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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

DANILO YAP, Plaintiff and Appellant, v. LOS ANGELES DEPARTMENT OF WATER & POWER, Defendant and Respondent.	B230969 (Los Angeles County Super. Ct. No. BC400316)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Kesluk & Silverstein and Douglas N. Silverstein for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Paul N. Paquette, Assistant City Attorney, Heather Elaine Jones, Deputy City Attorney; and Richard M. Brown for Defendant and Respondent.

Plaintiff and appellant Danilo Yap appeals from a summary judgment entered in favor of defendant and respondent Los Angeles Department of Water & Power (DWP) in this action for discrimination and retaliation. Yap contends triable issues of fact exist as to whether: 1) the reasons given by DWP for adverse employment actions against Yap were a pretext for discrimination and retaliation in violation of the Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12940 et seq.); 2) DWP failed to reasonably accommodate his disability; 3) DWP failed to engage in an interactive process; 4) DWP failed to prevent discrimination; 5) DWP retaliated against him in violation of the whistleblower protection provided by Labor Code section 1102.5; and 6) the trial court should have granted his motion for relief under Code of Civil Procedure section 473, subdivision (b).

We conclude Yap failed to raise a triable issue of fact as to whether DWP's reasons for adverse employment actions were pretextual. The evidence showed DWP engaged in an interactive process and accommodated Yap's disability as requested. There is no issue concerning DWP's prevention of discrimination. Yap failed to raise a triable issue of fact that reports he made to his supervisor in the course of his job had any connection to adverse employment actions taken against him by DWP. We also find no abuse of discretion in the trial court's denial of the motion for relief under Code of Civil Procedure section 473, subdivision (b). Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Allegations of the Complaint

Yap filed a fourth amended complaint against DWP on December 24, 2009, for disability and age discrimination, failure to engage in the interactive process, failure to accommodate, failure to prevent discrimination, retaliation, and violations of Labor Code sections 98.6, 1102.5 and 2699. He alleged that in the course of his job, he identified errors in vendor contracts and billings. Yap's supervisor disagreed with him and

approved items over Yap's objection. Yap's supervisor excluded him from a review group for a promotional examination in December 2006, and as a result, Yap scored below candidates who participated in the review group. He was on disability leave from April 10, 2007, to February 4, 2008. A position that Yap applied for was abruptly cancelled when it appeared that Yap was entitled to the position. DWP failed to inform him of a promotion opportunity in October 2007. In November 2007, Yap requested a transfer to another supervisor as an accommodation of his mental disability, which was denied. DWP held a review group for a promotion in June 2008 but excluded Yap from individualized review. Yap scored poorly on the exam. An opportunity to transfer laterally to another position became available in June 2008, but DWP withheld the information from Yap. In August 2008, Yap was not promoted to one of three available positions. He was fired on November 10, 2009.

Motion for Summary Judgment and Supporting Evidence

DWP filed a motion for summary judgment on May 7, 2010. DWP submitted evidence in support of its motion for summary judgment that established the following facts. Yap began working at DWP in October 2003 as a utility accountant "B." In October 2005, he transferred laterally to the Internal Audit Department, where his supervisor was James Tan. This was the only position for which Tan ever interviewed Yap. Yap audited contracts with vendors. Yap failed the written test for a promotional examination in October 2006 and was not eligible to interview.

In March 2007, Tan gave Yap an assignment that was due April 16, 2007. On April 9, 2007, when Tan realized that Yap did not understand the assignment, Tan assigned another employee to supervise the project. The following day, Yap reported to DWP's medical office with anxiety. He was taken to a hospital emergency room. Yap went on disability leave beginning April 10, 2007.

In June 2007, while he was on disability leave, Yap applied for a lateral transfer. One of his interviewers noted that he was not a good applicant for the position and did

not meet the qualifications based on his responses. A second interviewer stated that she did not recommend Yap for the position. Despite the interviewers' critical remarks, Yap would have received the position as the sole bidder. However, the position was responsible for a critical project and needed to be staffed immediately. A DWP manager asked staff members to call Yap and determine when he would be able to return to work. She was told that Yap could not provide a date by which he could return to work. Because Yap was out on disability with no anticipated return-to-work date, he was not accepted for the position. The position was reassigned internally on July 9, 2007.

