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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID BARRY,

Plaintiff and Appellant,

v.

KOHL'S DEPARTMENT STORES, INC.,

Defendant and Respondent.

B252275

(Los Angeles County
Super. Ct. No. BC483482)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Michelle R. Rosenblatt, Judge. Affirmed in part and reversed in part.

JML Law, Joseph M. Lovretovich, David F. Tibor, Karen Y. Cho and Jennifer A.
Lipski for Plaintiff and Appellant.

Payne & Fears, Leila Narvid and Daniel F. Lula for Defendant and Respondent.

Plaintiff and appellant David Barry challenges a judgment entered following the trial court's order granting the motion for summary judgment brought by defendant and respondent Kohl's Department Stores, Inc.

We reverse the judgment. Plaintiff presented a triable issue of fact on the question of whether defendant's stated reason for the termination of his employment was pretextual. We therefore also reverse the trial court's order granting summary adjudication of the first (disability discrimination in violation of the Fair Employment and Housing Act (FEHA)), fifth (failure to prevent discrimination/harassment), sixth (retaliation in violation of FEHA), seventh (retaliation in violation of the California Family Rights Act (CFRA)), eighth (wrongful termination in violation of FEHA), and ninth (wrongful termination in violation of public policy) causes of action. We affirm the trial court's order granting summary adjudication of the second, third, and fourth causes of action as well as plaintiff's request for punitive damages.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

A. Plaintiff's Employment with Defendant

In December 2002, defendant hired plaintiff at its Cerritos store. In May 2007, plaintiff left defendant's employment to become a manager at Sears. But, in November 2007, defendant rehired plaintiff to work at its Torrance store and, in February 2008, he became the assistant store manager for its Alhambra store. In April 2010, defendant promoted plaintiff to store manager of the Arcadia store. In that position, plaintiff reported to district manager Franklin Cho (Cho).

B. Defendant's Policy on Tax Exempt Sales

According to defendant's tax exempt policy, a customer seeking a tax exempt sale is required to provide, at the time of purchase, a properly completed and signed tax exemption certificate issued by the State of California. Also according to defendant's policy, an employee could receive disciplinary action, up to and including immediate discharge, for inappropriate sales transaction procedures.

On December 13, 2010, Tracie Wickenhauser (Wickenhauser), defendant's vice-president and regional manager, sent an e-mail to several store executives, including plaintiff, reminding them of store policies regarding customer discounts and tax exempt purchase guidelines. Plaintiff received the e-mail and reviewed it with his team.

C. Customer Raymond Kolo's (Kolo) Purchases at Defendant's Stores

Wickenhauser's e-mail was prompted by the discovery that one of defendant's customers, Kolo, was receiving unauthorized stacked discounts on large purchases of denim. He was a frequent shopper at several of defendant's stores in Southern California, including the Arcadia and Alhambra stores. Kolo's habit was to make large denim purchases using his store credit card. After "max[ing] out" his credit card, he would pay the balance at the store, so that he could purchase more denim on his credit card. By using his store credit card, Kolo often received special discounts available only for credit card purchases and would get "Kohl's Cash," a sales promotion where the customer receives a \$10 coupon for the first \$50 in purchases. He would then apply the Kohl's Cash towards his purchases, receiving an even greater discount.

Plaintiff was familiar with Kolo's purchasing habits and estimated that he made purchases at the Arcadia store on more than 20 occasions as of December 2010.

D. Plaintiff is Written Up in December 2010 for Unauthorized Discounts to Kolo

On December 18, 2010, plaintiff was written up for authorizing multiple improper discounts to Kolo for denim purchases. He was instructed to "inform[] and seek[] information and guidance from appropriate business partners" in the future. The counseling form also advised that future violations could lead to further disciplinary action, including termination.

E. Plaintiff Asks Cho for Help

In February and March 2011, the Arcadia store continued to authorize tax exempt sales for Kolo without a valid tax exempt certificate. Kolo was presenting the store with a reseller's permit and not a tax exempt certificate. Plaintiff admits that he authorized the transactions and that he simply took Kolo's word that the document he presented was a valid tax exempt certificate.

On February 18, 2011, Kolo went to the store to make a large purchase of denim. According to his deposition testimony, plaintiff called Cho and asked him how to handle the transaction. Cho “instructed [plaintiff] to ring it up at customer service as tax exempt.” Plaintiff had reached out to Cho for help, to distance himself from Kolo and “to follow the first counseling’s direction, which was to partner with [his] manager.”

