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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RANDOLPH JEFFREY, Plaintiff and Appellant, v. TEMPLE CITY UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B241688 (Los Angeles County Super. Ct. No. BC448109)

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

Irving Meyer for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Marlon C. Wadlington for Defendant and Respondent.

The trial court granted summary judgment in favor of a public school district, in a lawsuit alleging that the district violated the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.)[1] There are no triable issues of material fact because plaintiff cannot establish all elements of his FEHA claims. We affirm the judgment in favor of the school district.

FACTS

Plaintiff's Employment and Injuries

Randolph Jeffrey was hired as a part-time custodian in December 2005 by the Temple City Unified School District (TCUSD) to perform light maintenance and repairs, and to direct traffic. Among other things, he vacuumed; wiped down tabletops; cleaned whiteboard; took out trash; swept and washed down walkways; cleaned and sanitized restrooms; changed lights; painted; waxed floors; cleaned carpets; lowered and folded the flag; and moved tables, desks and chairs.

In April 2007, Jeffrey was in a car accident and injured his shoulder and arm. He was unable to work for six to eight months. He asked to return to TCUSD, doing light duties such as stuffing envelopes, but was told that no such work was available. He perceived this as racist. He returned to TCUSD as a full-time employee (with benefits) at a different school in December 2007. After returning, Jeffrey felt "another onslaught of racial discrimination" because "I wasn't Mexican" and was made to work harder than other custodians.

In August 2008, Jeffrey injured his ankle while walking down stairs at work.[2] He did not file a claim for workers' compensation. However, he filed a complaint with the Department of Fair Employment and Housing, claiming that he was the victim of racial

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[1] All undesignated statutory references in this opinion are to the Government Code.

[2] In interrogatories, Jeffrey stated, "Although I probably injured my ankle outside of work, I aggravated it while at work, while walking down a flight of stairs." During his deposition, Jeffrey testified that the ankle injury he sustained at work was unaffected by his prior injury outside of work.

discrimination from November 2007 until June 2008 because he was "forced to accept a permanent position" with TCUSD and toiled harder than his colleagues "doing the grunt work." Jeffrey went on medical leave September 3, 2008.

Plaintiff's Inability to Work

Jeffrey obtained medical impairment forms from physicians at Kaiser Permanente. The first two notes state that Jeffrey was unable to work from August 7-29, 2008. A third note stated that Jeffrey was unable to work from September 5-10, 2008, but added, "Randy Jeffrey can return to full duties with no restrictions on 9/11/ 2008." A fourth note indicated that Jeffrey was unable to work from September 15-28, 2008. Subsequent physicians' notes stated that Jeffrey was "completely unable to work (Homebound)" after September 30, 2008.

Though Jeffrey discussed the idea of a golf cart with his physician, there is no medical documentation stating that he could perform his duties with an accommodation, such as a golf cart. Plaintiff acknowledged in testimony that he cannot enter classrooms with a golf cart, but felt he could clean four or five classrooms of the 26 he was assigned.

TCUSD contacted Jeffrey regularly regarding his medical status until he told the district to "stop harassing me while I'm convalescing." Jeffrey was able to walk while convalescing. He did not see any doctors from January 2009 until September 2009. He was ready to work by June or July 2009.

The Letter

On January 23, 2009, TCUSD sent Jeffrey a letter informing him that his paid leave will soon end (the Letter). TCUSC acknowledged receipt of medical impairment forms indicating that "your injury has left you completely unable to work. [N]o request was submitted by you or your physician to return to work with accommodations."

The Letter continues on to say that "As of January 30, 2009 you will be placed on the 39-month re-employment list. During that 39-month period, you may resume employment in a vacant position in a classification for which you are qualified upon presentation of your physician's verification that you are released from the present

restrictions, and that you are able to perform the essential functions of the classification, with or without reasonable accommodations."

Plaintiff testified that he saw the Letter "countless times." He considered himself terminated because the Letter says "Termination of Employment" at the top. With respect to the language regarding reemployment, Jeffrey testified, "I didn't believe that at all." He began looking for employment elsewhere "immediately," applying for jobs with United Parcel Service, at supermarkets, with the City of San Marino, and 100 other places. He did not ask TCUSD for reemployment.

After Recovering, Plaintiff Files an Administrative Complaint and Lawsuit

Eight months after plaintiff received the Letter, a physician signed a note stating that he could return to work on September 3, 2009, "without restrictions." Jeffrey does not recall forwarding the medical clearance form to TCUSD. He obtained medical clearance so that he could find employment elsewhere, not at TCUSD.

