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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM T. LONG,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B229173

(Los Angeles County
Super. Ct. No. BC391967)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Silver & Field, Lawrence Silver, Mark E. Field and Karen S. Lai for Plaintiff and Appellant.

Office of the County Counsel, Joyce M. Aiello, Assistant County Counsel, Eduardo Montelongo, Deputy County Counsel; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendant and Respondent.

Plaintiff William T. Long, M.D., a former employee of defendant the County of Los Angeles (the County), appeals from a judgment entered in favor of the County. After a court trial, the trial court concluded that Long's action against the County for reimbursement of fees and costs incurred in assisting the County in defending a third-party lawsuit was barred because Long did not file a timely claim under the Government Claims Act (Gov. Code, § 810 et seq.). Long contends that a claim was not required because he brought this action for reimbursement under Labor Code section 2802 (section 2802)¹ and, moreover, an exception to the claims presentation requirements (Gov. Code, § 905, subd. (c))² applies. In the alternative, he contends that the claim he filed was timely. We affirm.

BACKGROUND

For more than 10 years, beginning in January 1994, Long was employed by the County as a physician, working as an orthopedic surgeon, and teaching and monitoring residents, at Martin Luther King Hospital (MLK). He also held an academic position with Charles Drew Medical School (Drew), first as an assistant professor of orthopedics and later as the director of the orthopedic residency program. MLK was the base hospital for Drew's residency program.

Before Long became the director of the orthopedic residency program at Drew in early 2004, one of the residents, Edward Kolpin, had been suspended from the residency program. Long did not initiate Kolpin's suspension. When he became program director, Long reviewed the incident which led to Kolpin's suspension as well as other incidents of alleged misconduct by Kolpin. The former director of the residency program told Long

¹ Section 2802, subdivision (a), provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

² Government Code section 905, subdivision (c), provides that "[c]laims by public employees for fees, salaries, wages, mileage, or other expenses and allowances" are not subject to the claims presentation requirements.

to reinstate Kolpin and allow him to graduate. Long suggested that Kolpin not be readmitted until all of the incidents of misconduct were considered and Kolpin was educated on acceptable behavior and requirements for graduation.

According to Long, Kolpin lodged complaints about Long with the County which resulted in the County serving Long with a notice of intention to discharge Long from his employment. Long retained an attorney to defend him against Kolpin's complaints, which Kolpin made not only to the County, but also to the United States Attorney's Office and the California Medical Board, among other agencies. In November 2004, Long resigned his employment with the County after entering into a confidential settlement agreement with the County. The other agencies where Kolpin lodged complaints against Long closed their investigations, finding no evidence of wrongdoing by Long.

Kolpin was terminated from Drew's residency program in December 2004. Thereafter, in 2005, Kolpin filed a complaint against the County with the Equal Employment Opportunity Commission (EEOC), challenging his termination. In the complaint, Kolpin accused Long of wrongdoing, but did not name Long as a respondent.

In May 2005, the County asked Long to assist it in defending Kolpin's claims against the County. On May 25, 2005, Lawrence Silver—the same attorney who defended Long against Kolpin's complaints to the County and other agencies—wrote a letter to Jeffrey Hausman, the County's attorney in the Kolpin matter, stating in pertinent part: "I have spoken to Dr. Long, who is willing to be of assistance to the County in connection with the Complaint filed by Dr. Kolpin. There are a couple of questions however. Should Dr. Long be a party to this proceeding, will the County provide him with counsel? Second, in the event that Dr. Long is not a party, will the County reimburse him for the necessary legal fees which he will incur in connection with providing assistance for the [C]ounty?" The County did not immediately respond to this inquiry.

In June 2005, Kolpin filed a court action against the County and Drew, asserting wrongful termination, retaliation and discrimination, and other claims. Although Kolpin

alleged that Long played a role in his wrongful termination, Kolpin did not name Long as a defendant or include Doe defendants in his complaint. Nonetheless, Silver believed that Kolpin would attempt to name Long as a defendant. The County requested that Long submit to an interview by the County regarding Kolpin's allegations in the EEOC and court actions.

