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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PERRY BATTLE, Plaintiff and Appellant, v. JAPAN TOBACCO INTERNATIONAL U.S.A., INC., Defendant and Respondent.	B235816 (Los Angeles County Super. Ct. No. BC441114)

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

Law Offices of Joseph M. Lovretovich, Joseph M. Lovretovich, David F. Tibor for Plaintiff and Appellant.

Holland & Knight, Linda Auerbach Allderdice, James W. Michalski, Timothy F. Fisher for Defendant and Respondent.

A former employee appeals from a grant of summary judgment, contending that triable issues of material fact exist as to whether his termination was motivated by the filing of a complaint alleging racial discrimination. We conclude that, because the defendant employer showed that its reason for terminating appellant was legitimate and nonretaliatory, and because appellant failed to counter this showing, summary judgment was proper.

FACTUAL AND PROCEDURAL BACKGROUND

Termination of Battle's Employment

Respondent Japan Tobacco International USA, Inc. (JTI) is a seller of tobacco products. Appellant Perry Battle joined JTI as the "west regional sales manager" in JTI's Torrance office in 2003, an at-will position that Battle held throughout the duration of his employment. Battle occupied a top spot in the JTI hierarchy as one of only two regional sales managers in the United States. During the time period relevant to this case, he was supervised by Rick Di Donato, the planning & operations director and national sales director for JTI. As the west regional sales manager, Battle directly supervised four district sales managers and a key account manager, and indirectly supervised between 20 to 25 other sales representatives.

In February 2009, Battle, who is African-American, filed a complaint for race and age discrimination with the Equal Employment Opportunity Commission (EEOC). He alleged that in January 2009 he was given an unwarranted negative performance review by Di Donato. Following mediation, Battle and JTI settled the EEOC charge. The parties agreed that Battle would receive a positive adjustment in his performance review and a bonus and salary increase. The settlement agreement further provided that JTI did not admit to any violations.

Battle continued to work as the west regional sales manager following the settlement. On June 25 of 2009, Battle and a subordinate, Jim Jones, a district sales manager, were in Fresno on a business trip. At the end of the night, Battle and Jones returned to their hotel and sat talking in the lobby, when they got into a heated argument. The next day, Jones called Anne Binkley, JTI's human resources director, to report the

incident. He described Battle as the instigator, stated that Battle was yelling and swearing at him, and said that Battle pushed him.

Binkley initiated an investigation of the incident, and Di Donato was brought in to interview Jones and Battle. Following their investigation, Binkley and Di Donato met with Douglas Van Staveren, general manger of American operations for JTI. The three agreed that Battle should be terminated. On July 7, 2009, Binkley sent a letter to Battle on behalf of JTI, stating that Battle had been terminated as result of violations of company policy and JTI's code of conduct, specifically relating to the June 25, 2009 argument.

Summary Judgment

Battle filed his operative second amended complaint against JTI in March 2011, pleading the following causes of action: (1) retaliation in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.); (2) race discrimination in violation of FEHA; (3) wrongful termination in violation of FEHA; (4) failure to maintain a workplace free from discrimination and harassment in violation of FEHA; and (5) wrongful termination in violation of Labor Code section 1102.5. Battle alleged that JTI's stated reason of terminating Battle for his argument with Jones was merely pretext, and that he was actually terminated because of filing the EEOC complaint and because he is African-American.

JTI filed a motion for summary judgment in April 2011. JTI argued that it conducted a thorough investigation of the June 25, 2009 incident with Jim Jones, and that based on Battle's behavior, including his inconsistent explanations of the incident, and taking into account that he was a high ranking manager of the company, termination was warranted. Jones submitted a declaration in support of the motion. His declaration stated that on the night of June 25, he and Battle went to a dinner meeting with a client, where they drank wine. Afterward, Battle and Jones went to a bar and drank more wine. They then returned to their hotel where they got into the argument. Jones's declaration stated that, in reporting the incident to Anne Binkley, he told her that in the lobby Battle expressed displeasure that the previous fall Jones and Di Donato had elected to go out to

a casino instead of attending an important customer dinner that they had been scheduled to attend. After Jones responded, Battle began screaming and shouting at him, swearing at him, and disparaging him. Battle got so close to Jones that Jones could feel his spit, and Battle pushed him in the chest. Battle and Jones eventually moved their argument from the lobby to a hallway corridor, where a security guard came and asked them to leave. They then continued their argument just outside a building exit. About half an hour later, the security guard came again and asked them to move away from the building because they were disturbing guests. Battle responded "fuck them," and both Battle and Jones moved farther out into the parking lot to continue their argument. Over an hour later, Jones returned to his room. He called the Fresno Police Department to report the incident.

