Filed 4/26/17 Raseknia v. County of Los Angeles CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOE RASEKNIA, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B250783 (Los Angeles County Super. Ct. No. BC457999)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

Law Offices of Gloria D. Haney and Gloria D. Haney for Plaintiff and Appellant.

Peterson • Bradford • Burkwitz, Avi Burkwitz and Gil Burkwitz for Defendants and Respondents.

Plaintiff and appellant Joe Raseknia (Raseknia) appeals from the summary judgment entered in favor of defendants and respondents the County of Los Angeles (the County) and Francine Jimenez (Jimenez)[1] in this action for discrimination based on age, race, ethnic origin, religion, and disability, retaliation, harassment, failure to prevent discrimination, and failure to accommodate. We affirm the judgment.

BACKGROUND

Raseknia is currently employed by the County Probation Department as a Deputy Probation Officer II. His duties include compiling reports on criminal defendants and submitting these reports to court.

Previous lawsuits

June 2008 lawsuit

Raseknia filed his first lawsuit against the County in June 2008, alleging claims of discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). At the time, Raseknia was working at the Probation Department's Long Beach office.

In April 2009, Raseknia accepted a reassignment from the Long Beach office to the Probation Department's Central Adult Investigation (CAI) unit in Los Angeles. After Raseknia was transferred, the Probation Department's administration became concerned that the transfer may have contravened union guidelines. In May 2009, the Probation Department's Deputy Director of Administration, Robert Smythe, issued an order to have Raseknia report back to the Long Beach office. Smythe's order was disregarded, and Raseknia remained at the CAI office.

---

[1] Jimenez and the County are referred to collectively as defendants.

In May 2009, Raseknia underwent a psychiatric examination as part of a worker's compensation case. The psychiatrist's report from that examination stated that Raseknia could continue to work as a Deputy Probation Officer II with two work restrictions: (1) he should not work under Charlene Vartanian, the former director of the Long Beach office, and (2) he should not be exposed to undue stress. At the time the report was issued, Raseknia had already transferred to the CAI unit and was no longer working under Vartanian.

In October 2009, Smythe learned that Raseknia had not been transferred back to the Long Beach office, and he had a transfer order issued to return Raseknia to Long Beach. Following issuance of the October 2009 transfer order, Raseknia filed a grievance. The grievance was granted in November 2009, and Raseknia remained in the CAI office.

On February 15, 2010, Raseknia and the County entered into a settlement agreement with respect to the June 2008 lawsuit.

May 2010 DFEH complaint

In May 2010, Raseknia filed a complaint with the Department of Fair Employment and Housing (DFEH), claiming that the County had not accommodated his disabilities.

Raseknia's May 2010 DFEH complaint prompted an investigation by the County's Office of Affirmative Action Compliance. Jimenez, an ADA coordinator for the County, was assigned to investigate Raseknia's claims. She scheduled an interactive process meeting to determine what accommodations, if any, Raseknia needed.

On March 10, 2011, Jimenez and other Probation Department representatives met with Raseknia, his attorney, and his union representative. During the meeting, which became

contentious at times, Raseknia told Jimenez that he had no need for any accommodation in his position at CAI.

After the meeting, Jimenez sent Raseknia a letter dated March 25, 2011, confirming that Raseknia needed no further accommodation. The letter further stated that Jimenez was closing her file with respect to the May 2010 DFEH complaint.

September 2013 lawsuit

On September 11, 2013, Raseknia filed another lawsuit against the County and Jimenez, alleging against Jimenez a single cause of action for harassment, and against the County, causes of action for age discrimination, race/ethnic origin discrimination, disability discrimination, retaliation, and failure to prevent discrimination. Judgment was subsequently entered in favor of Jimenez and the County, and Jimenez was awarded attorney fees on the ground that the action against her was unreasonable, frivolous, meritless, or vexatious. We affirmed the judgment and the attorney fee award. (*Raseknia v. County of Los Angeles* (Mar. 8, 2017, B264153) [nonpub. opn.].)

The instant lawsuit

On June 1, 2011, Raseknia filed the instant action against the County and Jimenez, alleging eight causes of action for harassment, retaliation, and discrimination based on age, race, national origin, religion, and disability. Only the fifth cause of action for harassment was asserted against Jimenez.