On August 23, 2005, Hausman responded in writing to Silver's May 25, 2005 inquiry regarding reimbursement of Long's attorney fees: "In connection with seeking the cooperation of Dr. Long in our defense of the [Kolpin] matter, please be advised that I have spoken with the County regarding Dr. Long's request that a defense be provided to him should he be sued. The County would need to review any lawsuit filed against Dr. Long. . . . It would seem that if allegations against Dr. Long involve conduct while he was acting in the course and scope of his County employment, I would suspect there should be no issue in this regard. [¶] In connection with Dr. Long's request for attorney fees while he is being interviewed, at this time the County does not feel it would be appropriate for a number of reasons. First, the County and Dr. Long are not adverse parties, and further Dr. Long's objectivity may be compromised by such an arrangement. [¶] Please discuss this matter with Dr. Long as we would still seek his cooperation and assistance in the defense of the [Kolpin] lawsuit."

In further oral discussions about the issue, Hausman asked Silver to refrain from pressing the County regarding reimbursement of Long's attorney fees until after the Kolpin action was concluded. Hausman did not want the County and Long to be arguing over attorney fees while the Kolpin action was pending. According to Silver, Hausman noted that their letters on the issue were discoverable. Hausman never told Silver that the County would reimburse Long for the attorney fees. Hausman and Silver did not discuss whether or when Long should file a government claim with the County. They did not discuss the claims presentation requirements of the Government Claims Act at all.

Long voluntarily submitted to the interview with the County, where he was represented by Silver. Long understood that he could decline to participate and decline to assist the County. During the interview, Long provided the County with MLK

documents regarding Kolpin that Long had copied from MLK files. Later, Kolpin subpoenaed Long for a deposition and Silver represented Long at the deposition.

In connection with the Kolpin action, Silver represented Long in matters where Long sought to protect his right to privacy because he believed that the County was not abiding by the confidentiality provision of the settlement agreement between Long and the County. Silver sought to prevent the County from producing certain documents to Kolpin.

In June 2007, Kolpin dismissed his action against the County after they reached a settlement. On November 14, 2007, Long filed a claim under the Government Claims Act for reimbursement of the attorney fees and costs he incurred in connection with the Kolpin action. He listed the amount of his damages to date as \$50,242.68. On December 3, 2007, the County notified Long that it had rejected his claim as untimely and that he could file an action under section Government Code section 946.6 seeking relief from the claims presentation requirements. Long did not file an action under section 946.6.

Instead, in June 2008, Long filed this action, alleging that he is entitled to reimbursement of the attorney fees and costs incurred in the Kolpin action, as well as fees and costs incurred in this action, under section 2802. In his first amended complaint, filed in August 2009, Long asserted that he was not required to present a government claim to the County, but that he did so “[o]ut of an abundance of caution.” He alleged that he filed his government claim on November 14, 2007, “at the specific request of the County, in that the County requested that no claim for attorneys fees be made until such time as the *Kolpin* litigation was finally concluded.”

After denying the County’s motion for summary judgment and motion for judgment on the pleadings, the trial court conducted a bench trial in this matter. On September 8, 2010, the court issued its final statement of decision. The court concluded that Long was required to file a government claim and that his claim was untimely because he filed it more than a year after his cause of action accrued. The court noted that Silver testified that Long began incurring fees and costs in connection with Kolpin’s claims against the County in March 2005. Long did not file his government claim until

November 14, 2007. The court also concluded that Long did not preserve his claim that the County was estopped from asserting noncompliance with the Government Claims Act because Long did not file an application to present a late government claim. Finally, the court concluded that section 2802 is not applicable to Long's reimbursement claim against the County.

The trial court refused to consider legislative history of section 2802, submitted by Long after the court issued its tentative decision in this matter, finding that the submission was untimely. The court also found that a review of legislative history was not appropriate because section 2802 is not ambiguous.

DISCUSSION

Long contends that he was not required to present a government claim to the County because the Government Claims Act is not applicable to his cause of action under section 2802. He also contends that an exception to the claims presentation requirements under Government Code section 905, subdivision (c), applies. Finally, he contends that, to the extent the claims presentation requirements apply to his cause of action against the County, he presented a timely government claim. We conclude Long cannot establish that the County was obligated to reimburse him under section 2802. Accordingly, we need not reach the issue of whether Long was required to file a government claim.