According to the Declaration of Anne Binkley, also submitted in support of the motion, she received a phone call on the morning of June 26 from Jim Jones. Jones told her that he was very upset because he had a "huge argument" with Battle. After Jones explained his version of the events, Binkley informed Van Staveren and Di Donato, and then called Battle to get his side of the story. Binkley's declaration stated that Battle admitted to having "strong words" with Jones, and that Battle stated the reason for the argument was that Jones refused to invest in a real estate business that they had agreed to start together. Battle denied that he pushed Jones. He also denied seeing a security guard during the incident.

Binkley's declaration went on to state that, after speaking to Battle, she called the Fresno hotel to ascertain whether hotel personnel had witnessed the incident. She was connected to the security guard, who stated that he first observed the argument about 11:45 p.m., when the men were "'making a loud raucous [*sic*] in the lobby area.'" The guard told Binkley that Jones was "'trying to tone it down'" but that Battle's demeanor was "'aggressive.'" The night of the incident, the security guard authored an incident report, which stated that he asked the men to take their argument outside and to move away from the building, and which described Battle as yelling and swearing at Jones. The guard also submitted a declaration in connection with JTI's motion for summary

judgment, stating that on the night of the incident he was wearing his security uniform, which has visible security badges, and that he twice asked the men to move their argument away from the other hotel patrons. The declaration stated that the second time the security guard asked them to move so as not to bother other guests, Battle responded "fuck them."

Battle opposed the motion for summary judgment, primarily arguing that the argument in Fresno was not a sufficient reason for termination. Battle contended that the details of the argument had been embellished by Jones and Binkley, and that the argument was not as serious as it had been portrayed. Battle then attempted to list other JTI employees who had engaged in misconduct but whose employment had not been terminated. He argued that the entirety of this evidence showed that the argument was merely pretext for his termination, and that the decision-makers at JTI were actually motivated to fire him by his EEOC filing. Many of the assertions Battle made in opposing summary judgment were not supported by any evidence, and Battle failed to file any objections to the evidence presented by JTI.

The trial court heard the motion for summary judgment on June 23, 2011. After argument, the court granted the motion, finding that Battle failed to raise a triable issue of whether the proffered reason for termination was pretextual. Its decision noted that Battle did not dispute that an argument took place, that he used "'aggressive language'" during the argument, or that the incident merited discipline. The court wrote: "Plaintiff has not presented evidence contradicting the main facts that underlie Defendant's reasons for terminating him, namely that Plaintiff engaged in unprofessional behavior consisting of a protracted loud, public and likely profane argument with a subordinate that required the intervention of security personnel from a hotel."

Battle timely appealed.

DISCUSSION

Summary judgment must be granted if the papers show an absence of triable issues of material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review a trial court's decision on summary

judgment de novo, determining independently whether the facts not subject to dispute support summary judgment. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Doubts are resolved in favor of the party opposing the judgment, and we are not bound by the trial court's reasons for the summary judgment ruling. (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 97; *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 703–704; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85.)

On an appeal from summary judgment, we take the facts from the record before the trial court. (*State Dep. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035.) We affirm an order granting summary judgment if it was correct on any ground that the parties had an adequate opportunity to address in the trial court. (*Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 120.)

I. Retaliation

In his appeal, Battle first contends that the trial court erred by granting summary judgment on his claims for retaliation. FEHA prohibits employers from "discharg[ing], expel[ling], or otherwise discriminat[ing] against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) Labor Code section 1102.5, subdivision (b), provides that an "employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." Battle alleged that JTI engaged in improper conduct by firing him for bringing the EEOC complaint.