On September 24, 2012, defendants filed a motion for summary judgment, arguing that Raseknia's claims were barred by the terms of the February 2010 settlement agreement, there was no adverse employment action to support Raseknia's claims of discrimination and retaliation, there was no causal connection between the purported acts of wrongdoing and any protected activity or characteristic, and there were legitimate business reasons underlying the purported acts of wrongdoing.

Two days before his opposition was due, Raseknia gave ex parte notice of a motion to continue the summary judgment motion and the previously scheduled trial date, on the ground that he needed more time to conduct discovery. The trial court denied the ex parte application.

On December 5, 2012, the trial court granted defendants' motion for summary judgment. Judgment was entered in defendant's favor on January 25, 2013.

Raseknia appealed, and on September 30, 2014, this court reversed the judgment and remanded the matter to the trial court with direction that Raseknia should be allowed additional time to conduct discovery to oppose the summary judgment motion because of his counsel's personal circumstances. A remittitur was issued on December 22, 2014.

On March 2, 2015, defendants renewed their motion for summary judgment, supported by a separate statement of undisputed material facts, deposition testimony, and documentary evidence. Raseknia opposed the motion, submitting his own separate statement of disputed and undisputed facts and supporting evidence.

The trial court sustained many of defendants' evidentiary objections to Raseknia's supporting evidence and granted the motion for summary judgment in its entirety. Judgment was entered in defendants' favor on July 21, 2015. This appeal followed.

DISCUSSION

I. General legal principles and standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether,

despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037 (*Cucuzza*).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element." (*Id*. at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) In doing so, we "[consider] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

II. Discrimination causes of action

FEHA prohibits employers from discriminating against a person in compensation or in the terms, conditions, or privileges of employment because of the person's age, race, religion, ancestry, national origin, or physical or mental disability. (Gov. Code, § 12940, subd. (a).) A prima facie case of discrimination under FEHA requires evidence that the employee was a member of a protected class, had satisfactory job performance, suffered an adverse employment action, and that similarly situated individuals outside the protected class were treated more favorably. (*Guz, supra*, 24 Cal.4th at p. 379.)

An employer seeking summary judgment in a discrimination case meets its burden by showing that one or more of these prima facie elements is lacking, or that legitimate, nondiscriminatory reasons existed for the adverse employment action. Here, the County met its burden of showing that Raseknia suffered no adverse employment action.

An adverse employment action is one that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051-1052 (*Yanowitz*).) "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 (*Akers*).) Transfer of an employee to a comparable but less desired position, for example, is not an adverse employment action under FEHA. (*Akers*, at p. 1457; see also *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358.)

The undisputed evidence shows that Raseknia currently works in the Los Angeles CAI office, his preferred location. He has remained at CAI continuously since April 2009, despite several attempts by a Probation Department administrator to transfer him to other locations. Raseknia admits that while

stationed at CAI, he has never received any substandard performance evaluations, letters of reprimand or warnings, and has never been suspended or criticized for his work. Raseknia further admits that his current assignment accommodates all of his medical needs and work restrictions, and that he has no complaints with his work assignment at CAI.

Because the County met its initial burden of showing that Raseknia suffered no adverse employment action, the burden shifted to Raseknia to present admissible evidence raising a triable issue of material fact as to that prima facie element of his discrimination causes of action. (*Aguilar, supra,* 25 Cal.4th at pp. 850-851.) He failed to do so.

Raseknia's evidence of defendants' alleged wrongdoing, individually and collectively, do not constitute actionable adverse employment actions as a matter of law. Because an actual transfer to a comparable but less desired position is itself insufficient to constitute an actionable adverse employment action (*Akers, supra,* 95 Cal.App.4th at p. 1457), unsuccessful attempts to transfer Raseknia from CAI are not actionable adverse employment actions. Raseknia's complaints concerning the 2011 interactive process meeting similarly do not constitute adverse employment actions. The meeting, which was prompted by Raseknia's 2010 DFEH complaint, resulted in no changes to the terms and conditions of his employment. Raseknia's complaints about Jimenez's allegedly hostile demeanor during and after the 2011 interactive process meeting do not constitute adverse employment actions. "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as affecting the terms, conditions, or privileges of employment." (*Yanowitz, supra,* 36 Cal.4th at p. 1054.) ""[W]orkplaces are

rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [Citation.] If every minor change in working conditions or trivial action were a materially adverse action then any "action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." [Citation.]' The plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment. [Citation.]" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386.)