One of defendant’s representatives testified that plaintiff should not have been trying to “distance [himself]” from Kolo; that is not what defendant expected of a manager.

F. Plaintiff Receives an Unsatisfactory Performance Review

In 2010, before plaintiff discovered that he was ill and before defendant knew that he had been authorizing tax exempt purchases without proper documentation, plaintiff received an overall rating of “Inconsistent” and a ranking of 1.9 out of 6 from his manager on his 2010 performance review dated April 1, 2011. In spite of this evaluation, plaintiff also received a salary increase at that time.

G. Plaintiff Goes on Medical Leave of Absence

In early May 2011, plaintiff was diagnosed with colon cancer. He was told by his medical providers that he required immediate surgery. He requested, and was granted, a medical leave of absence, beginning May 6, 2011. He underwent surgery on May 12, 2011. He was released to work without restrictions on June 27, 2011.

H. Defendant’s Investigation Into Tax Exempt Sales

Meanwhile, in the spring of 2011, defendant made a thorough investigation of the handling of Kolo’s purchases at various Southern California stores.

The first store that came on defendant’s radar as having sold significant amounts of merchandise to Kolo without charging tax was the Alhambra store. As a result of the investigation, the Alhambra store manager, Angela Avina (Avina),¹ was terminated in June 2011.

¹ Avina had taken a medical leave of absence, characterized as stress leave during her deposition, before her employment was terminated.

An investigation into large denim sales at the Santa Clarita store revealed that associates at that store did not know the tax exempt policy for defendant and that associates and store leaders did not know the difference between a permit to sell and a tax exempt certificate. Defendant decided not to terminate the Santa Clarita store manager's employment because she had no prior written warnings; she received a written warning with notice that further violations would result in termination of employment. She has never claimed a disability or taken a medical leave of absence.

I. Defendant Decides to Terminate Plaintiff's Employment

At the conclusion of its investigation, defendant decided to terminate plaintiff's employment.

Procedural Background

A. Complaint

On April 24, 2012, plaintiff filed his complaint against defendant, alleging nine causes of action all sounding in disability discrimination and retaliation.

B. Motion for Summary Judgment

On June 18, 2013, defendant filed a motion for summary judgment or, in the alternative, motion for summary adjudication of issues. It argued that plaintiff could not establish his claim for disability discrimination because (1) he was not terminated because of any alleged disability, and (2) defendant had a legitimate, nondiscriminatory reason for terminating his employment—plaintiff's failure to comply with company policy; and plaintiff could not show that this reason was pretext. For the same reasons, his claims for retaliation in violation of FEHA and CFRA and wrongful termination failed.

Moreover, plaintiff could also not establish harassment based on disability because he presented no evidence that he was subjected to unwelcome, pervasive harassment.

Because these two causes of action failed, plaintiff's "failure to prevent" discrimination and harassment necessarily failed.

Finally, defendant sought summary adjudication of plaintiff's request for punitive damages on the grounds that plaintiff could not establish oppression or malice.

C. Opposition to Motion for Summary Judgment

Plaintiff opposed defendant's motion.² He argued that his employment was terminated on account of his disability or medical condition. He also asserted that defendant's proffered reason for terminating his employment was pretext—after all the Santa Clarita store manager did not have her employment terminated; only he and another manager (who had just taken stress leave) lost their jobs. Thus, he claimed that he had satisfied his burden on his discrimination, retaliation, and wrongful termination causes of action.

As for his claim of harassment, plaintiff asserted that, after his return from medical leave, defendant's territory human resources manager Rafael Bayona (Bayona) never attempted to collect facts from him, was dismissive of his answers, and did not allow dialogue or discussion.

Regarding his request for punitive damages, plaintiff testified that he did not know of a reason why Cho or Bayona would want to harm him. But, "[i]ntentionally terminating the employment [of] a person because they have cancer and are returning from a leave of absence related to treatment of it necessarily requires a finding of malice. No further argument is needed."

D. Trial Court Order; Judgment; Appeal

After entertaining oral argument, the trial court granted defendant's motion for summary judgment. Regarding the first cause of action (disability discrimination in violation of FEHA), the trial court determined that defendant established a legitimate business reason for plaintiff's termination and plaintiff was unable to establish that the termination was motivated by discriminatory animus or that the business reason was a pretext for disability discrimination. As for the second (failure to accommodate in violation of FEHA) and third (failure to engage in the interactive process) causes of action, the trial court noted that plaintiff conceded that the claims should be dismissed

²

Notably, in his opposition, plaintiff conceded that his second and third causes of action should be dismissed.

