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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

KARL MCCLAIN,

Plaintiff and Appellant,

v.

PACIFIC MARITIME ASSOCIATION et al.,

Defendants and Respondents.

2d Civil No. B262952
(Super. Ct. No. 56-2013-00437691-CU-WT-VTA)
(Ventura County)

Karl McClain brought an action against his employer alleging violations of the Fair Employment and Housing Act (FEHA). (Gov. Code, §§ 12900 et seq.) He claimed discrimination because of his disability. McClain's employer joined his labor union as a defendant. The trial court found against McClain and in favor of the defendants. We reverse the award of costs to the defendants as not allowed under FEHA. In all other respects, we affirm.

FACTS

The Pacific Maritime Association (PMA) is the collective bargaining agent for its members, which include stevedoring companies, shipping lines and terminal operators. The International Longshore and Warehouse Union, Local 46 (Local 46) represents longshore workers. Longshore work is governed by a collective bargaining agreement between PMA and Local 46.

Longshore jobs are offered to workers based on their priority with the union. The first priority goes to Class A workers, then to Class B workers and finally to casual workers. Casual workers work when they want to. Although casual workers are not required to take any particular job, they must work at least one shift every six months.

The Joint Port Labor Relations Committee (JPLRC) was formed by PMA and Local 46. The JPLRC periodically reviews membership compliance with the work rules. In August 2010, the JPLRC met and decided to send letters to casual workers who had not worked at least one shift in the last six months. The minutes of the meeting stated the letters would be sent to anyone who had not worked since April 14, 2008. Carl Halbert, a JPLRC member, testified the minutes were in error. The actual cut-off date was April 14, 2009.

McClain is a casual worker. He was injured and had not worked since March 2009. He received a letter from the JPLRC dated August 18, 2010. The letter stated in part:

"This letter serves to formally notify you that, the Joint Port Labor Relations Committee has agreed that all casual workers whose last date paid for work is prior to April 14, 2009 are in violation of the casual availability requirement and shall have their casual dispatch privileges revoked. The minimum work availability requirement is one shift within a six-month period from his/her last date worked.

"You are receiving this letter because your last date paid for work is prior to April 14, 2009, and due to your not having met the work availability requirement, your dispatch privileges may be revoked.

"The Committee further agreed, without precedent, to provide a method for the reinstatement of your casual dispatch privileges. In order to have your dispatch privileges reinstated you must attend an unpaid General Safety Training class on the dates specified below. The revocation of your dispatch privileges shall become permanent, without an appeal, if you do not attend the below GST class . . . .

"If you have been on disability, active military leave or a full time student, you may provide documentation to the JPLRC and do not need to attend this unpaid GST class. You

will have 45 calendar days, from the date of this letter, to submit official supporting documentation excusing your inability to meet the requirement. The supporting documentation may only be submitted, in person, to the dispatcher at the ILWU Local 46 Dispatch Hall."

The letter notified McClain that the required class would be held at the Oxnard Harbor District offices at 7:30 p.m. on September 10, 2010. McClain did not attend the class. He admitted his disability did not prevent him from attending the class.

McClain's Testimony

McClain testified that on September 1, 2010, he called Jess Herrera, the Local 46 dispatcher, about the August 18 letter. McClain said he used his cell phone, but did not introduce his cell phone records at trial. McClain said Herrera told him to meet him at the dispatcher's office the next day.

McClain claims he saw Herrera at the dispatcher's office the next day. McClain provided Herrera with the August 18 letter and a letter from his workers' compensation attorney stating he has been on total temporary disability since March 19, 2009. McClain testified Herrera looked at the letters and said, "This is fine." Herrera told McClain that he could go home.

McClain testified three people saw him at the dispatcher's office on September 2, 2010, when he claims he met Herrera: Leo Carter, Mario Franco and Oscar Loya.

McClain received a letter dated December 23, 2010, from the JPLRC. The letter notified McClain that his dispatch privileges ended as of September 15, 2010, stating that McClain failed to attend the required class or provide documentation relating to his absence from the industry.

McClain testified that in late 2011, he met with Herrera at Herrera's office at the harbor commission. He told Herrera that an investigator from the Department of Fair Employment and Housing (DFEH) wanted to talk to Herrera about a complaint McClain had filed.

McClain admitted that his memory is not good. He has had memory problems for years and his memory is not improving. His memory problems predate the events in this case.

Herrera's Testimony

Herrera is a long-time union member and served as union dispatcher from October 2008 to October 2010.