In this lawsuit, Long asserts that he is entitled to reimbursement of the attorney fees and costs incurred in the Kolpin action, as well as fees and costs incurred in this action, under section 2802. This statute provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." (§ 2802, subd. (a).)

The County argues that section 2802 does not apply because Long did not incur the fees for which he seeks reimbursement "in the necessary activities' for his employer within the meaning of section 2802." For the reasons discussed below, we agree with the County that Long's lawsuit does not seek reimbursement of "*necessary* expenditures or

losses incurred by the employee *in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer*” within the meaning of section 2802, subdivision (a). (Italics added.)³

The trial court did not reach this issue in its statement of decision. Long did not request that the trial court make findings on this issue. The facts regarding the legal services that Silver provided are not in dispute. What is in dispute is Long’s characterization of these legal services as “necessary activities” which were “taken [by Long] to advance the employer’s cause.” We conclude as a matter of law that Long cannot prove his cause of action under section 2802 because he cannot establish that the expenditures qualify as “necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer” within the meaning of section 2802, subdivision (a). We may affirm the judgment on any ground properly supported by the record. (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 632; *MacGregor Yacht Corp. v. State Comp. Ins. Fund* (1998) 63 Cal.App.4th 448, 460-461.)

Long voluntarily provided assistance to the County in the Kolpin action. The County was not Long’s employer at the time Long agreed to assist the County, and the

³ The County also argues that section 2802 does not apply to public employers. We are aware of no case applying section 2802 to a cause of action by a public employee against a public employer. (See *Thornton v. California Unemployment Ins. Appeals Bd.* (2012) 204 Cal.App.4th 1403, 1422-1423 [“Thus Labor Code section has no application to public employees seeking reimbursement of defense costs from their employers; their reimbursement rights are governed exclusively by the Government Claims Act.”]; see also *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 341, fn. 12 [“even in the traditional area of indemnity for litigation expenses, it is likely that section 2802 has no application to public entities”].) We do not reach this issue, however, because we conclude that section 2802 does not apply to Long’s cause of action for another reason, as set forth above. Accordingly, we need not decide whether the trial court erred in excluding the legislative history of section 2802 and we also deny Long’s request that we take judicial notice of this legislative history. Long submitted the legislative history in support of his argument that section 2802 applies to causes of action by public employees against public employers, an issue we do not reach.

County did not and could not direct Long to provide such assistance. Long agreed to review the transcript from Kolpin's deposition and to help the County develop facts to support its defense. He agreed to let the County interview him. He does not seek reimbursement in this action for the time *he* spent engaging in these activities, to the extent they took him away from his job. Any attorney time incurred in connection with these activities was not a "necessary expenditure" because Long could have told the County he would not assist it in developing the facts to defend the action.

Although Long was not sued in the Kolpin action, he retained Silver to represent him in connection with the Kolpin action. "[C]ourts that have held an employer has a duty to reimburse an employee for defense costs under Labor Code section 2802 have done so *only* when the employee was sued by a third party." (*Thornton v. California Unemployment Ins. Appeals Bd.*, *supra*, 204 Cal.App.4th at p. 1420.) Long retained Silver to protect Long's interests. Long wanted to prevent Kolpin from gaining access to information that Long believed was protected under Long's settlement agreement with the County. To that end, Silver made a motion to quash Kolpin's deposition subpoena to Long, Silver represented Long at Long's deposition, Silver attended depositions of others who might produce the confidential information and Silver drafted a protective order regarding the confidential information. Long has cited no authority indicating that a former employer must reimburse its former employee under circumstances where the former employee chooses to retain counsel to represent him in connection with proceedings in a third-party action in which he is not a party. Nor have we found such authority upon our review.

Long also relies on Government Code section 905, subdivision (c), which provides that a claimant need not file a government claim where the claimant is a public employee who is making a claim for "fees, salaries, wages, mileage, or other expenses and allowances." This section does not provide Long with a right to reimbursement for attorney fees and costs he incurred in connection with a third-party lawsuit after his public employment ended.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.