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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

RICHARD BAKER, Plaintiff and Appellant, v. CHARLES R. DREW UNIVERSITY OF MEDICINE AND SCIENCE, Defendant and Respondent.	B270973 (Los Angeles County Super. Ct. No. BC544253)

APPEAL from an order of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed.

Law Offices of Mokri & Associates, Brad A. Mokri and Jennifer N. Harris; Law Offices of Eric V. Luedtke and Eric V. Luedtke for Plaintiff and Appellant.

Peckar & Abramson, Eric M. Gruzen and Kerri Sakaue for Defendant and Respondent.

Richard Baker (appellant) appeals from an order awarding attorney fees to Charles R. Drew University of Medicine and Science (CDU) pursuant to Government Code section 12965, subdivision (b). The award was issued after the trial court determined that appellant's case against CDU, brought on the grounds of discrimination, retaliation, and harassment, was "unreasonable, frivolous and meritless." We find no abuse of the trial court's discretion to make the award, therefore we affirm.

FACTUAL BACKGROUND

CDU is a private, nonprofit, nonsectarian medical and health sciences institution. David Carlisle, M.D., Ph.D. (Dr. Carlisle) is the President and Chief Executive Officer (CEO) of CDU and has served in this capacity since July 2011. Dr. Carlisle is African-American and was born on September 15, 1954.

Appellant is African-American and was born on October 22, 1952. He served as Dean of CDU from 2007 until June 4, 2012. In 2010, appellant was appointed provost, and served in that capacity in addition to his role as dean. Appellant served in the positions of provost and dean subject to termination at any time without cause.

Daphne Calmes, M.D. is the current interim dean of CDU. She was appointed to the position by Dr. Carlisle to replace appellant. Dr. Calmes is African-American and her date of birth is August 3, 1956.

During the relevant time period, James Main served as the Chief Operating Officer of CDU.

Throughout his tenure as dean of CDU, appellant was aware that CDU was in violation of an agreement with the Regents of the University of California (Regents) through which CDU received funds. He further believed that CDU was misallocating state funds in violation of Senate Bill No. 1026 (SB

1026).[1] Appellant complained of such violations to various individuals, including Dr. Carlisle and every CFO throughout his tenure at CDU. Appellant did not complain to anyone outside of CDU about CDU's noncompliance with its contracts because he was unsure whether or not CDU and the Regents had entered into another agreement regarding the allocation of funds.

On June 4, 2012, Dr. Carlisle informed appellant that he would no longer serve as dean and provost. However, appellant remained a member of the faculty of CDU in an uncompensated position and continued to receive compensation through June 30, 2013, as an accommodation by Dr. Carlisle.

At no time during his employment at CDU did appellant complain of discrimination based upon his age or race. Appellant was unaware of anyone making any derogatory comments about him based upon his age or race. Appellant had no belief that Dr. Carlisle harbored any resentment towards him because of his age or race.

Dr. Carlisle testified that his decision to remove appellant from his positions as dean and provost was not related in any way to his age or race. In addition, Dr. Carlisle's decision to remove appellant as CDU's dean and provost was not in any way related to any concerns or complaints appellant may have made regarding CDU's use of funds obtained by CDU via CDU's agreement with the Regents or SB 1026.

PROCEDURAL HISTORY

On April 30, 2014, appellant filed a lawsuit against CDU, James Main and David Carlisle alleging causes of action for (1)

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[1] SB 1026 provides that funds appropriated under SB 1026 will be provided for the support of a program of clinical health sciences, education, research and public service to be conducted by CDU in conjunction with the University of California at Los Angeles.

age discrimination; (2) failure to prevent discrimination (Gov. Code, § 12940); (3) whistleblowing (Lab. Code, § 1102.5); (4) retaliation under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (5) harassment under FEHA; and (6) termination in violation of public policy.[2]

On January 5, 2015, CDU filed a motion for summary judgment or, in the alternative, summary adjudication (summary judgment motion). Appellant opposed the motion. CDU filed 68 evidentiary objections to the declarations filed by appellant in support of his opposition to the summary judgment motion.

The motion was heard on March 20, 2015, and the trial court took the matter under submission.[3] On March 25, 2015, the court filed its ruling on CDU's evidentiary objections, sustaining all but eight of the 68 objections.

On March 26, 2015, the court issued a minute order granting CDU's summary judgment motion. The court pointed out that appellant provided no evidence that he was replaced by a significantly younger person, or that he had engaged in protected activity and was thereafter subject to an adverse employment action, or that there was a causal link between the two. In addition, appellant provided no evidence that he had a reasonable belief that CDU violated a state or federal statute; that CDU made or enforced any rule preventing appellant from disclosing information to a government or law enforcement agency; that appellant disclosed any such information to such an agency; or that appellant refused to participate in an activity that

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[2] The fifth cause of action against all defendants, and the sixth cause of action against the individual defendants, were disposed of by demurrer in October 2014.