and did not oppose defendant's motion as to these causes of action. With respect to the fourth cause of action (harassment based on disability in violation of FEHA), the trial court found that plaintiff failed to provide referenced deposition pages and did not establish severe and pervasive harassment. Regarding the fifth cause of action (failure to prevent discrimination and harassment in violation of FEHA), the trial court granted the motion on the grounds that because plaintiff failed to present a viable claim for discrimination or harassment, he could not establish a claim for failure to prevent discrimination and harassment. As for the sixth (retaliation in violation of FEHA) and seventh (retaliation in violation of CFRA), the trial court reiterated its finding that there was no causal connection between his termination and his medical leave and plaintiff admitted that no one ever made any negative comments regarding his leave or illness; thus, defendant was entitled to summary adjudication of these causes of action as well. For the same reasons set forth above, defendant was entitled to summary adjudication of the eighth (wrongful termination in violation of FEHA) and ninth (wrongful termination in violation of public policy) causes of action.

Finally, the trial court granted defendant's motion for summary adjudication of plaintiff's request for punitive damages.

Judgment was entered, and this timely appeal ensued.

DISCUSSION

I. Standard of review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion *prima facie* justifies a judgment, we determine whether the opposition demonstrates the existence of a

triable, material factual issue. [Citation.]” (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) “[W]e construe the moving party’s affidavits strictly, construe the opponent’s affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.” (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

II. *The trial court erred in granting defendant’s motion for summary judgment; defendant was only entitled to summary adjudication of the second, third, and fourth causes of action and plaintiff’s request for punitive damages*

A. First Cause of Action

In the first cause of action, plaintiff alleges disability discrimination in violation of FEHA.

“The FEHA makes it an unlawful employment practice to discriminate against any person because of a physical or mental disability. ([Gov. Code,] § 12940, subd. (a).) A prima facie case for discrimination ‘on grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability. [Citations.] On a motion for summary judgment brought against such a cause of action the plaintiff bears the burden of establishing a prima facie case of discrimination based upon physical disability, and the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has done so the plaintiff must offer evidence that the employer’s stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]’ [Citation.]” (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)

Here, it is undisputed that plaintiff suffered an adverse employment action—his employment was terminated.³ But, defendant offers evidence of a legitimate reason for his termination: defendant terminated plaintiff’s employment because of his mishandling of purchases made by a frequent customer, Kolo. Thus, the burden shifted back to plaintiff to establish that defendant’s stated reason was pretextual.

We agree that plaintiff presented evidence, albeit minimal, to dispute defendant’s proffered legitimate reason for the termination of his employment. Specifically, plaintiff points to his deposition testimony, wherein he stated that, in accordance with his December 2010 write-up, he called Cho for assistance when Kolo appeared in the store on February 18, 2011, to make a large tax exempt purchase of denim.⁴ But Cho’s employment was not terminated; only plaintiff’s employment was terminated, and that was after he had returned from a medical leave of absence. This evidence is sufficient to create a triable issue of fact regarding defendant’s proffered reason. Accordingly, we must reverse the trial court’s order granting summary adjudication of this cause of action.

B. Second and Third Causes of Action

In his opposition to defendant’s underlying motion for summary judgment, plaintiff conceded that these causes of action should be dismissed and did not oppose defendant’s motion for summary adjudication of these causes of action. As stated in his opening brief, these claims are not at issue in this appeal.

³ Directing us to plaintiff’s 2010 performance evaluation, defendant argues that plaintiff was not performing his job satisfactorily and thus did not make out a prima facie case of discrimination. The problem for us is that there is evidence that, at the same time, plaintiff received a salary increase.

⁴ During oral argument, defendant’s counsel purported to dispute this evidence by claiming that plaintiff was specifically told in his December 18, 2010, write-up who to contact and that was not Cho. The appellate record does not support this contention. Plaintiff was told to contact “appropriate business partners,” and there is no evidence that that could not have been Cho.

C. Fourth Cause of Action

In the fourth cause of action, plaintiff alleges harassment based on disability in violation of FEHA.

FEHA explicitly prohibits an employer from harassing an employee. (Gov. Code, § 12940, subd. (j)(1).) To prevail on this cause of action, a plaintiff must establish that he was harassed, on the basis of his disability, and that “the harassment was ““sufficiently severe or pervasive to alter the conditions of the victim’s employment.”” [Citations.]” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465.)