In October 2007, DWP employee Mohammed Hossain inquired about bid opportunities when he called in sick. He applied for and received a promotion to utility accountant "A." Yap did not apply for the position.

On November 1, 2007, Yap's doctor recommended that Yap be returned to work on November 12, 2007, with the condition that he "may not report directly or indirectly" to Tan. When DWP asked Yap's doctor for clarification as to Yap's limitations, the doctor responded that the primary disabling issue was Yap's toxic relationship with Tan, based on Yap's predisposition toward depression and anxiety, but the discharge of his job duties was never a problem.

DWP sent Yap for an independent medical evaluation on January 17, 2008. The evaluator concluded it would be advisable for DWP to work with Yap to find alternative job placement within the company, but it was not a psychiatrically necessitated work restriction. Therefore, the evaluator recommended that Yap should be returned to his usual and customary employment without restriction, but that Yap should continue to work with DWP's accommodation coordinator to obtain a job transfer.

Yap returned to work on February 4, 2008. DWP considered him to have returned to work with no medical restrictions. DWP denied his request to be moved from the Internal Audit Division, because there were no utility accountant "B" vacancies in the financial services system. In addition, DWP could not authorize a transfer that bypassed the bid plan in violation of the memorandum of understanding. However, DWP placed Yap under the direct supervision of Winetta Leslie instead of Tan.

Yap filed a worker's compensation action for job stress on February 5, 2008. DWP's worker's compensation office subpoenaed Yap's employment history from his prior employers to ensure that he did not have a preexisting condition that contributed to his job stress. DWP received documents from the American Red Cross, which was one of Yap's former employers, in April 2008. The documents showed that Yap was terminated or forced to resign from the organization, which he did not disclose on his employment application.

In August 2008, Yap applied for one of three available utility accountant "A" positions in the Internal Audit Division under Leslie and other supervisors. He was not accepted for a position. The recipients of the positions had all scored higher than Yap in the application process.

DWP received documents from TMC Financial, which was another one of Yap's former employers, in response to the subpoenas in the worker's compensation matter. The documents showed Yap was fired from TMC, contrary to information that Yap provided on his employment application.

Yap began a second disability leave on September 29, 2008. While on disability leave, he filed the instant action. He returned to work on November 14, 2008. However, he took disability leave for a third time beginning in March 2009.

On April 27, 2009, DWP deposed Yap in the instant action. DWP's attorneys questioned Yap about the documents from his previous employers which showed that Yap had been fired or forced to resign, contrary to the information that he had provided on his employment application. Had Yap been truthful in his application about these issues, he would not have qualified for employment with the City of Los Angeles. There was a question about whether Yap could provide evidence that he was laid off, rather than terminated. However, evidence to support a lay-off was not provided to DWP.

In July 2009, a doctor examined Yap and found that he could return to work immediately without restrictions.

In September 2009, DWP Utility Administrator Faye Strong prepared a memoranda proposing that DWP terminate Yap for falsifying his employment

application. The documents proposing termination were served on Yap on September 8, 2009. Yap returned to work from disability on September 21, 2009. DWP terminated Yap's employment on November 10, 2009, for falsification of information on his employment application.

Opposition to the Motion for Summary Judgment and Supporting Evidence

Yap opposed the motion for summary judgment on July 16, 2010. He submitted his declaration in support of the motion. DWP objected to portions of Yap's declaration. The trial court sustained most of DWP's objections. The parties filed supplemental papers. DWP objected to portions of Yap's supplemental declaration, which the trial court sustained.[1]

Yap's admissible evidence established the following additional facts. In December 2005, he audited a contract with Convergent Group. He objected to certain terms and billings, but Tan approved the expenses. Yap objected to Tan's actions. After that, Tan regularly raised his voice, insulted and belittled Yap in front of his colleagues and others.

