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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

MEHRDAD MOLAEI, Plaintiff and Appellant, v. STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.	B276510 (Los Angeles County Super. Ct. No. BC507335)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Law Offices of Jeffrey Curran McIntyre, Jeffrey Curran McIntyre, and Sarah A. Swanson for Plaintiff and Appellant.

Jeanne E. Scherer, Chief Counsel, Jerald M. Montoya, Deputy Chief Counsel, and David Rodriguez for Defendant and Respondent.

* * * * * * * * * *

Plaintiff Mehrdad Molaei sued defendant State of California Department of Transportation (Caltrans) for disability discrimination, failure to accommodate, ancestry and national original discrimination based on plaintiff's Iranian ancestry, harassment, retaliation, and failure to prevent harassment and retaliation, in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.). The trial court granted defendant's motion for summary judgment. We affirm the judgment.

BACKGROUND

Plaintiff has been employed with defendant since 1991. Since 1998, he has worked as a civil transportation engineer, range D. Plaintiff is of Iranian national origin. He suffers from a number of health conditions, including a congenital heart anomaly, chronic fatigue syndrome, anxiety, and depression, that limit major life activities. His health conditions affect his ability to sleep, and therefore impact his concentration, and his ability to deal with stress and interact with others.

Beginning in June 2011, defendant was supervised by Celina Aviles. His second level supervisor was Jerrel Kam, to whom Ms. Aviles reported. When Ms. Aviles began supervising plaintiff, she observed that he often came in late, and left work when he felt like leaving. Plaintiff told her he had an arrangement with his previous supervisor that he could come and go as he pleased. Ms. Aviles found no record of this special arrangement and instructed plaintiff to conform to a full-time working schedule. According to plaintiff, attempting to work an eight-hour day caused his health to decline because he was unable to adjust his schedule on days where his sleep was disturbed.

Between June 2011 (when Ms. Aviles started supervising plaintiff) and December 30, 2011, plaintiff was often out sick, and was told by his physicians that he should be placed off work. He only worked 14 out of 30 weeks, and of the 14 weeks worked, only 6 weeks consisted of more than 15 hours of work. He never put in a full 40 hours per week. During this time, plaintiff was granted all of the time off he requested.

On December 23, 2011, plaintiff completed reasonable accommodation forms provided by defendant. Plaintiff asked that he be allowed to work from home three days per week, and in the office two days per week, because he was distracted in the office. He also requested a "secluded" work space at the office. Plaintiff's request for an accommodation was supported by a letter from his psychiatrist, Dr. Shannon Easton-Carr, who said that plaintiff suffered from depression and anxiety, and that sitting in a communal office space, in a cubical among his coworkers, was distracting and impaired his concentration.

According to Ms. Aviles, the information provided by Dr. Easton-Carr was insufficient for defendant to complete its evaluation of plaintiff's request for an accommodation. She told plaintiff that she needed more information about which essential job functions he was able to perform in a communal office setting, and which functions he was unable to perform. She was considering changing plaintiff's duties or moving his cubicle to another location rather than allowing him to work from home.

Ms. Aviles informed plaintiff that she needed his medical provider to respond to her concerns. Plaintiff did not provide more information from his doctors. According to plaintiff, his health deteriorated because he was not accommodated, and therefore he was unable to work. On January 25, 2012,

Dr. Easton-Carr wrote a letter stating that plaintiff needed to be off work for two months because he was "severely impaired" by his anxiety and major depressive disorders. On February 15, 2012, licensed Marriage and Family Therapist Bram Conley wrote a letter indicating that plaintiff is "currently unable to fulfill the demands of his work due to his multiple mental and physical conditions . . . ."

In July 2012, plaintiff provided defendant with two more letters from Dr. Easton-Carr. The first letter, dated July 24, 2012, stated plaintiff suffered from major depressive disorder and generalized anxiety disorder, and that his illness had prevented him from working for the last year. However, plaintiff was feeling better and "would like to try to return[] to work" although he still suffered from fatigue and difficulty concentrating. Dr. Easton-Carr recommended the following work modifications to accommodate plaintiff's health conditions: "(1) he be allowed to work in an environment with minimal distractions, in a cubicle in a quiet area in the workplace or from home as his duties allow; (2) a reduced project load and part-time work schedule with gradual increase in project load as the patient is able to tolerate increased responsibilities and work hours; (3) a transfer to a different supervisor as the patient states that conflict with his present supervisor is causing him tremendous anxiety and will likely affect his ability to successfully return to full time employment with your organization."

A second letter, dated July 30, 2012, stated plaintiff was ready to return to work starting July 30 with the accommodations recommended in the July 24 letter.

Defendant provided plaintiff with accommodation forms on July 30, 2012, so that plaintiff could provide more information

about the accommodations he requested. Plaintiff returned to work.

Plaintiff told Ms. Aviles and Mr. Kam that he believed Dr. Easton-Carr had recommended a flexible work schedule to accommodate his health conditions. Both Ms. Aviles and Mr. Kam understood Dr. Easton-Carr's recommendations differently; she had not recommended a flexible schedule, but had suggested that plaintiff be allowed to work part-time from home with a reduced work load to be gradually increased. Both Ms. Aviles and Mr. Kam had concerns about plaintiff working from home. Based on her experiences during the time she had supervised plaintiff, Ms. Aviles believed he was not a "self-starter" as he had difficulty completing his assignments on time. Sometimes, he failed to complete assignments at all, and they had to be reassigned to a coworker.

Ms. Aviles allowed another employee from plaintiff's unit to work from home on a part-time basis, but not as a reasonable accommodation. That employee had a history of completing her assigned work. Like plaintiff, she was of Iranian descent.

On August 6, 2012, Mr. Kam sent plaintiff a letter denying the accommodations recommended by Dr. Easton-Carr. Mr. Kam stated he needed more information to understand plaintiff's limitations, and "how his job duties could be addressed given those limitations." Specifically, Mr. Kam asked that plaintiff's physician review plaintiff's duty statement outlining his job duties; that he or she define what a "work environment with minimal distractions" entails in light of his job duties that require him to communicate and coordinate with utility companies and engineers; that he or she quantify what reduction

in work load was required; and that he or she address the nature of the conflict between plaintiff and his current supervisor.

In the interim, while awaiting further information about the accommodations plaintiff requested, defendant placed plaintiff on a part-time work schedule, from 8:00 a.m. until noon, five days per week. On August 7, 2012, Ms. Aviles sent an email to plaintiff, informing him of his part-time work schedule. She repeated Mr. Kam's request that plaintiff provide a clarification letter from his physician regarding his ability to work more time. She also informed plaintiff that if he arrived late to work, he was not to work past noon to make up the time without prior authorization from Ms. Aviles or Mr. Kam.

Plaintiff failed to provide the requested information. Mr. Kam called Dr. Easton-Carr requesting additional information regarding plaintiff's limitations, but she never provided any additional information. Instead, beginning in October 2012, plaintiff provided notes from his doctors placing him off work, stating he was unable to perform his job, and was totally disabled. According to plaintiff, he attempted to conform to the part-time schedule, but became more ill and was unable to continue working.

Plaintiff was off from work from October 2012 until December 2014.

After his return in December 2014, plaintiff was transferred "at his request and through business necessity" to work in a different unit for a different supervisor, Kirsten Stahl. Like Ms. Aviles, Ms. Stahl reported to Mr. Kam. Plaintiff had different duties in the new unit, although he still performed work within the job classification of transportation engineer.

Plaintiff admitted in his deposition that he did not have any "facts or any document" to show that Ms. Aviles discriminated against him because he was Iranian. It was just his "feeling."

In opposition to the motion for summary judgment, plaintiff presented evidence that he has never been formally disciplined by defendant, and has never received a negative performance evaluation. Ms. Aviles agreed that she never disciplined plaintiff. And Mr. Kam testified that a "chronically poor employee" would have had an "adverse action."

Plaintiff also presented evidence that defendant allowed several of his coworkers to transfer to different supervisors in 2012 and 2013. However, according to Mr. Kam's deposition testimony, he "never look[ed] into having [plaintiff] report to some other supervisor."

Plaintiff testified in his declaration that after becoming his supervisor, Ms. Aviles engaged in a course of conduct intended to "antagonize" his medical conditions. She changed his work schedule, assigned projects and "immediately demand[ed] why the project was not completed" even though plaintiff believed there was insufficient time to complete the project; and she "fail[ed] to provide the type of guidance that was expected of a supervisor based on [his] experience at Caltrans . . . responding to questions with more questions or merely talking to [him] rudely and dismissively."

Plaintiff also presented evidence that other employees who were not Iranian worked from home. However, there was no evidence that these individuals had the same job duties as plaintiff, or that they worked from home as an accommodation for any disability.

The trial court sustained a number of objections to plaintiff's opposition evidence on the grounds of hearsay, lack of foundation, lack of relevance, and because parts of plaintiff's declaration contradicted his unambiguous deposition testimony.

The trial court concluded that defendant had reasonable business reasons to request more information from plaintiff and his doctors, there was no evidence of any discriminatory motive based on his disability or national origin, defendant took no adverse employment action against plaintiff, he was granted medical leave as an accommodation, defendant engaged in the interactive process, and any purported harassment was not severe and pervasive. Judgment was entered for defendant and plaintiff timely appealed.

DISCUSSION

1. Summary Judgment

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to [that] cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.) The party opposing summary judgment "shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor

of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar*, *supra*, 25 Cal.4th at p. 854.) It is no longer called a "disfavored" remedy. (*Perry,* at p. 542.) "Summary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid*.) On appeal, "we take the facts from the record that was before the trial court . . . . ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, citation omitted (*Yanowitz*).)

a. Failure to Reasonably Accommodate Claim

Plaintiff alleges that defendant failed to accommodate his disabilities, and failed to engage in good faith in the interactive process. FEHA makes it unlawful for an employer to "fail to make reasonable accommodation for the known physical or mental disability of an . . . employee" and to "fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known . . . disability or . . . medical condition." (Gov. Code, § 12940, subds. (m), (n).)

The plaintiff bears the burden of proving that (1) he suffers from a disability covered by FEHA; (2) he can perform the essential functions of his position with a reasonable

accommodation; and (3) his employer failed to reasonably accommodate his disability after he requested an accommodation. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256; see also *Gelfo v. Lockhead Martin Corp.* (2006) 140 Cal.App.4th 34, 54.)

FEHA defines a reasonable accommodation as including but not limited to "[m]aking existing facilities used by employees readily accessible to, and usable by, individuals with disabilities . . . [¶] . . . Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." (Gov. Code, § 12926, subd. (p).)

"[A]n employer is not required to choose the best accommodation or the specific accommodation the employee seeks. Instead, ' " 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.' [Citation.] . . . [A]n employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." ' " (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1194.) Paid or unpaid medical leave can constitute a reasonable accommodation. (*Ibid.*)

When an employee seeks an accommodation for a disability, the employer is permitted to "inquire into the ability of [the employee] to perform job-related functions and may respond to an applicant's request for reasonable accommodation." (Gov.

Code, § 12940, subd. (e)(2); see also *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 444.) Moreover, " '[t]he interactive process of fashioning an appropriate accommodation lies primarily with the employee.' [Citation.] An employee cannot demand clairvoyance of his employer. [Citation.] ' "[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. . . ." ' [Citation.] 'It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee.' [Citation.]" (*King,* at p. 443.) An employee has an obligation to cooperate in good faith with the employer, and summary judgment is proper where an employee fails to respond to an employer's request for additional information. (*Id*. at pp. 442-444.)

i. December 2011 request for an accommodation

As described above, defendant offered evidence that it accommodated plaintiff by granting him extensive medical leaves, and that it engaged in the interactive process, but that plaintiff caused the interactive process to break down by not responding to its reasonable requests for more information from his doctors. On December 23, 2011, plaintiff completed reasonable accommodation forms, asking to work from home three days per week, and in the office two days per week, because he was distracted in the office. He also requested a "secluded" work space at the office. He supported his request for an accommodation with a letter from his psychiatrist, Dr. Shannon Easton-Carr, who stated plaintiff suffered from depression and

anxiety, and that his coworkers were distracting and impaired his concentration.

Defendant sought more information from plaintiff about which essential job functions he was able to perform in a communal office setting, and which functions he was unable to perform. Plaintiff did not provide more information from his doctors about the accommodations he required. Instead, on January 25, 2012 and February 15, 2012, he provided letters from his health care providers stating he was unable to work and required a leave of absence. Defendant granted the requested leave.

Plaintiff argues the request for additional information from his doctors was merely a "delay tactic" and that defendant's claim that it required more information to craft an accommodation is "specious" because he had been reasonably accommodated for a number of years with a flexible work schedule.

No evidence supports this argument. It is undisputed that plaintiff failed to provide any additional information about the accommodations he requested, and the law required plaintiff to give defendant at the earliest opportunity a concise list of restrictions which must be met to accommodate him. Instead, plaintiff provided documentation from his doctors that he was unable to work at all, and he was granted time off as requested by his doctors.

ii. July 2012 request for an accommodation

In July 2012, plaintiff provided defendant with more letters from Dr. Easton-Carr, stating plaintiff would like to return to work with certain modifications, such as possibly working from home, a reduced workload, and a transfer to a new supervisor. Defendant gave plaintiff accommodation forms on July 30, 2012.

After plaintiff returned to work, he told Ms. Aviles and Mr. Kam that he believed Dr. Easton-Carr had recommended a flexible work schedule. Both Ms. Aviles and Mr. Kam understood the recommendations differently (and Dr. Easton-Carr's letters did not in fact recommend a flexible work schedule). Defendant denied plaintiff's request for accommodation until more information could be provided by plaintiff's doctors. To accommodate plaintiff while awaiting additional information about his work restrictions, defendant placed plaintiff on a part-time work schedule.

Plaintiff failed to provide the requested information, and Dr. Easton-Carr did not respond to Mr. Kam's follow-up request for additional information. Instead, beginning in October 2012, plaintiff's doctors declared him totally disabled and unable to perform his job. Again, defendant granted plaintiff a disability leave from October 2012 until December 2014.

Plaintiff contends the part-time work schedule did not reasonably accommodate his disability, and that defendant failed to discuss the schedule with plaintiff. Defendant presented evidence that it engaged in the interactive process in good faith, and took reasonable steps to accommodate plaintiff by requesting additional information about plaintiff's limitations, and by providing him with a part-time work schedule. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222.) It is undisputed that plaintiff failed to provide any additional information about the accommodations he requested. He never told defendant that he required a later start time for the part-time schedule provided to him.

Plaintiff attempts to create a triable issue of material fact with evidence that defendant allowed other employees who were

supervised by Ms. Aviles to transfer to different supervisors in 2012 and 2013, and other employees with differing responsibilities and work performance were allowed to work from home. However, these facts are irrelevant because plaintiff was totally disabled when these transfers occurred, and there was no evidence of the reason for these transfers. Moreover, an employer is not required to transfer a disabled employee to a different supervisor as a reasonable accommodation. (See, e.g., *Weiler v. Household Fin. Corp.* (1996) 101 F.3d 519, 526 [Americans with Disabilities Act does not require transfer to a different supervisor as a reasonable accommodation]; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812-813 [federal decisions interpreting ADA are instructive in applying FEHA].)

And, the fact that other employees with differing responsibilities and work performance were allowed to work from home does not create a material dispute because plaintiff offered no evidence to rebut Ms. Aviles's conclusion that he was unsuitable for working from home. An employer is not necessarily required to allow an employee to work from home as a reasonable accommodation. (See, e.g., *Vande Zande v. Wisconsin Dept. of Admin.* (1995) 44 F.3d 538, 544-545.)

Also, there is absolutely no evidence that plaintiff could have performed his job with accommodations between October 2012 and December 2014. Plaintiff's doctors said he was totally disabled, and his employer provided the only accommodation it could in those circumstances, time off as prescribed by his doctors.

b. Disability Discrimination Claim

Plaintiff alleged that defendant discriminated against him on the basis of his disability. FEHA prohibits an employer from

discriminating on the basis of "physical disability, mental disability, [and] medical condition" in the terms and conditions of employment. (Gov. Code, § 12940, subd. (a).) To resolve discrimination claims, California courts use the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) The plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Ibid.*) A prima facie case generally means the plaintiff must prove that (1) he suffers from a disability, (2) he was able to perform his job, (3) he suffered an adverse employment action, such as termination or demotion, and (4) some other circumstance suggesting a discriminatory motive. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004 (*Scotch*).) An adverse employment action must materially affect the terms, conditions, or privileges of employment. (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1051-1052.)

"If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence . . . the employer took its actions for a legitimate, nondiscriminatory reason. [Citation.] If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive." (*Scotch*, *supra*, 173 Cal.App.4th at p. 1004.) An employer's proffered reasons do not need to be "correct," " 'wise, shrewd, prudent, or competent' "; they need only be nondiscriminatory. (See *Guz*, *supra*, 24 Cal.4th at p. 358.) To

avoid summary judgment, plaintiff must produce specific and substantial evidence of pretext. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

Here, defendant presented evidence that plaintiff could not perform his job because he was totally disabled, and that he suffered no adverse employment action because he was given all of the medical leave he requested, and because defendant engaged in the interactive process in good faith. As we discussed *ante*, we agree, and necessarily conclude that plaintiff cannot establish this element of his claim.

Defendant provided evidence that it had legitimate business reasons for requesting additional information about plaintiff's requested accommodations, and it had concerns about plaintiff's ability to effectively work from home. Plaintiff failed to respond to defendant's requests. Plaintiff attempts to establish pretext with evidence that other nondisabled employees were given transfers, and allowed to work from home. However, as discussed *ante*, this evidence did not create a material dispute whether defendant accommodated him or engaged in the interactive process in good faith, and thus, plaintiff did not demonstrate discriminatory motive or pretext.

c. National Origin Discrimination

Plaintiff alleges he was discriminated against because of his Iranian national origin. FEHA prohibits an employer from discriminating in the terms and conditions of employment on the basis of national origin and ancestry. (Gov. Code, § 12940, subd. (a).)

Plaintiff testified at his deposition that he did not have any "facts or any document" to show that defendant discriminated against him because he was Iranian. It was just his "feeling."

Plaintiff's subjective belief that defendant discriminated against him is insufficient to raise a triable issue of material fact. (*Crosier v. United Parcel Serv.* (1983) 150 Cal.App.3d 1132, 1139.)

He also contends that he was treated differently than non-Iranian employees who were permitted to work from home. However, defendant presented evidence that it allowed another Iranian employee to work from home, based on her work performance. Quite simply, plaintiff failed to carry his burden.

d. Harassment

To establish a prima facie case of harassment, plaintiff was required to show that (1) he was a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was sufficiently severe and pervasive so as to interfere with his work performance by creating an intimidating, hostile, or offensive work environment; and (5) the defendant is liable for the harassment. (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 876.) " 'In determining what constitutes "sufficiently pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.' " (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142.)

Here, the purported harassment was that Ms. Aviles was critical of his work, would not grant him reasonable accommodations, and delayed in processing his request for accommodations, and that Mr. Kam was "upset" with him and told him he wished he would retire. We have already concluded the claims regarding plaintiff's requests for accommodation are baseless. And, as a matter of law, the conduct complained of was

not sufficiently severe and pervasive to support a claim of harassment.

e. Retaliation

FEHA also makes it unlawful "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA]." (Gov. Code, § 12940, subd. (h).) "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.)

Plaintiff contends he was retaliated against after he requested accommodations. However, as discussed *ante*, there is no evidence that plaintiff suffered any adverse employment action.

f. Failure to prevent discrimination, harassment, or retaliation

Plaintiff's cause of action for failure to prevent discrimination is derivative of his other claims, and fails for this reason. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 597-598.)

2. Evidentiary Rulings

Lastly, plaintiff contends the trial court erroneously sustained defendant's objections to some of his evidence. "[A]n appellate court reviews a court's final rulings on evidentiary

objections by applying an abuse of discretion standard." (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Plaintiff sought to introduce evidence that he had received an accommodation under his previous supervisor, allowing him a flexible work schedule. He also sought to introduce evidence that he was allowed a flexible schedule under his new supervisor. The trial court sustained defendant's objections to this evidence on relevance grounds. We find no abuse of discretion. Evidence of his working conditions for a new supervisor, in a different department, years after his original requests for accommodations, is irrelevant and, in any event, undermines rather than supports his claims against defendant. Even if the objection had been overruled and the evidence were admitted that plaintiff had an informal arrangement with a previous supervisor, years before the conduct giving rise to this lawsuit, it would not have been sufficient to create a material dispute.

The trial court also sustained defendant's hearsay objection to plaintiff's evidence that a later start time for the part-time schedule offered in August 2012 would have accommodated him, on the basis that plaintiff never told defendant that a later start time would accommodate him. The court did not abuse its discretion because plaintiff did not provide evidence that he requested that defendant permit him to start work later, or that his doctors recommended a later start time.

The trial court also sustained defendant's objection to plaintiff's testimony that Ms. Aviles told him she would delay processing his request for an accommodation, on the basis that it was contradicted by his deposition testimony that he had no evidence of discrimination and he simply felt that Ms. Aviles did not like him, but that she never said anything inappropriate to

him. We find no abuse of discretion. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["[A] party cannot create an issue of fact by a declaration which contradicts his prior discovery responses."].)

For the same reason, we find no abuse of discretion in the trial court sustaining the objections to plaintiff's testimony that, after he complained to Ms. Aviles and Mr. Kam that they were treating him differently because of his disabilities, Ms. Aviles was more critical of his work, and Mr. Kam was upset with him; Ms. Aviles asked about the ancestry of his Iranian doctors; and Mr. Kam had assured him that he would be permitted to continue in the flexible schedule he had before Ms. Aviles became his supervisor. This testimony was also inadmissible because plaintiff testified in his deposition that he had no evidence that Ms. Aviles discriminated against him because of his Iranian national origin; he simply "felt" Ms. Aviles did not like him; but Ms. Aviles never said anything inappropriate to him. Even if the evidence were credited, it was insufficient to create a material disputed fact.

DISPOSITION

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

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.