Battle's claims for retaliation under FEHA, wrongful termination, and violation of Labor Code section 1102.5 are each subject to the same analysis. (See *Morgan v. Regents of University of California* (2001) 88 Cal.App.4th 52, 67-68.) "When a plaintiff alleges retaliatory employment termination either as a claim under the FEHA or as a claim for wrongful employment termination in violation of public policy, and the

defendant seeks summary judgment, California follows the burden-shifting analysis of *McDonnell Douglas Corp. v Green* (1973) 411 U.S. 792 to determine whether there are triable issues of fact for resolution by a jury. (Cf. *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.) In the first stage, the 'plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.' (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) If the employee successfully establishes these elements and thereby shows a prima facie case exists, the burden shifts to the employer to provide evidence that there was a legitimate, nonretaliatory reason for the adverse employment action. (*Morgan* [, *supra*, at p.] 68.) If the employer produces evidence showing a legitimate reason for the adverse employment action, 'the presumption of retaliation """"drops out of the picture,"""" (*Yanowitz, supra*, at p. 1042), and the burden shifts back to the employee to provide 'substantial responsive evidence' that the employer's proffered reasons were untrue or pretextual (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735)." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App. 4th 1102, 1108-1109.)

In moving for summary judgment, JTI did not dispute that Battle established a prima facie case for retaliation based on the filing of the EEOC charge and his subsequent termination, which occurred about five months later. JTI presented evidence showing a legitimate reason for Battle's termination, however, which shifted the burden back to Battle to provide substantial evidence that the reason was pretextual. As correctly found by the trial court, Battle failed to meet this burden.

A. Temporal Proximity

On appeal, Battle first argues that the temporal proximity between the EEOC filing and his termination established a triable issue of retaliatory motive. This assertion is plainly incorrect. "Where the employee relies solely on temporal proximity in response to the employer's evidence of a nonretaliatory reason for termination, he or she does not create a triable issue as to pretext, and summary judgment for the employer is

proper." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 357; see also *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388.)

B. Sufficiency of the evidence

Battle next argues that JTI's proffered reason for termination was unworthy of credence. Battle does not dispute that a "loud" argument involving "challenging words" transpired. He contends, however, that the evidence presented by JTI was not sufficient to show that the argument was a valid ground for termination.

Battle's quibbles with JTI's evidence include: (i) JTI employees use swear words in the course of their employment at JTI, so any swearing during the argument was not a per se violation of company policies; (ii) the security guard's statement regarding the argument was unspecific; (iii) Battle has never "lost control" during his five "impeccable" years with JTI; (iv) Battle is "health conscious and physically fit" and so would not have been drinking to excess on the night of the incident; and (v) Battle was tired and wanted to go to bed, but Jones wanted to keep drinking. One problem with Battle's argument is that many of these assertions are not supported by citations to evidence in the record. This failure in itself renders Battle's argument ineffective. (See *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3; *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294.) Furthermore, certain evidence presented by JTI that Battle takes exception with potentially could have been subject to objection. Battle did not file any evidentiary objections, however, and provides no valid reason on appeal for why we should disregard JTI's evidence.

Moreover, even if we were able to fully consider Battle's argument that JTI's evidence was insufficient, reversal would still be unwarranted. It is unimportant that there may have been some varying accounts of the details of the argument. What was important was that JTI's management believed that a heated argument involving swearing and possible physical contact occurred. The incident involved a high-level JTI employee and his direct report, and Battle was the aggressor. Battle did not act in a manner expected of a high-level employee, and the incident did not reflect well on JTI as a company. Further, JTI determined that Battle misrepresented the details of the incident

when he was questioned. JTI was entitled to investigate the incident, attempt to determine what transpired, and impose discipline commensurate to the violation. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1224-1225.) Nothing in the record shows that JTI did not adequately investigate, or that it lacked evidence for finding that Battle engaged in improper conduct warranting termination.

The evidence presented by JTI was sufficient to shift the burden to Battle on summary judgment. Since Battle failed to counter the conclusion that JTI's reason for terminating his employment was legitimate and nonretaliatory, summary judgment was proper.

C. Other employees' misconduct

A plaintiff may show that an employer's stated reason for termination was pretext by presenting evidence that other employees in similar circumstances were treated less severely. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 172.) During his deposition, Battle named a number of JTI employees who, according to Battle, engaged in misconduct and were not terminated. Battle stated that certain JTI employees committed theft, lied about other employees, loudly argued with other employees, worked on personal business during company hours, and falsified company documents.