In the spring of 2006, Yap audited Northwest Hydraulics Consultants. He complained about Tan's characterization of portions of the contract. In the fall of 2006, he audited Environmental Contractors. In October 2006, he discovered that a duplicate check had been issued without the original check having been reconciled by accounting. When he told Tan, Tan said they should protect the employees in accounting.

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[1] On appeal, Yap does not contend the trial court ruled incorrectly on any particular objection. Instead, Yap contends the evidence submitted in connection with the motion for summary judgment, including evidence submitted by DWP, shows the existence of triable issues of fact. Because Yap has not appealed the evidentiary rulings, we need not consider the standard of review of evidentiary rulings on appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].)

The promotional examination was not held in October 2006, but was held on December 9, 2006. Prior to the examination, Tan gave Yap several assignments, while other coworkers studied during work hours. Yap took three vacation days to study.

In March 2007, Tan gave Yap an assignment that Yap did not understand. Yap suffered a panic attack in April 2007 as a result of Tan's treatment and was taken to the emergency room. He took medical disability leave.

In June 2007, while he was on disability leave, Yap bid for a lateral transfer. No one called him about the position. On June 11, 2007, DWP sent a letter to Yap stating that no selection was being made for the position at that time.

In September 2007, Tan said he would help Yap transfer to another position. In October 2007, DWP did not inform Yap of the opportunity to bid for a promotion to utility accountant "A," which Hossain eventually received.

On November 1, 2007, Yap presented DWP with a request for accommodation of mental disability by transferring him to a supervisor other than Tan. Yap filed an internal discrimination complaint alleging age discrimination and retaliation. On February 4, 2008, Yap returned to work.

In June 2008, DWP conducted a review group for promotion to senior utility accountant. Yap participated in one study session. He did not hear about any further group sessions. Yap took four vacation days to study.

In June 2008, a lateral transfer position became available. He received notice of the position on the day that bids were due, rather than several days prior to the due date. Yap took the promotional examination in July 2008 and did not score well. Also in July 2008, he audited Asplundh Expert Tree Company and found discounts totaling $8,000 had not been applied.

In August 2008, three utility accountant "A" positions became available. Yap performed well on the examination but did not receive a promotion.

On October 23, 2008, while Yap was out on disability leave, Leslie warned him that he might have to complete an attendance improvement program as a result of the amount of sick time and disability leave that he had taken in the previous year.

In January 2009, Yap's e-mail and work product were deleted from the computer system during a computer upgrade. Leslie did not allow Yap to charge the time that he spent recovering his work. In March 2009, Tan questioned Yap about sick leave that Yap had taken and Yap felt singled out. Tan and Yap had a lengthy confrontation, and Tan admitted suppressing the draft audit report for Environmental Contractors.

With respect to his answers on his employment application, Yap declared that he was laid off by a previous employer and voluntarily resigned from the other. He did not consider being laid off to be a termination.

Reply, Trial Court Ruling, and Motion for Relief

DWP filed a reply. A hearing was held on July 30, 2010. The trial court granted the motion for summary judgment. Yap filed a motion for relief under Code of Civil Procedure section 473. Yap's attorney failed to file a timely motion for reconsideration because he was on vacation and did not receive notice that the summary judgment motion had been granted until he returned. Yap attached the declaration of a coworker as new evidence in support of a motion for consideration. The court found that the summary judgment against Yap, which Yap had opposed, was not analogous to a default judgment for which mandatory relief was available under Code of Civil Procedure section 473. The court found Yap had failed to show mistake, inadvertence, surprise or excusable neglect sufficient to warrant relief under the discretionary provisions of the statute. Therefore, the court denied the motion. Yap filed a timely notice of appeal from the judgment and the postjudgment ruling.

DISCUSSION

Standard of Review

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "The moving party bears the burden to demonstrate 'that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.' [Citation.] If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment 'to make [its own] prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

In making and opposing motions for summary judgment, the parties must include all material facts in their separate statements and cite to evidence to support those facts. (Code Civ. Proc., § 437c, subds. (b)(1) & (b)(3).) The trial court has discretion not to consider facts that are not referenced in the moving or opposing parties' separate statement. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315–316.)