On October 20, 2009, Jeffrey filed an administrative claim with the Department of Fair Employment and Housing, alleging that he was discriminated against due to his race and medical disability. He received a "right-to-sue" letter on October 26, 2009. In a complaint filed October 25, 2010, Jeffrey alleged that TCUSD wrongfully terminated his employment in violation of the FEHA.[3] Jeffrey asserted that TCUSD neither accommodated his disability nor attempted to determine a reasonable accommodation, and engaged in retaliation.

Motion for Summary Judgment

TCUSD moved for summary judgment arguing that plaintiff cannot make a FEHA claim because he failed to show that he could do his job: his physician deemed him "completely unable to work." Placing plaintiff on the 39-month list was a ministerial act required by statute when plaintiff exhausted his paid leave time. Plaintiff did not notify

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3 Plaintiff has abandoned his claim of racial discrimination.

TCUSD that he was medically cleared for work in September 2009, nor did he ask for reemployment. TCUSD did not retaliate against plaintiff.

Jeffrey opposed the summary judgment motion. He argued that a jury could believe that the Letter permanently terminated his employment and was "an adverse action." Also, he could have performed his job if he had been provided with a golf cart, but his request for one was not taken seriously. Plaintiff did not notify TCUSD that he was medically cleared for work in September 2009, owing to his belief that the school district terminated him in January 2009, when it sent him the Letter.

THE TRIAL COURT'S RULING

The trial court granted TCUSD's motion for summary judgment and dismissed all of plaintiff's causes of action, finding that TCUSD "is entitled to judgment as a matter of law." There is no triable issue that TCUSD discriminated against Jeffrey based on a disability. Further, Jeffrey cannot establish that TCUSD retaliated against him, failed to engage in the interactive process, or failed to accommodate him. Jeffrey appeals.

DISCUSSION

1. Standard of Review

Summary judgment is proper if there is no triable issue of fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To succeed, the defendant must show that a necessary element of the plaintiff's case cannot be established, or there is a complete defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Id.* at p. 843.) Review of the ruling on summary judgment is de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.)

2. Jeffrey's FEHA Claims

a. Discrimination Claim

Under the FEHA, an employer may not discriminate against an employee on account of a physical disability. (§ 12940, subd. (a); *Deschene v. Pinole Point Steel Co.*

(1999) 76 Cal.App.4th 33, 43-44.) "A prima facie case for discrimination on grounds of physical disability under the FEHA requires 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." (*Deschene, supra,* at p. 44.) TCUSD does not contest that Jeffrey suffered from a physical disability, but argues that the remaining elements of his discrimination claim are not satisfied.

1. Jeffrey's Ability to Do His Job

The school district contends that Jeffrey cannot prevail on his discrimination claim because he was not "qualified to do his job." The FEHA does not prohibit an employer from discharging an employee "where the employee, because of his or her physical [ ] disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety . . . even with reasonable accommodations." (§ 12940, subd. (a)(1).) The employee's "essential functions" are fundamental to his job; they "may be essential because the reason the position exists is to perform that function." (§ 12926, subd. (f).) "[I]n disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job with or without reasonable accommodation." (*Green v. State of California* (2007) 42 Cal.4th 254, 265.) The Legislature never intended to compel employers to retain workers who cannot perform their essential duties. (*Id.* at p. 266.)

At the time it sent the Letter in January 2009, TCUSD possessed the opinion of Jeffrey's physician that Jeffrey was "completely unable to work (Homebound)." The final work status report from Kaiser states that Jeffrey "is placed off work from 12/15/2008 through 3/16/2009." There is no indication from the physician that Jeffrey could perform his job on a restricted basis. An employer is entitled to use physician opinions to gauge the employee's abilities and limitations. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229.) The unrefuted medical evidence shows that Jeffrey could not perform any work for TCUSD, with or without an accommodation.

Although the medical impairment forms indicate that Jeffrey could not work at all, he contends that he asked TCUSD for an accommodation in the form of a golf cart, but his request was not taken seriously. Jeffrey contends that this amounted to a "failure to engage in the interactive process," which is required by the FEHA to determine a reasonable and effective accommodation of a physical disability. (§ 12940, subd. (n).)

It is undisputed that Jeffrey's job required him to direct traffic; vacuum; clean classrooms; remove trash; sweep and wash walkways; clean and sanitize restrooms; change lights; paint; wax floors; clean carpets; lower and fold the flag; and move tables, desks and chairs. Jeffrey did not show that these functions can be performed in a golf cart, which (he admitted) cannot enter classrooms or restrooms, or be used while waxing floors, cleaning carpets, sweeping sidewalks, changing light bulbs, or painting. Jeffrey suggested during his deposition that he could wheel around a few classrooms in a desk chair while dusting, a trivial fraction of his essential duties.