Herrera testified that during the months of August and September 2010, he did not receive a telephone call from McClain. Herrera said he told people at a JPLRC meeting that "it was possible" McClain brought him some documentation

concerning his disability, but he does not remember McClain bringing him any such documentation.

Herrera said the acceptable disability documentation would be from a doctor. If a person handed him documentation, he would scan it to see if it was from a doctor. If it was from a doctor, he would put it in the JPLRC file. If the documentation was not sufficient, he would return it to the person and tell him what was sufficient. Neither the PMA nor the Local 46 files contain any documentation of McClain's disability.

Herrera said he has been a harbor commissioner for 20 years. He has an office in Port Hueneme. Neither McClain nor any other longshoreman has ever met with Herrera at his commission office.

Loya's Testimony

Loya testified McClain could not have seen him at the dispatcher's office on September 2, 2010. Loya's log book showed he was working in Long Beach that day. McClain did not call the two other persons who he claimed he saw in the dispatcher's office that day.

McClain's Reinstatement

In June 2012, McClain wrote a letter to PMA inquiring about his union membership. PMA employee, Janee Ortiz, asked McClain to provide documentation to the JPLRC relating to his excuse for violating the six-month rule. It was not

until December 2012 that McClain submitted medical documentation. In February 2013, the JPLRC sent McClain a letter advising him that he had been reinstated. McClain began work shortly thereafter.

McClain's work consists primarily of driving cars off boats. The work accommodates his permanent injury-related work restrictions.

Statement of Decision

The trial court found McClain failed to prove the necessary elements of his causes of action. Herrera's testimony was credible. McClain's testimony was not credible. McClain was given options to keep himself qualified as an eligible worker and he did not comply with those options. The defendants' actions were neither motivated by nor based on McClain's disabilities. McClain failed to exhaust his administrative remedies.

DISCUSSION

I

McClain contends the trial court failed to render a sufficient statement of decision.

A statement of decision is sufficient if it fairly discloses the court's determination of the ultimate facts in the case. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007)

154 Cal.App.4th 547, 559.) The court need not address all legal and factual issues raised by the parties. (*Ibid.*)

Here the trial court found McClain's testimony was not credible; he was given options to keep himself eligible, but he did not comply; PMA's actions were neither motivated by nor based on McClain's disabilities; and McClain failed to exhaust administrative remedies on his FEHA claims. The trial court's statement of decision is more than adequate. It states the ultimate facts found by the trial court and fully advises the parties of the basis for the court's decision. That is all that is required.

II

McClain contends the trial court erred in placing the burden of proof on him to show he exhausted his administrative remedies on his FEHA claims.

FEHA creates an administrative agency, the Department of Fair Employment and Housing (DFEH). (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345.) Before filing a civil action alleging FEHA violations, an employee must exhaust his or her administrative remedies with the DFEH. (*Ibid.*) That includes filing a complaint with the DFEH and the procurement of a right-to-sue letter. (*Ibid.*)

McClain relies on *Kim*. There the court held the defendant waived its exhaustion of administrative remedies

defense by waiting to raise the defense until after a full trial on the merits. (*Kim v. Konad USA Distribution, Inc.*, *supra*, 226 Cal.App.4th at pp. 1347-1348.) But *Kim* acknowledges that the burden of proving exhaustion of administrative remedies is on the plaintiff. (*Id.* at p. 1345.) The plaintiff knows or should know that. It is difficult to understand why the burden is on the defendant to point out, prior to the end of trial, that the plaintiff has failed to prove an element of his case.

Even assuming *Kim* is properly decided, it would not change the result here. The trial court's finding that McClain failed to prove he exhausted his administrative remedies is an alternative ground for the judgment. The court also found that McClain failed to prove the substantive elements of his case.

III

McClain contends the trial court erred in refusing to grant his motion for a new trial on the grounds of irregularity in the proceeding or accident or surprise.

McClain's motion was based on a casual remark by the trial judge. After Herrera testified, the trial court stated: "I have to tell you, two years ago, Mr. Herrera was running for Congress and I was fighting off an election challenge for this job. One Sunday morning at St. Paul's Baptist Church in Oxnard, which is an African-American congregation, we were sharing the

pulpit. For a white Irish Catholic like me, that was a unique experience."

McClain raised no objection until after the trial court issued its statement of decision finding against him. Then he made a motion for a new trial.

In response to McClain's motion for a new trial, the trial judge clarified his comments on Herrera, referring to him as "Mr. Hernandez." The judge stated: "First thing I need to do is clarify my nonacquaintance with Mr. Hernandez. Three years ago, starting right about now, I was involved in an election because I had received a challenge to my judicial seat. And as you know, judges are considered elected officials, so I formed a campaign committee. I had a lawyer who introduced me to the Board of Directors of the local NAACP. That led to being invited to talk to the congregation at St. Paul's Baptist Church in south Oxnard. I don't remember the date, it was on a Sunday, it was in May, and I believe it was two weeks before the week of the election. I showed up that Sunday morning, not knowing that there were going to be other people who had received a similar situation, a similar invitation. To my knowledge, I had never laid eyes on Mr. Hernandez, much less met him up to that date. I gave my pitch, he gave his, there may have been one or two others. I left to go to another Baptist Church that morning. I don't remember whether Mr. Hernandez and I even shook hands,

we just happen to be in the same building at the same time. That's May of 2012. I don't recall having again seen him, met him, talked to him, or had any contact with him up until the day he walked into this courtroom, what was it, 2014, to testify in the case."

McClain does not bother to mention the trial court's clarification. He is not entitled to a new trial because the trial judge was once in the same room as one of the witnesses.

IV

McClain contends the trial court erred in refusing to grant his motion for a new trial on the ground that the verdict is against the law.

McClain argues the judgment in favor of PMA and Local 46 is not supported by substantial evidence. But McClain misapprehends the substantial evidence rule.

As plaintiff, McClain had the burden of proof. (See Evid. Code, § 500; *Gebert v. Yank* (1985) 172 Cal.App.3d 544, 552.) A judgment against the party with the burden of proof need not be supported by substantial evidence. It is the lack of credible evidence of sufficient weight to convince the trier of fact that results in a judgment against the party who has the burden of proof.

McClain's argument is based on a view of the evidence most favorable to himself. But that is not how we view the evidence on appeal.

In viewing the evidence, we look only to the evidence supporting the prevailing party. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376, pp. 434-435.) The trier of fact is not required to believe even uncontradicted testimony. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

The trial court, as the trier of fact, simply did not find McClain's testimony sufficiently credible to carry his burden of proof. "An appellate court is without power to judge the effect or value of the evidence, weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427.)

V

McClain contends the trial court erred in refusing to enforce his notice to appear at trial issued to PMA employee Kathleen O'Sullivan.

Code of Civil Procedure section 1987, subdivision (b) allows a party to serve a notice to appear on any "officer, director or managing agent" of another party. The notice to appear has the same effect as a subpoena.

O'Sullivan is PMA's in-house counsel. McClain does not argue that she is an officer or director of PMA. He claims she is a managing agent. McClain's argument that O'Sullivan is PMA's managing agent is based on McClain's allegations that she investigated McClain's DFEH complaint, made decisions on how to conduct the investigation, prepared PMA's response to the DFEH. PMA's discovery responses stated that O'Sullivan "can be contacted through counsel for PMA."

A managing agent is "someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.) O'Sullivan did not exercise discretionary authority over decisions that ultimately determined corporate policy. Instead, her actions were typical of an attorney representing a client in litigation.

McClain's reliance on *Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, is misplaced. Davis sued Kiewit alleging sexual harassment at her work and related conduct. Kiewit moved for summary adjudication on Davis's request for punitive damages on the ground that no officer, director or managing agent of Kiewit engaged in or ratified the alleged wrongful conduct. In opposition to the motion, Davis submitted affidavits showing Preedy and Lochner were managing agents of Kiewit. The affidavits showed that Preedy was Kiewit's "top management employee" and that Lochner was responsible for administering its policies for prevention of discrimination based on gender. (*Id*. at pp. 366-368.) The Court of Appeal held that Davis raised a triable issue of fact on whether Preedy and Lochner were managing agents.

Here McClain presented no evidence that O'Sullivan was PMA's top management employee or that she exercised authority over any of PMA's policies. She was simply an attorney representing a client.

The trial court did not err in refusing to enforce the notice to appear.

VI

McClain alleges the trial court erred in awarding costs to PMA and Local 46.

PMA and Local 46 acknowledge that after the trial court awarded them costs, our Supreme Court held that in a FEHA action the prevailing defendant is not entitled to costs unless the action was objectively without foundation. (*Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, 105.) In light of that case, PMA and Local 46 are waiving costs.

DISPOSITION

The judgment is affirmed. Each party is to bear his or its own costs.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Appleton Law Group and Heather Appleton for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Clifford D. Sethness and Mirna Villegas for Defendant and Respondent Pacific Maritime Association.

Holguin, Garfield, Martinez & Goldberg, Steven R. Holguin, and Gillian G. Goldberg for Defendant and Respondent International Longshore and Warehouse Union, Local 46.