We review summary judgment orders de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) "We do not resolve conflicts in the evidence as if we were sitting as the trier of fact. [Citation.] Instead, we draw all reasonable inferences from the evidence in the light most favorable to the party opposing summary judgment. [Citation.] All doubts as to the propriety of granting summary judgment are resolved in favor of the opposing party. [Citation.]" (*Nadaf–Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 961 (*Nadaf-Rahrov*).)

Discrimination and Retaliation Under the FEHA

Yap contends triable issues of fact exist as to whether DWP's reasons for adverse employment actions were a pretext for discrimination and retaliation in violation of the FEHA. We disagree.

A. Applicable Law

It is an unlawful employment practice under the FEHA, unless based upon a bona fide occupational qualification, for an employer to discriminate against a person based on characteristics such as age or physical disability. (Gov. Code, § 12940, subd. (a).) California allocates the burden of proof at trial in discrimination claims according to the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).)

"Under the *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz, supra,* 24 Cal.4th at p. 354.) To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. (*Id.* at p. 355.) A prima facie case generally means the plaintiff must provide evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was qualified for the position he or she sought or was performing competently in the position held, (3) the plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. (*Ibid.*)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1004 (*Scotch*).)

"If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the

employer took its actions for a legitimate, nondiscriminatory reason. (*Guz, supra,* 24 Cal.4th at pp. 355–356.) If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive. (*Id.* at p. 356.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.)

The employer's true, nondiscriminatory reasons "need not necessarily have been wise or correct. [Citations.]" (*Guz, supra,* 24 Cal.4th at p. 358.) "In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.] The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]" (*Id.* at p. 356.)

Under the FEHA, retaliation claims, like discrimination claims, are also subject to the three stage burden-shifting test. (*Guz, supra,* 24 Cal.4th at p. 354; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) Thus, after the plaintiff establishes a prima facie case of retaliation, the employer must articulate a nonretaliatory explanation for its acts, and the employee must then show that the explanation is a pretext for unlawful retaliation. (*Yanowitz, supra,* at p. 1042; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69.)

B. December 2006 Review Group

Yap contends there is a triable issue of fact as to whether he was excluded from a review group for a promotional examination in December 2006. We disagree. DWP submitted evidence that Yap took a promotional examination in October 2006 and did not take another promotional examination until 2008. There would have been no review group in December 2006 that Yap was entitled to join. This evidence was sufficient to shift the burden of proof to Yap. The only admissible evidence that Yap submitted in response was his declaration that the examination was held on December 9, 2006, not in October 2006. He stated that Tan assigned him multiple projects, while he saw other

candidates studying during their work hours. Yap failed to submit admissible evidence that a review group was held prior to the examination. There is no evidence from which a reasonable trier of fact could find that a review group was held for a promotional examination in December 2006 or that Yap was excluded from anything in December 2006.

C. Application for Lateral Transfer in June 2007

Yap contends triable issues of fact exist as to the denial of his application for a lateral transfer in June 2007 while he was on disability leave. We find no triable issue of material fact. DWP submitted evidence that the position available in June 2007 needed to be filled immediately. Yap, who was the sole applicant for the position, was out of the office on disability leave without an anticipated return-to-work date. Therefore, DWP decided not to select an applicant for the position and simply reassigned the position internally. Yap informed DWP that he was able to return to work with accommodation over six months later. This was sufficient evidence of a legitimate, nondiscriminatory reason for DWP's actions to shift the burden of proof. In response, Yap failed to submit evidence raising a triable issue of material fact. He did not submit evidence that the position could have remained open indefinitely. It is undisputed that he had not provided DWP with an anticipated return-to-work date or requested an accommodation to return to work. Yap's statement that no one called him at home to inquire about his disability status is not sufficient to raise a triable issue of fact as to DWP's reasons.

D. Job Opening in October 2007

Yap contends triable issues of fact exist concerning a job opening in October 2007. We cannot agree. DWP submitted evidence that information about the job opening was supplied upon request. Yap's coworker Hossain inquired about job opportunities and learned about the position. Yap did not apply for the position. This

was sufficient to shift the burden of proof to Yap. In response, Yap did not submit any evidence that the job opening was posted or distributed any differently than other positions, such as the lateral transfer for which he applied for in June 2007. There is no evidence that Yap was prevented from learning about or applying for the job opening. No triable issue of fact has been shown.

E. Review Group for July 2008 Promotional Examination

Yap contends triable issues of fact exist as to whether he was excluded from review sessions in June 2008 and, as a result, did not perform as well on the examination as the other candidates who received promotions in July and August 2008. We disagree. The evidence submitted by the parties showed that Yap participated in the only group review session that was held prior to the July 2008 examination. There is no evidence that Yap requested an individual review session or was otherwise denied an opportunity for individualized review. The evidence failed to show a triable issue of fact concerning review sessions for a promotional examination in July 2008.

F. Termination in September 2009

Yap contends the evidence shows triable issues of fact exist as to whether falsification of answers on his employment application was the true reason for his termination. We disagree. DWP submitted evidence that in the normal course of investigating Yap's worker's compensation claim, DWP received documents showing that Yap had not been truthful on his employment application. DWP gave Yap an opportunity to explain the answers during his deposition and to provide additional information. Within five months, DWP notified Yap that his employment would be terminated for falsifying answers on his employment application. This evidence was sufficient to shift the burden of proof to Yap. In response, Yap did not dispute that he had falsified the answers on his employment application, nor did he refute that he would

not have been eligible for employment with DWP had he been truthful. Yap suggests that DWP had the documents for months and did not choose to terminate him until the day he was scheduled to return from disability leave. However, it was reasonable for DWP to investigate the information that it received and provide Yap an opportunity to submit evidence to clarify his prior employment history. When that information was not provided, DWP terminated Yap. The timing in this case alone is not sufficient to create a triable issue of fact that Yap was terminated for falsifying answers on his employment application. There are no triable issues of fact concerning DWP's legitimate, nondiscriminatory and nonretaliatory employment actions.

Failure to Accommodate

Yap contends triable issues of fact exist as to whether DWP failed to reasonably accommodate his disability. We disagree.

The FEHA imposes on employers the duty to reasonably accommodate their employees' known physical or mental disabilities. (Gov. Code, § 12940, subd. (m); *Scotch, supra*, 173 Cal.App.4th at p. 1003.) "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 (*Jensen*).)" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192 (*Wilson*).)

Under the FEHA, "reasonable accommodation" means "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." (*Nadaf–Rahrov, supra*, 166 Cal.App.4th at p. 974.) Reasonable accommodation can include providing a disabled employee with a finite leave for treatment, either accrued paid leave or unpaid leave, provided the employee is likely to be able to perform at the end of the leave. (*Wilson, supra*, 169 Cal.App.4th at pp. 1193–1194.) "If the employee cannot be accommodated in his or her existing

position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223.)

"[A]n employer is not required to choose the best accommodation or the specific accommodation the employee seeks. Instead, ' " 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.' [Citation.] . . . [A]n employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citation.]" [Citation.]' [Citation.]" (*Wilson*, *supra*, 169 Cal.App.4th at p. 1194.)

The undisputed evidence was that Yap was permitted to take extensive disability leave to accommodate his disability. When Yap applied for a lateral transfer in June 2007 while on disability leave, there is no evidence that he requested the position as an accommodation of his disability or that DWP was aware he was requesting the position as an accommodation of his disability. In fact, other than taking leave, Yap did not request an accommodation of his disability until November 2007. In November 2007, he informed DWP that he could return to work with accommodation; namely, reporting to a different supervisor. DWP provided the requested accommodation when he returned to work in February 2008. There was no accommodation that Yap requested which DWP did not provide. No triable issues of fact exist as to whether DWP provided accommodation for Yap's disability.

Interactive Process

Yap contends triable issues of fact exist as to whether DWP failed to engage in an interactive process after becoming aware of his disability and need for accommodation. This is incorrect.

The FEHA makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable

accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).)

"The interactive process imposes burdens on both the employer and employee." (*Scotch, supra*, 173 Cal.App.4th at p. 1013.) If the disability and resulting limitations are not obvious, the employee must initiate the process by identifying the disability, resulting limitations, and suggestions for reasonable accommodations. (*Ibid.*) "'Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation.' [Citation.]" (*Ibid.*)

"Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. [Citation.]" (*Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137 (*Humphrey*).) "Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. [Citation.]" (*Id.* at pp. 1137–1138.)

"Once the interactive process is initiated, the employer's obligation to engage in the process in good faith is continuous. '[T]he employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work . . . .' (*Humphrey, supra*, 239 F.3d [at p.] 1138.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1013.)

It was Yap's responsibility to make DWP aware of his disability and suggest accommodation, if required. DWP provided disability leave to Yap when he requested it. DWP did not become aware that Yap needed an accommodation in order to return to work until November 2007, when his doctor informed DWP that Yap could not report to

Tan. The undisputed evidence shows that DWP engaged in a process to ascertain the nature of Yap's condition and restriction. When Yap returned to work, although DWP did not recognize the restriction as medically necessary, DWP provided a different supervisor. DWP subsequently provided disability leave each time Yap requested it. There is no evidence that DWP failed to engage in an interactive process to consider accommodation once Yap made DWP aware of his need for accommodation in order to return to work.

Failure to Prevent Discrimination and Harassment

There are no triable issues of fact as to whether DWP discriminated or retaliated against Yap, provided reasonable accommodation, or engaged in good faith in an interactive process. Therefore, there are no triable issues of material fact as to whether DWP failed to prevent discrimination, retaliation, and harassment.

Labor Code Section 1102.5

Yap contends that he reported suspected illegal activity to Tan, to DWP's EEO office in his discrimination and retaliation complaint against Tan, and to the Department of Fair Housing and Employment in his discrimination and retaliation complaint. According to Yap, Tan had disagreed with his conclusions and failed to take proper corrective action. Yap contends that triable issues of fact exist as to whether he was excluded from review groups, denied transfer and promotions, denied disability leave and benefits, and was terminated as a result of his reports. We find no evidence of a causal connection between the reports and the employment actions.

"Labor Code section 1102.5, subdivision (b), prohibits an employer from retaliating 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 statutory or regulatory violation. The purpose of this statute is to

‘“encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.”’ [Citation.]” (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1545–1546.) “To establish a prima facie case for whistleblower liability, a plaintiff must show that he or she was subjected to adverse employment action after engaging in protected activity and that there was a causal connection between the two. [Citation.]” (*Id.* at p. 1546.)

DWP submitted evidence showing there was no causal connection between Yap’s audit reports or discrimination complaints and the adverse employment actions taken against him. DWP’s evidence showed Yap was not excluded from any review group, Tan did not interview Yap for any of the positions which he applied for and did not receive, and DWP employees other than Tan made the decision to terminate Yap’s employment based on the falsification of his employment application. This evidence was sufficient to shift the burden to Yap. In response, Yap did not submit any evidence showing a causal connection between the reports and DWP’s employment actions. He relied on the bare fact that he made reports and suffered adverse employment actions years afterward. In light of DWP’s evidence that Tan was not involved in any of the adverse employment actions taken against Yap, we conclude that Yap failed to raise a triable issue of fact as to whether he suffered adverse employment actions as a result of his audit reports to Tan and Tan’s response to the reports. Summary judgment was properly granted on this cause of action.

Labor Code Section 2699

Yap’s complaint included a cause of action under Labor Code section 2699. Labor Code section 2699 allows an “aggrieved employee” to bring an action for civil penalties that could be collected by the Labor and Workforce Development Agency for a violation of the Labor Code. An aggrieved employee is anyone “who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” (Lab. Code, § 2699, subd. (b).) Since we have concluded above that Yap

failed to show a violation of the Labor Code was committed against him, there is no basis for Yap's cause of action under Labor Code section 2699.

Motion for Relief Under Code of Civil Procedure Section 473, subdivision (b)

Yap contends the trial court should have granted his motion for relief under either the mandatory or discretionary provisions of Code of Civil Procedure section 473, subdivision (b). We disagree.