[3] Appellant's allegations of racial discrimination were withdrawn at the hearing on the summary judgment motion.

would result in a violation of a state or federal statute or was in violation of a federal rule or regulation. The court concluded that there were no genuine issues of fact for trial.

On May 21, 2015, appellant filed his notice of appeal from the trial court's judgment. On May 25, 2016, this court affirmed the judgment in an unpublished opinion. (*Baker v. Charles R. Drew University of Medicine and Science* (May 25, 2016, B264330 [nonpub. opn.] (*Baker*).)[4]

On August 10, 2015, CDU moved for attorney fees under Government Code section 12965, subdivision (b). On September 30, 2015, appellant filed his opposition to the motion for attorney fees. On October 7, 2015, CDU filed a reply brief.

On October 20, 2015, the trial court issued a written order awarding CDU its reasonable attorney fees. Citing *Bond v. Pulsar Video Productions* (1996) 50 Cal.App.4th 918, 921-922, the court noted that an award of attorney fees to a prevailing defendant in a discrimination case should only be awarded where "'"the action brought is found to be unreasonable, frivolous, meritless or vexatious."'" The court explained that although appellant had two years to conduct a proper investigation, he had no evidence to support his claims. The court further noted that appellant did "almost nothing" by way of discovery. In sum, appellant's lawsuit was "unreasonable, frivolous and meritless." Appellant did not offer a declaration or any other evidence suggesting that he was unable to pay CDU's reasonable attorney fees.

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[4] We cite the prior unpublished opinion in this case pursuant to California Rules of Court, rule 8.1115, subdivision (b). Pursuant to this rule, an unpublished opinion may be cited in an opinion of a California Court of Appeal when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

However, the court found that the billing statement for CDU's law firm was too heavily redacted for the court to properly assess the reasonableness of the hours claimed. Thus, CDU was ordered to file and serve by November 2, 2015, an unredacted billing statement for the fees requested.

On January 13, 2016, the court issued its ruling on CDU's motion for attorney fees. The motion was granted in full, and appellant was ordered to pay CDU the sum of $94,017.50.

On March 14, 2016, appellant filed his notice of appeal from the January 13, 2016 order awarding CDU attorney fees.

DISCUSSION

I. Applicable law and standard of review

Several of appellant's causes of action were brought under FEHA. (Gov. Code, § 12900 et seq.). Government Code section 12965, subdivision (b), permits a court, in its discretion, to award to the prevailing party in a FEHA action reasonable attorney fees and costs.

In determining whether an award of attorney fees to a FEHA defendant is appropriate, California courts apply the standard applied in discrimination cases under Title VII of the Civil Rights Act of 1964, set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n.* (1978) 434 U.S. 412, 422 (*Christiansburg*). (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 103 (*Williams*).) Under the *Christiansburg* standard, a plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claims were frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (*Christiansburg*, at p. 422.) The *Christiansburg* court reasoned that the purpose of the fee provision was to ""make it easier for a plaintiff of limited means to bring a meritorious suit."" (*Id.* at p. 420.) "To award fees to a defendant simply because the plaintiff was ultimately

unsuccessful 'would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.' [Citation.]" (*Williams, supra*, at p. 101.) Thus, a defendant should be awarded attorney fees "'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable.'" (*Christiansburg*, at p. 421.)

The *Christiansburg* court warned against "post hoc" reasoning. (*Christiansburg, supra*, 434 U.S. at p. 421.) Thus, a court must not conclude that, simply because the plaintiff did not prevail, "his action must have been unreasonable or without foundation." (*Id*. at p. 422.) The high court reasoned that "[n]o matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." (*Ibid*.) Thus, the term "meritless" means "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." (*Id*. at p. 421.)

A trial court's award of attorney fees and costs under Government Code section 12965, subdivision (b), is subject to an abuse of discretion standard. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1200 (*Villanueva*).) Under this standard, we will not disturb a trial court's discretionary decision in the absence of a manifest abuse of the trial court's discretion. (*Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1150.)

II. The attorney fee award did not constitute an abuse of discretion

The trial court provided a detailed written order explaining its decision to award attorney fees to CDU. The trial court noted that the initial complaint was not filed "on information and belief." Instead, appellant alleged that CDU and two individually

named defendants had discriminated against him on the basis of his age and his race, and because he was a whistleblower. The complaint did not reveal that these allegations were without evidentiary support and that discovery would be needed to obtain such evidence. In fact, the trial court noted, appellant did not have evidence to support his claims.

The court further noted that the complaint alleged that appellant was "born in China and is of Asian descent and . . . has an accent" and that plaintiff's "primary language is Chinese." The court pointed out that these statements were completely false, as appellant is African-American.

Appellant had no basis for his claim of discrimination based upon race, nor did he have a basis for his claims against the two individual defendants. The two individual defendants were dismissed on demurrer and the allegation of racial discrimination was withdrawn at the time of CDU's summary judgment motion.

The court explained that appellant conducted almost no discovery, and waited an inordinate amount of time to seek the discovery that appellant did eventually seek. No third-party declarations were provided in opposition to CDU's summary judgment motion. Instead, only appellant and his attorneys provided declarations, most of which were inadmissible.

The trial court provided a comparison to the *Villanueva* case, where an employee filed and prosecuted an unsuccessful discrimination lawsuit and was held responsible for the defendant's reasonable attorney fees. (*Villanueva, supra,* 160 Cal.App.4th 1188.) The trial court stated that appellant's case was "much weaker than that of plaintiff in the *Villanueva* case, where substantial attorneys fees were awarded to the City of Colton. In *Villanueva,* the opposition papers to the summary judgment motion included declarations from a former manager and deposition testimony from at least five other witnesses."

In sum, the trial court concluded, appellant's case was "unreasonable, frivolous and meritless."

The trial court's written decision provides both factual and legal reasoning to support the court's decision to award CDU its attorney fees. No manifest abuse of discretion is apparent.

III. Objective basis for the claims

Appellant argues that the trial court did not analyze appellant's objective basis for bringing the action, but instead focused on the fact that appellant did not have any evidence to support his claims. Appellant argues that the trial court should have evaluated appellant's objective basis, not his failure to prevail. In doing so, appellant argues, the trial court should have considered all of the evidence, whether or not it was admissible, supporting appellant's objective belief that CDU discriminated and retaliated against him. Such evidence must be considered in determining "how honest [appellant's] belief [was] that he has been the victim of discrimination." (*Christiansburg, supra*, 434 U.S. at p. 422.)

Appellant is correct that the trial court focused on appellant's lack of evidence to support his claims. However, in this case, appellant's lack of evidence supports the trial court's implicit conclusion that appellant had no objective basis for his claims.

For example, appellant's allegations that he was "born in China and is of Asian descent," that he "has an accent" and that his "primary language is Chinese" were central to appellant's racial discrimination claim[5]. Because there was no evidence that appellant was of Asian descent, appellant had no objective basis

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[5] Appellant protests that this was a "typo in the Complaint." A "typo" is generally a small spelling or punctuation error. This was a detailed, two-sentence description of appellant, and is not accurately described as a "typo."

to claim racial discrimination on the grounds of Asian descent. In fact, appellant is African-American, the same race as his superior and his replacement.

There was no evidence that anyone made any derogatory comments about appellant's race. Appellant admitted he had no opinion of whether Dr. Carlisle harbored any animosity towards him because of his race. The claim for racial discrimination was ultimately withdrawn. The trial court did not abuse its discretion in determining that appellant had absolutely no evidence, and therefore no objective basis, for this claim.

Nor did appellant provide evidence to support his age discrimination claim. Specifically, appellant provided no evidence that he was replaced by a significantly younger person. In fact, appellant was replaced by an individual who was only four years younger than appellant, and who was, like appellant, over 40. Because he was not replaced by a significantly younger person, and presented no other evidence of age discrimination, appellant had no objective basis for his claim that he had been discriminated against on the basis of age. The trial court did not abuse its discretion in so holding.

The trial court also focused on appellant's failure to provide any third party declarations in support of his opposition to CDU's summary judgment motion. Such third party evidence would have served to corroborate appellant's allegations and support a determination that appellant had an objective basis for his claims. Appellant's failure to provide third party declarations reflected upon the merit of his allegations, and the trial court did not abuse its discretion in concluding as much.

IV. The facts listed do not change the result

Appellant lists numerous facts that the trial court should have considered in assessing appellant's objective basis for his claims that he was a victim of discrimination. None of the listed

facts are taken from the present record on appeal, thus it appears that appellant did not highlight these facts to the trial court in the attorney fee proceedings. Nevertheless, we conclude that even considering this evidence, there is no basis for a finding that the trial court abused its discretion in awarding attorney fees.

First, appellant sets forth the extent of the adverse employment decisions that he faced, and the fact that those appointed to replace him had lesser qualifications and experience. While these facts are relevant to the analysis, they are insufficient to provide an objective basis for appellant's claims of discrimination.

Appellant lists the fact that he made a Human Resources complaint regarding Dr. Carlisle in May 2012 which was "never relayed to his superiors and never investigated." As pointed out in the first appeal in this matter, appellant's own statement negates any causal link between his alleged complaint and his termination. As stated in the prior unpublished opinion, "Appellant points to no evidence that Dr. Carlisle ever knew of appellant's alleged 'HR claim' or that it ever left the desk of the unknown human resources employee that accepted the claim." (*Baker, supra*, at p. 23.) Because there was no evidence that Dr. Carlisle knew of the alleged Human Resources complaint, it could not have formed the basis for appellant's termination.

Appellant points out that he was terminated the day after sending an email to Dr. Carlisle stating that budget allocations were significantly out of compliance with CDU's agreement with the Regents. Considering other facts alleged by appellant, this fact is not sufficient to give appellant an objective basis to believe that the email led to his termination. As set forth in the prior opinion, appellant had been making these complaints for years without consequence, so no specific temporal connection existed due to this single email. Without a causal connection, the email

does not create an objective basis for appellant's claims of retaliation or whistleblowing.

Appellant has failed to show an abuse of discretion on the part of the trial court. The listed facts do not undermine the basis for the trial court's decision, which was supported by the record and grounded in the law.[6]

V. Whistleblower claim

Appellant focuses on his claim for whistleblowing under Labor Code section 1102.5.[7] Appellant argues that because this court found appellant's complaints about the violations of SB

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[6] We reject appellant's suggestion that, when the trial court stated that appellant "is not the 'usual' FEHA plaintiff," it meant to suggest that the "objective basis standard and underlying policy implications do not apply to him." The court applied the correct standard in determining that appellant should pay CDU's fees, and supported its decision with facts and law. The court made clear what it meant by stating that appellant is not the usual plaintiff. First, the court pointed out that appellant had not offered any declaration indicating that he was unable to pay CDU's fees. The court then noted that "[p]erhaps this is because plaintiff is not the 'usual' FEHA plaintiff." What set appellant apart from the usual plaintiff was his earning potential, with degrees from Stanford and Harvard. The court was merely speculating that perhaps this was why no declaration of inability to pay was filed. It had nothing to do with the underlying standard applied to the attorney fee motion.

[7] The whistleblower claim under Labor Code section 1102.5 was not brought under FEHA and was not part of the trial court's analysis under Government Code section 12965, subdivision (b).

1026 to be protected activity, appellant's complaint was not completely frivolous and lacking foundation.[8]

The status of SB 1026 was not material to the trial court's analysis regarding attorney fees. Instead, the court focused on appellant's lack of evidence supporting his claims. Regardless of whether SB 1026 is current law, appellant provided no evidence to support his claim that he had been retaliated against for the alleged protected activity. There was no temporal connection, nor was there any other evidence of a connection between appellant's termination and his reports of noncompliance with SB 1026 beyond appellant's own speculation.

Appellant presents an interpretation of Labor Code section 1102.5, subdivision (a), which prevents an employer from adopting or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that a violation of law has occurred. Appellant argues that the statute does not require that the rule, regulation or policy must be made or enforced for the purpose of preventing the violation. Thus, although it was Dr. Carlisle's "general policy" that appellant should not communicate directly with the Regents, it had the effect of preventing appellant from disclosing the alleged violation of SB 1026. Thus, appellant argues, his claim

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[8] The trial court held that appellant "'cited no authority to support his argument that violation of a 40-year-old Senate appropriations bill . . . could be a basis for violation of [Labor Code section 1102.5].'" (*Baker, supra*, at pp. 19-20.) In the first appeal in this matter, this court noted that there was no information in the record suggesting that SB 1026 had ever been repealed or amended, thus we disagreed with the trial court's determination that appellant's protests regarding noncompliance with SB 1026 could not provide a basis for violation of Labor Code section 1102.5. (*Baker*, at p. 20.)

for violation of Labor Code section 1102.5, subdivision (b), was not without merit.

Appellant's position fails due to his own testimony that the reason he did not go to someone outside of CDU to complain of CDU's alleged noncompliance was because he was not sure if "'another agreement . . . has been forged.'" (*Baker, supra*, at p. 21.) Thus, "by appellant's own admission, his reason for failing to report the alleged violation was that he did not have sufficient information to know if a violation had in fact occurred -- not because of a policy preventing him from doing so." (*Baker*, at p. 21.)

In sum, the trial court did not err in finding that appellant lacked an objective basis for his claims. Appellant has failed to show that the trial court's determination that appellant's case was unreasonable, frivolous and meritless constituted an abuse of discretion.[9]

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[9] We deny CDU's request for attorney fees and sanctions on appeal pursuant to Government Code section 12965 and Code of Civil Procedure section 128.7. Appellant raised an arguable issue, thus the appeal was not frivolous. (*Villanueva, supra,* 160 Cal.App.4th at p. 1204.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.