There is no evidence in the record that Raseknia suffered an adverse employment action. Summary judgment was therefore properly granted as to the causes of action for unlawful discrimination based on age, race, national origin, religion, and disability.

III. Retaliation

FEHA makes it unlawful for an employer to discharge, expel, or otherwise discriminate against any person because the person opposed any practices forbidden under the statute, filed a complaint, or testified or assisted in any FEHA proceeding. (Gov. Code, § 12940, subd. (h).) To establish a prima facie case of retaliation in violation of FEHA, a plaintiff must show that he or she suffered an adverse employment action.[2] (*Akers, supra*, 95 Cal.App.4th at p. 1453.)

As discussed, the County met its burden of establishing that Raseknia suffered no adverse employment action, and Raseknia provided no evidence raising a triable issue of material

---

[2] The other prima facie elements of a FEHA retaliation claim are: the employee engaged in a protected activity, and a causal link exists between the protected activity and the adverse employment action. (*Akers, supra*, 95 Cal.App.4th at p. 1453.)

fact as to this prima facie element of both his discrimination and retaliation claims. Summary judgment was therefore properly granted as to Raseknia's cause of action for retaliation in violation of FEHA.

IV. Harassment causes of action

FEHA prohibits harassment in the workplace based on age, race, national origin, religion, or physical or mental disability. To establish a prima facie case of harassment in violation of FEHA, a plaintiff must show that he was subjected to unwelcome conduct or comments, the harassment complained of was based on his protected status, and the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463-465.)

Harassment is different than discrimination under FEHA. Discrimination is bias in the exercise of official actions on behalf of the employer, whereas harassment is bias that is expressed or communicated through interpersonal relations in the workplace. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) "'[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job. [Citations.]'" (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.) Accordingly, "'commonly necessary personnel management actions'" including job, office or work station assignments, the provision of support, and deciding who will and who will not attend meetings, do not constitute harassment. (*Id.* at p. 646.)

The alleged acts of harassment by Jimenez and the County consist of attempts to transfer Raseknia from the CAI office to another location, and discussions and correspondence regarding Raseknia's work restrictions and accommodation of his disabilities. Such actions are commonly necessary personnel management actions that do not constitute actionable harassment as a matter of law. (*Reno v. Baird, supra*, 18 Cal.4th at p. 646.) Raseknia presented no evidence that raises a triable issue of material fact as to whether he suffered actionable harassment under FEHA. Summary judgment was accordingly properly granted as to the causes of action for harassment against Jimenez and the County.

V. Failure to prevent discrimination

FEHA makes it unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).) Claims for failure to prevent unlawful harassment or discrimination, however, fail as a matter of law when no underlying discrimination or harassment occurred. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1021 (*Scotch*); *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 283-284.)

Because Raseknia failed to establish any unlawful discrimination by the County, his cause of action for failure to prevent discrimination similarly fails. Summary judgment was properly granted as to this claim.

VI. Failure to accommodate

The elements of a failure to accommodate claim under FEHA are: (1) the plaintiff has a disability covered by FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate

the plaintiff's disability. (*Scotch, supra*, 173 Cal.App.4th at pp. 1009-1010.)

The undisputed evidence shows that Raseknia's disability and work restrictions were accommodated by his transfer to the CAI office in 2009 and that they continue to be accommodated by his current assignment there. Raseknia admits that his transfer to the CAI office accommodated his work restrictions, that he has never been transferred out of CAI, and that he has no complaints with regard to his work assignment at CAI. Raseknia cites no evidence that raises a trial issue of material fact as to whether his disability has not been reasonably accommodated.

CONCLUSION

For the reasons discussed, the trial court did not err in granting summary judgment.[3]

---

[3] Defendants argue that the judgment should be affirmed on the alternate ground that the February 2010 settlement agreement pursuant to which the parties resolved Raseknia's June 2008 lawsuit bars the instant action. We reject that argument because the record on appeal does not include all of the relevant provisions of the settlement agreement and because the provision on which defendants rely (and which they initially misquoted in their appellate brief), does not support their position.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

---

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