Plaintiff did not establish that defendant’s alleged misconduct was severe or pervasive. He directs us to evidence that Bayona was dismissive of plaintiff’s answers to questions and did not attempt to collect information from plaintiff. But this evidence is not indicative of actionable harassment. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042 [harassment is severe or pervasive when it alters the conditions of the victim’s employment and creates an abusive working environment; simple teasing or offhand comments or isolated incidents, unless extremely serious, does not amount to a change in employment conditions]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788 [Title VII is not a “general civility code”].)

D. Fifth Cause of Action

In the fifth cause of action, plaintiff alleges that defendant is liable for its failure to prevent discrimination and harassment.⁵ Defendant’s sole argument is that because plaintiff failed to meet his burden of proof on the underlying discrimination and harassment claims, his claims for failure to prevent the discrimination/harassment must fail as well.

As set forth above, plaintiff presented a triable issue of fact on the “foundational predicate” of discrimination. (*Trujillo v. North County Transit Dist.* (1998) 63

⁵ Government Code section 12940, subdivision (k), prohibits an employer from failing “to take all reasonable steps necessary to prevent discrimination.”

Cal.App.4th 280, 289.) Thus, defendant is not entitled to summary adjudication of this cause of action.⁶ (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4 [“courts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under [Gov. Code] section 12940, subdivision (k)”].)

E. Sixth and Seventh Causes of Action

In the sixth and seventh causes of action of the complaint, plaintiff alleges that he was terminated following his return from medical leave. According to plaintiff, his termination was in retaliation for taking medical leave; according to defendant, there was no causal link between his leave and his termination and, in any event, defendant had a legitimate reason for his termination.

“To establish a prima facie case of retaliation under [FEHA], [plaintiff] was required to show he engaged in a ‘protected activity,’ [defendant] subjected him to an adverse employment action, and a causal link existed between the protected activity and [defendant’s] action.” (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 874.) Likewise, “the elements of a cause of action for retaliation in violation of CFRA . . . are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised [his] right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination . . . because of [his] exercise of [his] right to CFRA leave.” (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261.) The same burden shifting analysis set forth above applies to these two causes of action. (See, e.g.,

⁶ Notably, defendant did not separate the two separate claims (failure to prevent discrimination and failure to prevent harassment) in its motion for summary judgment. (See, e.g., *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853–1855.) In light of our holding above that defendant is entitled to summary adjudication of plaintiff’s harassment cause of action, it is possible that defendant would have been entitled to summary adjudication of this aspect of the fifth cause of action. But we are limited to what the parties argued and briefed.

Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384; *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1152.)

As set forth above, plaintiff presented a triable issue of fact regarding the stated reason for the termination of his employment immediately following his return from medical leave. While the investigation into Kolo's purchases and how defendant's employees and managers handled those purchases may have commenced before plaintiff was diagnosed with cancer and took medical leave, it is disputed whether plaintiff was terminated solely as a result of that investigation or whether he was terminated because he took medical leave. After all, only he and one other manager were terminated and both of them took medical leave. And, that was after plaintiff followed the directive in his write-up: he sought and received help from Cho, who did not have his employment terminated. Thus, defendant is not entitled to summary adjudication of these two causes of action.

F. Eighth and Ninth Causes of Action

In these two causes of action, plaintiff again alleges that he was wrongfully terminated in violation of FEHA and public policy. "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.) As set forth above, there is a triable issue of fact regarding defendant's proffered reason for terminating plaintiff's employment. It follows that the trial court erred in granting defendant's motion for summary adjudication of these causes of action.

G. Punitive Damages

In his complaint, plaintiff seeks punitive damages. To recover punitive damages, plaintiff must establish fraud, oppression, or malice. (Civ. Code, § 3294, subd. (a).) "Under Civil Code section 3294, subdivision (b), an employer is not liable for punitive damages for the acts of one of its employees unless the employer had advance notice of the unfitness of the employee and employed him or her with conscious disregard for the

rights or safety of others, or authorized or ratified the wrongful conduct. In either case, punitive damages are not available unless the evidence to support such damages is “““so clear as to leave no substantial doubt”; ‘sufficiently strong to command the unhesitating assent of every reasonable mind.’” [Citation.]” (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1190.)

According to plaintiff, “[i]ntentionally terminating the employment of a person because they have cancer and are returning from a leave of absence related to treatment of it necessarily requires a finding of malice.” We cannot agree. “[W]rongful termination, without more, will not sustain a finding of malice or oppression.” (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 717.)

DISPOSITION

The judgment is reversed. The order granting summary adjudication is reversed on the first, fifth, sixth, seventh, eighth, and ninth causes of action. The order granting summary adjudication of the second, third and fourth causes of action and plaintiff’s request for punitive damages is affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT