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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SANDRA ATERE-ROBERTS, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B258691 (Los Angeles County Super. Ct. No. BC495411)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven J. Kleifield, Judge. Affirmed.

Paul Kujawsky for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Vivienne A. Swanigan, Assistant City Attorney, Janis Levart Barquist and Phyllis Townsend Henderson, Deputy City Attorneys, for Defendant and Respondent.

Plaintiff and appellant Sandra Atere-Roberts (plaintiff) challenges a judgment entered following the trial court's order granting the motion for summary judgment brought by defendant and respondent City of Los Angeles (the City).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Plaintiff, who is African-American and over 40 years of age, was originally hired as a workers' compensation analyst by the City in 1998. In 2000, she was promoted to senior analyst. She works in the workers' compensation division of the City's personnel department (the division).

In 2008, the division failed a mandatory California State Audit. In response, the City hired Dawn Alvarado (Alvarado) as the division's administrator. The division began making a number of organizational changes.

In November 2008, Alvarado and the division chief, David B. Noltemeyer (Noltemeyer), created two specialized teams and unilaterally selected two senior analysts to supervise the newly-created teams. The two selected were Donna Chatman, who is African-American, and Andrea Karcher (Karcher), who is Caucasian.

Appellant and others complained about the unilateral selection, without the benefit of a formal application process, which violated the "merit system" underlying the City's civil service system. Alvarado and Noltemeyer agreed not to use this system in the future. Appellant would have been interested in this position.

In March 2010, three transfer opportunities to the Department of Water and Power (DWP) became available. Plaintiff submitted a transfer application, but she did not include as much information about her work experience or other skills as the successful candidates. The application did not seek information about education, race, age, or

seniority, and plaintiff did not include that information on her application.[1] Plaintiff was not selected for the transfer.

According to plaintiff, "[d]ue to the stress caused by her caseload and her supervisor," plaintiff developed diabetes and high blood pressure. Consequently, from August to September 2010, she took medical leave pursuant to the California Family Rights Act (CFRA). When she returned, she had the same job classification, the same compensation, and the same benefits as she had before her leave. But, plaintiff believed that she was subjected to excessive scrutiny at work, in retaliation for taking medical leave.

Later, plaintiff was unilaterally assigned to manage a newly-created claims assistants pool. Thereafter, she was unilaterally reassigned to the future medical team. Plaintiff claims that no one told her she could decline the assignments. She believed that these assignments were punishment for taking medical leave as they offer reduced opportunity for promotion.

Procedural Background

On November 8, 2012, plaintiff filed the instant action. The second amended complaint (SAC), the operative pleading, alleges six causes of action: discrimination on the basis of race (Gov. Code, § 12940, subd. (a)); discrimination on the basis of age (Gov. Code, § 12940, subd. (a)); discrimination in violation of Government Code section 12945.2 (family care leave); retaliation in violation of Government Code section 12940, subdivision (h); failure to take all action necessary to remedy and prevent discrimination and retaliation (Gov. Code, § 12940, subd. (k)); and violation of Labor Code section 1102.5.

The City moved for summary judgment. Regarding the first and second causes of action, it argued that plaintiff could not show that she suffered any adverse employment

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[1] Plaintiff claims that no precautions were taken to ensure that the DWP did not know the applicants or could not access personal information about the applicants. She also speculates that the raters could get clues about the applicants' races by their names.

action; alternatively, plaintiff had no evidence that any of the challenged employment decisions were motivated by discriminatory animus towards plaintiff's race or age.

Regarding the third cause of action, the City argued that there was no evidence that plaintiff suffered an adverse employment action because she exercised the right to take CFRA leave. Even if the changes in her job duties rose to the level of an adverse employment action, there was no evidence of the requisite causal connection between her protected medical leave and the decision to change her assignment.

Finally, plaintiff's retaliation claim failed because she did not engage in protected activity.

Plaintiff opposed the City's motion.

After entertaining oral argument, the trial court granted the City's motion for summary judgment. With respect to the first and second causes of action, it found that plaintiff did not suffer an adverse employment action. It also found that plaintiff did not present evidence of discriminatory motive. Further, the trial court determined that the City met its burden that it had a legitimate nondiscriminatory reason for its employment decisions and that plaintiff failed to meet her burden in demonstrating that the City's stated reason was pretextual.

Regarding the third cause of action, plaintiff failed to create a triable issue of fact as to whether she was reinstated to the same or comparable position. Additionally, she failed to show a prima facie case and pretext.

As for the fourth cause of action, the City was entitled to judgment because plaintiff failed to address this cause of action in her opposition to the City's motion for summary judgment; she failed to meet her prima facie case.

With respect to the fifth cause of action, the City was entitled to judgment because plaintiff failed to address this cause of action in her opposition to the City's motion for summary judgment. As for her claim that the City failed to take proper steps to investigate her discrimination complaint, plaintiff did not make this allegation in her complaint; thus, she is barred from raising it now.

Finally, the City was entitled to judgment on plaintiff's sixth cause of action because plaintiff did not show that prior to any of the challenged employment decisions she engaged in protected activity. And, there was no evidence that she complained about ongoing discriminatory acts.

Judgment was entered, and plaintiff's timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *Motion for Summary Judgment*

A. First and Second Causes of Action

"In California, an employee seeking recovery on a theory of unlawful discrimination or retaliation must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. [Citation.] 'A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.' [Citation.] '"[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [Citation.] If every minor change in working conditions or trivial action were a materially adverse action then any "action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [Citation.]' [Citation.] The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment. [Citations.]" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386–387.)

Moreover, to defeat the City's motion for summary judgment, plaintiff was required to show some circumstances that suggest discriminatory motive and a causal link between the discriminatory animus and the alleged adverse employment action. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.)

Here, as the trial court correctly found, plaintiff has not demonstrated that she suffered an adverse employment action and/or that any action was taken against her because of her race and/or age. In urging us to reverse, plaintiff directs us to three supposed adverse employment actions: (1) The denial of a job opportunity in 2008,[2] when Karcher received an assignment that plaintiff "would have wanted"; (2) the denial of the transfer to the position at the DWP; and (3) plaintiff's unilateral reassignment after medical leave to a team that had no white members. But, there is no evidence that plaintiff was not given either the position in 2008 or the transfer position at the DWP or that she was reassigned in 2010 because of her race and/or age. (See *Autry v. North Carolina Dept's of Human Resources* (4th Cir. 1987) 820 F.2d 1384, 1386 [plaintiff "would have to show that she was not promoted *because of* her race, not that she was a member of the black race *and* was not promoted"].) The fact that the DWP raters may have had access to personnel files does not indicate discrimination. Plaintiff's suggestions that (1) the DWP raters could identify the applicants' races by their names, and (2) the reassignment diminished her opportunity for advancement are nothing more than unfounded speculation.

B. Third Cause of Action

Plaintiff alleges that the City discriminated against her by "changing and diminishing the position which [she] had occupied prior to her medical leave in August 2010." To the extent this cause of action is based upon claims discussed above, it fails for the reasons previously noted.

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[2] On appeal, the City defends the trial court's finding on the grounds that plaintiff's challenge to any misconduct related to her 2008 complaint is untimely. It seems that this issue was not briefed below. We will not consider it on appeal.

Plaintiff asserts that the City violated Government Code section 12945.2 by giving her diminished job responsibilities after her return from medical leave. She claims that her new position amounted to an adverse employment action because it "strangled" her future job prospects. The City presented evidence that the changes to plaintiff's duties were consistent with her job classification and did not constitute a demotion. Because plaintiff offers no contrary evidence, beyond her own perception that the new duties were beneath her, her claim fails.

C. Fourth and Fifth Causes of Action

Plaintiff expressly abandoned her appeal as to these causes of action.

D. Sixth Cause of Action

Under Labor Code section 1102.5, subdivision (b), "an employer may not retaliate against an employee for disclosing information to a government or law enforcement agency that the employee reasonably believes discloses a violation of, or noncompliance with, a state or federal statute or regulation" (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384) "or a violation of or noncompliance with a local, state, or federal rule." (Lab. Code, § 1102.5, subd. (b).) Here, there is no evidence that plaintiff engaged in protected activity, namely that she disclosed a violation or noncompliance with a state or federal statute, regulation, or rule. Thus, her claim fails as matter of law.

For the first time on appeal, plaintiff asserts that her 2008 complaint that the City failed to use its merit system violated California's ban on racial and age bias in employment, embodied in Government Code section 12940. But there is no evidence that she complained in 2008 about race and/or age discrimination. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198–1199.) Rather, the evidence shows only that she complained that the merit system was not utilized. Thus, her claim that she was retaliated against for complaining about race and/or age discrimination cannot be sustained.

DISPOSITION

The judgment is affirmed. The City is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