A. Mandatory Relief

Code of Civil Procedure section 473, subdivision (b), provides mandatory relief under certain circumstances. When a motion for relief is made within six months of the entry of judgment and is accompanied by an attorney's sworn affidavit attesting to mistake, inadvertence, surprise or neglect, the court must "vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Code Civ. Proc., § 473, subd. (b).) "Under this provision, a party will be relieved if a default judgment or dismissal is the result of its attorney's mistake, inadvertence, surprise, or neglect, without regard to whether the neglect is excusable. [Citation.]" (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 225 (*Henderson*).)

"The mandatory relief provision of [code of Civil Procedure] section 473[, subdivision] (b) is a 'narrow exception to the discretionary relief provision for default judgments and dismissals.' [Citation.] Its purpose '"was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys."' [Citation.] . . . The defaulting party 'must submit sufficient admissible evidence that the default was actually caused by the attorney's error.

[Citation.] "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief."' [Citation.]" (*Henderson*, *supra*, 187 Cal.App.4th at p. 226.)

"'By its express terms, the mandatory relief provision applies only to defaults, default judgments, and dismissals.' [Citation.] Some courts, however, have construed the provision to reach other circumstances deemed to be procedural equivalents of defaults, default judgments, and dismissals. (See, e.g., *In re Marriage of Hock & Gordon–Hock* (2000) 80 Cal.App.4th 1438, 1443 [relief granted in dissolution case where neither the party nor her attorney appeared for trial]; *Avila v. Chua* (1997) 57 Cal.App.4th 860 (*Avila*) [summary judgment].) 'The rationale of these cases is that, where there is no hearing on the merits, an attorney's neglect should not prevent the party from having his or her day in court.' [Citation.] 'Other courts have rejected that rationale, characterizing such decisions as "understandable, yet ultimately misguided quests to salvage cases lost by inept attorneys," which "have applied the mandatory provision far beyond the limited confines the Legislature intended."' [Citations.]" (*Henderson*, *supra*, 187 Cal.App.4th at p. 226.)

It is clear that the mandatory provision does not apply in this case under either rationale. Yap filed a timely opposition to the motion for summary judgment and the matter was heard on the merits. The summary judgment in this case was not the procedural equivalent of a default or default judgment. Yap sought relief from his attorney's failure to file a motion for reconsideration. The failure to file a motion for reconsideration is not in the nature of a default, default judgment, or dismissal. The mandatory provision of Code of Civil Procedure section 473, subdivision (b), does not apply.

B. Discretionary Relief

Yap alternatively contends the trial court abused its discretion in denying the motion for relief, because his attorney's failure to file a motion for reconsideration was due to excusable neglect. We find no abuse of discretion.

Code of Civil Procedure section 473, subdivision (b) provides the court discretion to relieve a party from a judgment entered as a result of mistake, inadvertence, surprise, or neglect. "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) "A requirement for discretionary relief is that the application 'be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted . . . .' (*Ibid.*)" (*Henderson, supra*, 187 Cal.App.4th at pp. 224-225.)

"'[T]o warrant relief under [Code of Civil Procedure] section 473[,] a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) "Generally speaking, the trial court's ruling on a discretionary motion for relief is reviewed for an abuse of discretion. [Citation.]" (*Henderson, supra*, 187 Cal.App.4th at p. 230.)

We find no abuse of discretion in this case. Yap sought relief in order to file a motion for reconsideration and attached a declaration from his co-worker. Yap's coworker declined to provide a declaration until he learned that the motion for summary judgment had been granted. There was no reason that the evidence provided by the coworker could not have been obtained earlier from the coworker or other individuals. Moreover, the coworker's declaration was rife with the same type of statements that the trial court had already ruled inadmissible in Yap's declaration on grounds including

hearsay and lack of foundation. We find no abuse of discretion in the trial court's denial of the motion for relief under Code of Civil Procedure section 473, subdivision (b).

DISPOSITION

The judgment is affirmed. Respondent Los Angeles Department of Water & Power is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.