We find that such evidence was insufficient to raise a triable issue of material fact. In order to establish pretext, Battle had to show that the identified employees were "similarly situated." (*Wills v. Superior Court*, *supra*, 195 Cal. App.4th at p. 172.) Employees are "similarly situated" if they "'engaged in the same conduct without any mitigating or distinguishing circumstances.'" (*Ibid.*) The trial court correctly found that Battle failed to show that other employees were similarly situated.

Only three of the employees used by Battle for comparison were involved in heated arguments. Battle provided no evidence that any of these three employees were ever referred to JTI's human resources department or otherwise referred for disciplinary purposes. In the case of Battle's inappropriate behavior, JTI presented evidence that Jones brought the matter to the attention of human resources personnel for the purpose of invoking a disciplinary investigation. The evidence that Battle relied on of other

employees who engaged in heated arguments did not include evidence of any internal complaint or investigation. It is possible that, if the other incidents were reported to human resources (or a supervisor) for disciplinary purposes, the subject employees might have been terminated or might have been "slapped on the wrist." But without comparator evidence of any sort of internal complaint, investigation, or discipline, it is impossible to find that Battle was treated more severely than similarly situated employees.[1]

Moreover, none of the employees identified by Battle occupied a high-level position like his. When an employee occupies a sensitive managerial or confidential position, the employer is provided a substantial scope to exercise subjective judgment with respect to employment decisions. (*Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 330; *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 293.) JTI appropriately determined that, because Battle was only one of two regional sales managers, he could be held to a high standard of conduct, and that a loud, public, and profane tirade against a subordinate would fall below this standard. Battle's display of anger certainly caused a scene. Battle was observed making a "loud ruckus" in the hotel lobby. He and Jones were asked to move away from the hotel building because they were bothering other hotel guests. JTI could reasonably believe that a high-level manager engaging in such conduct in a public area was contrary to the image that JTI wished to project as a company. Notably, none of the comparator evidence put forward by Battle involved an employee's public display of inappropriate behavior.

JTI could also expect Battle to be forthcoming and honest about the incident. The statement provided by a neutral third party witness—the security guard—contradicted

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[1] On appeal, Battle also assets that JTI does not follow its own policies and procedures, as evidenced by JTI's failure to investigate Battle's charges against Di Donato. JTI objected to such evidence below, and JTI's objections were sustained by the trial court. Battle has not challenged the trial court's evidentiary rulings on appeal, and they are therefore not subject to review. (See *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 739, fn. 4; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218, fn. 3.)

Battle's account in several key respects, providing a further reason for JTI to find termination warranted.

In sum, the facts before JTI's human resources personnel were sufficient to justify termination of employment. Because Battle was not able to identify any employee who occupied a sensitive position such as his, who engaged in behavior similar to his, and whom the JTI disciplinary system treated more leniently, his argument of pretext failed.

D. Investigation of Battle

On appeal, Battle briefly argues that both Di Donato and Binkley were either biased against him, or beholden to someone biased against him, and therefore should not have been involved in investigating the incident.

Battle does not develop this argument. He just plainly asserts that the investigation was improper. We cannot develop appellant's argument for him, and therefore do not consider it. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived."]; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

We also decline to address the argument because Battle failed to raise it in the trial court. "[W]e are not obliged to consider arguments or theories . . . that were not advanced by plaintiffs in the trial court." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676; see also *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281 ["Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will generally not be considered if it is raised for the first time on appeal."]; *Ibid.* ["Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal."].)

II. <u>Remaining Cause of Action</u>

In his opening brief, Battle affirmatively waived the right to appeal the trial court's ruling on his cause of action for race discrimination. Therefore, only Battle's claim that

JTI failed to maintain a workplace free from discrimination and harassment remains to be addressed. Battle acknowledges that a finding of discrimination or harassment is an "essential foundational predicate" of such a claim. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) Battle did not pursue his claim for discrimination and did not establish that any improper harassment may have occurred. As he is unable to establish the foundational predicate, his claim for failure to maintain a workplace free from discrimination and harassment necessarily fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.