citations and his concerns regarding the dismissal-with-fee proposal. The University's investigator contacted Crockett and interviewed Ziebarth, the TPS director, and other TPS employees. The investigator concluded TPS "exhibited gross mismanagement" in handling and collecting fines on the unpaid parking tickets.

Alleged Retaliatory and Discriminatory Acts

Five months after Crockett called the hotline, the University hired a new interim TPS director, Robert Silsbee. Around that time, Ziebarth reprimanded Crockett for saying he would "bitch slap" Ziebarth. Ziebarth wrote a warning letter. Crockett's next performance evaluation initially mentioned the warning letter, but Ziebarth's supervisors directed him to remove

the reference because the "bitch slap" incident happened outside the performance period.

Crockett reported that a graduate student assaulted him. Police officers investigated the incident and interviewed Ziebarth, who told the police that there were numerous complaints against Crockett and that Crockett could be "difficult to deal with." Crockett claims neither Ziebarth nor Silsbee took further action on his claim that he had been assaulted.

In June 2012, Ziebarth left the University. A month later, Silsbee received a year-end financial report showing a budget deficit for TPS. Silsbee decided to lay off the two parking enforcement supervisors (Crockett and Zbinden) and hire a single parking enforcement manager to replace Ziebarth. Silsbee gave Crockett and Zbinden identical layoff notices. The notices provided options for one-year preferential rehiring rights or a three-week severance. Crockett opted for preferential rehiring rights.

Silsbee met with Crockett and Zbinden and informed them that they could continue to work or they could take 60 days off with pay to look for work. Silsbee informed them about the new enforcement manager position, and encouraged them to apply. Crockett indicated that he would take eight weeks off to look for alternate employment. Silsbee offered Zbinden the opportunity to stay and "fill in" for Ziebarth's position during the notice period.

A university financial analyst later testified that Silsbee told her Crockett "will be going," but he was going to "find another job" for Zbinden. She raised concerns monthly with Silsbee about the deficit, but he assured her "there would be no layoffs because of the budget."

Several applicants, including Crockett and Zbinden, applied for the enforcement manager position. The top four applicants went through two panels of interviewers: one made up of TPS managers and another made up of managers from outside the TPS division. Six of eight panelists selected Zbinden as the most qualified candidate. Zbinden was offered the position, which he accepted.

PROCEDURAL HISTORY

Crockett filed a complaint with the University alleging that he had been retaliated against as a result of the whistleblowing complaint. A consultant hired by the University found no evidence supporting the claim.

Crockett filed this lawsuit, asserting seven causes of action for whistleblower retaliation and disability and age discrimination. The first cause of action for whistleblower retaliation (Gov. Code, § 8547.10) is alleged against the University, Ziebarth, and Silsbee. The other six causes of action are against the University. The University, Ziebarth, and Silsbee moved for summary judgment.

The trial court granted summary judgment, and judgment was entered in favor of all defendants. Crockett moved for a new trial. The trial court granted a partial new trial as to age discrimination but not disability discrimination.

DISCUSSION

Summary Judgment/Adjudication

Summary judgment or summary adjudication is appropriate "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, subds. (c) & (f).) The defendant bears the initial burden of

showing the plaintiff cannot establish one or more elements of the plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) If the defendant carries this burden, the burden shifts to the plaintiff to establish a triable issue of material fact. (*Id.* at p. 850.)

Our review is de novo. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84.) Upon the grant of summary judgment/ adjudication, we liberally construe the opposing party's evidence and resolve all doubts about the evidence in favor of the opposing party. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) We consider all evidence set forth in the moving and opposition papers, except evidence to which objections were properly sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)

First Cause of Action: Whistleblower Retaliation (Gov. Code, § 8547.10)

Crockett's first cause of action alleges that Silsbee, Ziebarth, and the University violated Government Code section 8547.10, which prohibits retaliatory acts against a university employee for making a protected disclosure. To prevail on this claim, the employee must demonstrate by a preponderance of evidence that his or her protected activity (i.e., whistleblowing) was a "contributing factor" for the retaliatory action. (Gov. Code, § 8547.10, subd. (e).) The burden then shifts to the employer to demonstrate by clear and convincing evidence that the action would have occurred for "legitimate, independent reasons" even if the employee had not engaged in protected activity. (*Ibid.*)

An employer's retaliatory motive is proved by showing that the plaintiff engaged in protected activities, the employer was aware of the protected activities, and the adverse

action followed within a relatively short time. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) The causal link may be established by an inference derived from circumstantial evidence such as the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected activities and retaliatory action. (*Ibid*.) Essential to a causal link is evidence that the employer was aware that the employee had engaged in the protected activity. (*Id*. at p. 70.)

The retaliation claim against Silsbee fails because there is no evidence he knew that Crockett was a whistleblower, and the alleged retaliatory acts occurred over a year after the whistleblower complaint was filed and were justified by legitimate business reasons.

Silsbee declared that while Crockett was employed at TPS, he "never became aware that [Crockett] had made" a whistleblower report. Silsbee also declared he did not join TPS until five months after the whistleblower complaint and investigation. The University investigator declared he did not disclose the whistleblower's identity, and the only other person who had access to that information was the audit director.

In opposition, Crockett submitted the investigator's deposition, showing he spoke with Silsbee during his investigation. Although Silsbee was not a part of TPS at the time, he was a "budget person" who "interacted with transportation parking." Crockett also submitted Silsbee's deposition, in which Silsbee was asked if he was "informed that Mr. Crockett had made a whistleblower retaliation complaint to the University at some point." Silsbee said, "Maybe. Maybe I was informed, but I don't remember." Crockett also presented circumstantial

evidence, such as e-mails between Ziebarth and Silsbee regarding complaints against Crockett, suggesting that Ziebarth "passed on" knowledge of Crockett's role as a whistleblower. But he offered no evidence that Ziebarth passed on information about the whistleblowing.

Crockett's evidence does not create a triable issue of material fact. It does not show that Silsbee knew Crockett was the whistleblower before the alleged retaliatory acts occurred. Silsbee's statement that "[m]aybe" he was informed that Crockett was a whistleblower "at some point" is not sufficient to create a triable issue of whether Silsbee knew of Crockett's involvement before Silsbee acted. Mere speculation is not enough. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144.)

The retaliation claim against Ziebarth fails because he did not take any "adverse employment action" against Crockett. Adverse actions are those which "materially affect[] the terms and conditions of employment," including actions that are "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1036, 1054.)

None of the acts attributed to Ziebarth were adverse retaliatory acts. Ziebarth's participation in an "unjustified misconduct charge" in March 2011 preceded the whistleblower complaint, so it could not have been in retaliation for subsequent acts by Crockett. The September 2011 warning letter did not "materially affect" Crockett's job performance or career because references to the letter were removed from Crockett's performance evaluation. And there is no other evidence that the

warning letter adversely affected his job. Similarly, there is no evidence that the comments related to the March 2012 "assault" and related police report materially affected Crockett's employment. Lastly, there is no evidence that Ziebarth participated in Crockett's layoff or Zbinden's hiring, both of which occurred after Ziebarth left TPS.

The trial court also properly granted summary adjudication to the University. Crockett identified no one, aside from Silsbee or Ziebarth, who committed retaliatory acts. It is undisputed that Silsbee and Ziebarth were responsible for all the "personnel decisions" that Crockett identified as retaliatory actions.

Second Cause of Action: Whistleblower Retaliation (Lab. Code, § 1102.5, subd. (b))

Crockett's second cause of action alleges that the University violated Labor Code section 1102.5, subdivision (b), which prohibits employers from retaliating against an employee for disclosing information to an investigating agency, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law. The trial court properly granted summary adjudication on the second cause of action for the same reasons discussed as to the first cause of action.

Third Cause of Action: Whistleblower Retaliation (Lab. Code, § 1102.5, subd. (c))

Crockett's third cause of action alleges that the University violated Labor Code section 1102.5, subdivision (c), which prohibits an employer from retaliating against an employee for refusing to participate in an activity that would violate state or federal law.

The dismissal-with-fee proposal went into effect in July 2012. Although Crockett alleges that he voiced his objections to the proposal in meetings, there is no evidence that he refused to participate in any activity once the proposal went into effect. Moreover, as discussed above, Crockett has not presented evidence of adverse retaliatory acts. The trial court properly granted summary adjudication on this cause of action.

Fourth and Fifth Causes of Action: Reasonable Accommodation and Interactive Process

Crockett's fourth and fifth causes of action allege that the University violated the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) by failing to provide a reasonable accommodation for his disability (i.e., epilepsy) and by failing to engage in the interactive process.

Under FEHA, it is unlawful for an employer to fail to make reasonable accommodations for known physical or mental disabilities of an employee. (Gov. Code, § 12940, subd. (m)(1).) "The elements of a failure to accommodate claim are '(1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability.' [Citation.]" (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 969.)

FEHA imposes an additional duty on employers to engage in a good faith interactive process with the disabled employee to explore alternatives to accommodate the disability. (Gov. Code, § 12940, subd. (n); *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) The interactive process requires that the employee initiate the process "unless the disability and resulting limitations are

obvious. 'Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, . . . the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.' [Citation.]" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013.)

A claim for failure to provide reasonable accommodation and a claim for failure to engage in interactive process are separate causes of action, but "each necessarily implicates the other." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54.) "The purpose of the interactive process is to determine what accommodation is required." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464.) Once it has been determined what accommodation is required, the employer has a duty to provide that reasonable accommodation. (*Ibid*.; see Gov. Code, § 12940, subd. (m).)

FEHA defines a physical disability as a "physiological . . . disorder or condition" that "[l]imits a major life activity." (Gov. Code, § 12926, subd. (m)(1)(B).) Although the Legislature has specifically listed epilepsy as a physical disability (Gov. Code, § 12926.1, subd. (c)), that section also states "the definitions of 'physical disability' . . . require a 'limitation' upon a major life activity." (*Ibid*.) An individualized assessment is necessary to determine whether a plaintiff has a disability under FEHA. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 348-349 (*Arteaga*) [whether a person has a disability is not necessarily based on the name or diagnosis of the impairment but rather its effect].)

Crockett presented no evidence that his epilepsy limited a major life activity. He admitted at his deposition that he was not aware of any restrictions on his activities and that none of his doctors told him he had restrictions on his activities.

Even if Crockett suffered a disability under FEHA, both the reasonable accommodation and interactive process claims fail because he did not request an accommodation. "An employee cannot demand clairvoyance of his employer." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443.) The employer is not expected to know the employee secretly wants a particular accommodation. (*Ibid.*)

Crockett admitted during his deposition that he was "not sure what accommodation [he] would need." He identified only one possible limitation—that he needed to take notes frequently because of his epilepsy. The evidence shows that he was not restricted from taking notes. Crockett stated in a memorandum that a superior told him he was not allowed to "take notes on others" after an employee complained that Crockett was spying on her and taking notes on her activities. But there is no evidence Crockett was restricted from taking notes related to his job. Crockett also admitted that he continued to take notes during his job. The trial court properly granted summary adjudication on these causes of action.

Order Partially Granting New Trial

Crockett's sixth and seventh causes of action allege age and disability discrimination in violation of FEHA, and failure to investigate the claims of discrimination. In granting a partial new trial on these claims, the trial court found that there were no triable issues of material fact regarding the disability

discrimination claim, but found triable issues regarding age discrimination claim. Both Crockett and the University appeal.

We review an order granting new trial following a grant of summary judgment de novo if the order relies on the resolution of a question of law. (*Aguilar*, *supra*, 25 Cal.4th at pp. 859-860; *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1505.) Whether a triable issue of fact exists is a question of law. (*Ibid*.)

Age and Disability Discrimination

The University contends the trial court erred in granting a partial new trial on the sixth cause of action because there is no evidence of a discriminatory motive.

A prima facie case for discrimination on grounds of physical disability under the FEHA requires the plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability. (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 344-345.) For reasons we have discussed, Crockett fails to make a prima facie case because he has not shown he suffers a disability under FEHA.

A prima facie case of age discrimination requires the employee to show he or she is over the age of 40, was performing satisfactorily at the time he or she suffered adverse employment action, and he or she suffered such adverse action under circumstances giving rise to an inference of unlawful discrimination. Such an inference can be established if an individual under the age of 40 was retained for the position or if such an individual with comparable skills filled his or her position. (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 799.)

Once a prima facie case has been established, the burden shifts to the employer to show evidence that the adverse action was based on legitimate nondiscriminatory reasons. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355-356.) The burden then shifts back to the employee to prove that the employer's proffered reason was a pretext for discrimination, or to offer other evidence of discriminatory motive. (*Id.* at p. 356.)

The parties do not dispute that Crockett and Zbinden were laid off from their former positions and that only Zbinden was rehired at the University. Although Zbinden's age is not a part of the record, the parties do not dispute that he was younger than 40 years old. The University contends that these acts were based on valid budgetary reasons and not age discrimination.

The University submitted Silsbee's declaration and deposition, in which he explained that his decision was made because of a $340,000 budget deficit that was discovered after he reviewed the year-end financial statement. He decided that one parking enforcement manager, rather than two supervisors, could adequately manage the staff. Crockett and Zbinden were given identical letters, explaining the terms of their layoff. Both Crockett and Zbinden were invited to interview for the enforcement manager position, and a hiring panel selected Zbinden as the most qualified candidate.

Crockett submitted the deposition testimony of the financial analyst, who said Silsbee knew about the deficit, assured her "there would be no layoffs because of the budget," and told her Crockett "will be going," but he was going to "find another job" for Zbinden.

Crockett also submitted an e-mail, which showed that Silsbee offered Zbinden the opportunity to stay and "fill in"

for Ziebarth's position after sending the layoff notices. Silsbee did not extend the same opportunity to Crockett.

Crockett's evidence is sufficient to create a triable issue of whether the University's proffered reason for the layoff and hiring decision was pretextual. The trial court properly granted a new trial on the age discrimination claim.

Failure to Investigate

An employer who knows or should have known of unlawful discrimination, and fails to take immediate and appropriate corrective action, may be liable for the resulting damages. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880; see also *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.)

Here, a triable issue of material fact exists as to the age discrimination claim. The University has not presented evidence that the University took appropriate action to correct the allegedly discriminatory actions. The trial court properly granted a new trial on the seventh cause of action.

DISPOSITION

We affirm the judgment as to Silsbee and Ziebarth and the order granting summary adjudication on the first through fifth causes of action against the University. We also affirm the order partially granting new trial on the sixth and seventh causes of action. The University, Silsbee, and Ziebarth shall recover their costs on appeal. Crockett shall recover his costs on cross-appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

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