Possible accommodations include making facilities accessible to disabled individuals; job restructuring; modified work duties to comply with medical restrictions; reassignment to a vacant position; or modifying equipment or devices. (§ 12926, subd. (o).) None of these possible accommodations are suitable for a custodian whose work is innately physical and requires constant movement. Jeffrey did not present evidence that he was capable of performing the essential duties of his job while seated in a desk chair or a golf cart, and his physician opined that Jeffrey was "homebound" and could not work. Under the circumstances, engaging in the interactive process would be futile.

A finite leave of absence may be reasonable accommodation under the FEHA if, following the leave, the employee can resume his duties. "Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.) An employer need not accommodate a disability by waiting indefinitely for an employee's medical condition to be corrected. (*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at pp. 226-227.)

The Letter indicates that Jeffrey was placed on a 39-month reemployment list, during which time he could resume employment in a vacant position for which he was qualified, upon verification by a physician that he was medically released for work and able to perform the essential duties of his job, with or without an accommodation. Upon receiving the Letter, Jeffrey testified that he "immediately" began looking for work elsewhere. Despite being on TCUSD's reemployment list, Jeffrey did not avail himself of this opportunity by submitting a medical clearance form to TCUSD, though he obtained such a form in September 2009.

2. Evidence of an Adverse Employment Action

The school district argues that the Letter did not constitute an "adverse employment action" based on Jeffrey's disability. An adverse employment action arises from discrimination that materially affects the terms, conditions or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1049-1051.) TCUSD presented evidence that its act of placing Jeffrey on the 39-month reemployment list was not discriminatory. Rather, its conduct was mandated by state law: "When all leaves of absence, paid or unpaid, have been exhausted and if the employee is not medically able to assume the duties of the person's position, the employee shall, if not placed in another position, be placed on a reemployment list for a period of 39 months." (Ed. Code, § 45192, subd. (f).)

In *Trotter v. Los Angeles County Bd. of Education* (1985) 167 Cal.App.3d 891, a school employee was absent for six months due to a medical disability. The school board notified her that she had been placed on a 39-month reemployment list. The employee sued for violation of her due process rights because she did not receive a hearing before being placed on the list. Division Three of this District concluded that placing a medically disabled school employee on the 39-month list "was not disciplinary and no hearing is required. Respondents' action, instead, was a ministerial action which involved no discretion and which required merely reviewing appellant's records and determining when her sick and vacation leaves expired." (*Id.* at p. 896.)

In short, state laws "clearly mandate the placement of an employee on the 39-month reemployment list once the employee is off work for medical reasons and has exhausted all leaves." (*Trotter v. Los Angeles County Bd. of Education*, *supra*, 167 Cal.App.3d at p. 897.) Jeffrey does not deny that he had exhausted all leave time when TCUSD placed him on the reemployment list. Because his placement on the list was mandatory and ministerial, it was not an adverse employment action motivated by animus or discrimination.

Jeffrey makes much of four words preceding the body of the Letter, before the salutation, reading "Re: Termination of Employment." Jeffrey does not argue that the Letter is ambiguous. In fact, it clearly states Jeffrey will be placed on the reemployment list and could resume employment upon presentation of his physician's verification that he is capable of working. Jeffrey obtained a medical release eight months after receiving the Letter, but did not give the release to TCUSD or ask to resume his employment. Despite reading the Letter "countless times" as stated in his testimony, Jeffrey did not believe that TCUSD placed him on the reemployment list. Jeffrey's unilateral disbelief in the unambiguous terms of the Letter do not create a triable issue as to whether he was subject to an adverse employment action based on discrimination.

b. Retaliation Claim

A prima facie case of retaliation under the FEHA requires plaintiff to show: (1) a protected activity; (2) an adverse employment action; and (3) a causal link between the protected activity and the employer's action. (*Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1042.) The employer may counter the employee's claim of retaliation by proffering evidence that its adverse employment action was legitimate and not motivated by animus. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 479.)

Jeffrey's retaliation claim fails for the same reason that his discrimination claim fails. State law required TCUSD to place Jeffrey on the 39-month reemployment list after all of his leave time was exhausted. Because this action was mandatory and ministerial, it was legitimate and nonretaliatory because no discretion was involved in the

decision. By extension, no animus can be inferred from the school district's obedience to the requirements of the Education Code.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.