Filed 5/25/18 Vivanco v. Stewart Title of California, Inc. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ESTEBAN VIVANCO, Plaintiff and Appellant, v. STEWART TITLE OF CALIFORNIA, INC. et al., Defendants and Respondents.	B276883 (Los Angeles County Super. Ct. No. BC558383)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

Keith A. Fink & Associates, Keith A. Fink and Sarah E. Hernandez for Plaintiff and Appellant.

Epstein Becker & Green, James A. Goodman and Amy B. Messigian for Defendants and Respondents.

In this unlawful discrimination case, Esteban Vivanco alleges his former employer Stewart Title[1] violated California law and public policy when it fired him for refusing to terminate a disabled employee who was over the age of 40. Stewart Title denies the allegation and contends Vivanco was terminated because his performance was substandard. The trial court granted summary judgment in favor of Stewart Title. We affirm.

FACTS

Vivanco was hired by Stewart Title on November 1, 2009, to serve as President of Stewart Title of California, Inc. and Group Vice President, Western States, for Stewart Title Company for the State of California (collectively, STCA). At the time Vivanco was hired, he was informed he would face various challenges in the California market. Vivanco initially received positive reviews for his performance at Stewart Title.

In 2010, Vivanco hired Randy Cox to be the Los Angeles Division President. Cox was over the age of 40 and suffered from Parkinson's Disease, which is a progressive disorder of the central nervous system that affects movement, but not cognitive ability.

In November 2011, Vivanco began reporting to Group President of Direct Operations Glenn Clements, who became Vivanco's supervisor. Six group vice presidents reported to Clements, each of whom was responsible for a separate geographic region of the United States. Vivanco's region was the State of California. Among his duties, Clements reviewed

---

[1] Vivanco brought suit against Stewart Title of California, Inc., Stewart Title of CA S.F., Stewart Title Guaranty Company, and Stewart Title Company, alleging they jointly employed him. We will refer to these entities collectively as Stewart Title.

Stewart Title's profit and loss statements, financial performance summaries, and annual budgets and quarterly forecasts to ensure performance targets were met. When Clements became group president, Stewart Title began to use a forecasting approach to measure performance rather than a budgeting process, which they had used in the past.

Vivanco received mixed performance reviews from Clements. It appeared that Vivanco's region suffered from poor performance under the new forecasting approach in comparison with the other regions. Vivanco disputed that his region could attain the profit margins Clements sought due to the state of the real estate market in California at the time.

Pertaining to Vivanco's 2011 performance, Clements stated, "[i]mprovement needed in making your budget and attaining desired margins." Vivanco understood that Clements expected him to make budget and attain desired profit margins. Vivanco acknowledged that "[p]erformance for the year has deviated from budget[,] . . . I believe we'll catch up through the remainder of the year."

In 2012, STCA's profit margin was three percent, which was well below the 10 percent profit margin Clements considered acceptable. At the beginning of 2012, the profit margin objective at Stewart Title was 20 percent, which Vivanco believed was unreasonable. The second lowest profit margin for the six regions in Stewart Title in 2012 was 19.5 percent.

Clements was similarly dissatisfied with Cox's performance. The Los Angeles Division generated $537,000 in profits, representing a less than three percent profit margin, in 2012. Clements did not believe Cox was a good fit to be Los Angeles Division President because he did not believe Cox, who

had spent most of his career in Texas, had a strong network of contacts and relationships in the Los Angeles and Southern California area. Clements believed these local contacts would help in recruitment and retention of key employees.

Clements gave Vivanco a performance review for 2012 in which he concluded, "Good progress in many areas, lot's [*sic*] of heavy lifting to be done." Clements complimented Vivanco for "hav[ing] personally added a tremendous amount of business to not only your offices, but other offices across the country." He also stated, "You are very skilled at creating and monitoring pertinent metrics to assure future profitability of the company." Clements noted that Vivanco had "made and [was] making lots of good moves to increase business and decrease losses."

A report for January 2013, however, showed that STCA lost $463,850, which was negative 185.5 percent of its forecasted profits of $250,031. It was the only region that lost money in that time period, and it had the worst percentage of forecast against actual profit. The report also showed the Los Angeles Division lost $210,480 during that time period. STCA's projected 2013 profit margin was 2.5 percent while the second lowest projected profit margin for the other regions was 18.7 percent.

In late 2012, Vivanco told Clements that Cox had Parkinson's when Clements noticed Cox's tremors at a meeting. On February 22, 2013, Clements told Vivanco, ". . . I do not have confidence in Randy leading the current offices, let alone giving him more offices. Need a plan to replace him as DP [Division President]." Vivanco responded, "I am working on a performance improvement plan for him with HR." When Vivanco asked Clements what type of person he wanted to replace Cox, he

replied that he wanted someone "young" and "vibrant" and "energetic."

The performance report for February 2013 showed STCA's forecast against actual profit percentage was the worst of all the regions. The report showed STCA lost $994,961 during the first two months of 2013 and that the Los Angeles Division lost $273,079 in February 2013, more than any other division in Stewart Title.

On March 15, 2013, Clements sent an email to Vivanco asking, "When can I expect your 'white paper' on the LA Division. It is the worst performer in the company. I hope your plans include management change immediately."

Vivanco responded, "As far as your 'management change immediately' comment, I assume you're talking about Randy. If so, here's the risk with the action you are proposing: 1. His region has progressively done better (bottom line) every year he's been with us. He inherited a region that lost almost $100k in 2010, made a profit of almost $380k in 2011, and improved to $537k in 2012. [¶] 2. The budget he was held to in 2012 was not the budget he submitted. [¶] He is in two protected classes. [¶] If we let him go, he will sue and it will cost us significant money to settle. This goes to a jury and we're looking at a multi=million [*sic*] dollar judgment. I have consulted with an employment attorney (under privilege) and confirmed. This does not mean I have not looked for a replacement; I actually have three strong folks."

The following day, Clements advised Vivanco, "LA is way behind on their forecast for Jan/Feb. I assume Randy did forecast as all DP's across the country. My issue is making $500k in the largest real estate market in the country is just

unacceptable." Vivanco assured Clements, "I have a plan to replace Randy . . . ." By April 17, 2013, Vivanco had begun looking for a replacement for Cox's position. Meanwhile, Vivanco demoted Cox to Title Operations Manager. Clements agreed with that decision. During this period, Vivanco complained to the Stewart Title human resources manager based in California as well as to a human resources director based in Houston, about the situation with Cox. Neither did anything to address the situation. The human resources director told Vivanco that Clements could "do whatever he wants."

The June 2013 performance report reflected year to date actual profits of $628,092 for STCA against a year to date forecast of $1,231,419, which was the worst forecast against actual profit percentage in any of the STC regions in the first six months of 2013.

On August 29, 2013, Vivanco told Clements he had an offer out to someone to replace Cox. Clements emphasized that the new hire for the Los Angeles Division was to be Vivanco's "TOP priority" because "[l]osing money in August in LA is unacceptable." Clements and Vivanco continued to exchange emails regarding finding a new division president for the Los Angeles Division during which Vivanco identified candidates to replace Cox.

Vivanco forecast a negative performance for the third quarter of 2013 versus the third quarter of 2012, the only group vice president to do so. Clements warned Vivanco that he was "way underperforming as compared to [his] peers." Clements and Stewart Title's CEO Matthew Morris met with Vivanco in October 2013 in Houston to discuss his performance and work with him on a performance improvement plan. At this meeting,

Clements gave Vivanco a warning notice and set forth the areas he believed needed improvement, particularly the hiring of a new division president for the Los Angeles Division. Vivanco eventually hired Jeff Simonian to be Los Angeles Division President and he replaced Cox in this role on November 1, 2013.

Fearing for his job, Vivanco retained an attorney. His attorney sent a letter to Clements on November 5, which addressed the warning notice and advised him that Vivanco was "actively recruiting a division president." The letter did not otherwise refer to Cox.

STCA again lost money in October 2013 and was the only region to do so. Vivanco's year-to-date forecast percentage was 33.2 percent, the lowest of the six regions, with the next lowest at 68 percent.

Clements attempted to schedule a weekly coaching call with Vivanco on November 12. Vivanco declined to participate and asked to reschedule since it covered the matters addressed in the letter by his attorney. Clements terminated him on November 15, 2013.

Vivanco brought suit against Stewart Title alleging seven causes of action for age and disability discrimination in violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900), failure to prevent discrimination (Gov. Code, § 12940, subd. (k)), wrongful termination, failure to pay wages (Labor Code, §§ 201 and 203), and unfair business practices (Bus. & Prof. Code, § 17200).

Stewart Title moved for summary judgment. The trial court granted summary judgment, finding there were no triable issues of material fact as to each of the seven causes of action. Vivanco appealed.

DISCUSSION

On appeal, Vivanco contends he presented sufficient evidence to create a triable issue of fact as to each of the seven causes of action. Vivanco contends he was associated with Cox, who was disabled and over 40, that he refused to terminate Cox, and that Clements terminated Vivanco in retaliation.

We disagree. All of Vivanco's claims rest on theories of associational discrimination (first and second causes of action) and retaliation (fourth and fifth causes of action). We find Vivanco's association with Cox was insufficient to fall within the purview of an associational discrimination claim. Further, the evidence was undisputed that Vivanco was underperforming and he failed to present sufficient evidence to overcome this legitimate, nondiscriminatory reason for his termination. As a result, summary judgment was properly granted in favor of Stewart Title.

I. Standard of Review

A defendant moving for summary judgment or summary adjudication must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Summary judgment is appropriate where "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." (*Id.*, subd. (c).) Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) It is no longer called a

"disfavored" remedy. "Summary judgment is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry*, at p. 542.)

On appeal from a grant of summary judgment, we review the record de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

California resolves discrimination claims under the FEHA by applying a burden-shifting procedure set forth in *Martin v. Lockheed Missiles & Space Co*. (1994) 29 Cal.App.4th 1718, 1730 (*Martin*). Under this test, the plaintiff bears the initial burden of proving a prima facie case of discrimination by presenting evidence showing: (1) he was a member of a protected class, (2) he was qualified for the position sought or was performing competently in the position held, (3) he suffered an adverse employment action, and (4) some other circumstance suggests a discriminatory motive. (*Guz, supra,* 24 Cal.4th at pp. 354–355.)

Once the employee sets forth a prima facie case, the burden shifts to the employer to present evidence of a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz, supra,* 24 Cal.4th at pp. 355–356.) The burden then shifts back to the employee to attack this reason as pretext for discrimination and offer any other evidence of discriminatory motive. (*Id.* at p. 356.)

When an employer moves for summary judgment, the employer satisfies its burden if it presents evidence of "nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th

1088, 1097–1098.) If the employer presents a legitimate nondiscriminatory reason for the adverse action, the burden then shifts to the employee to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004–1005 (*Hersant*).) "The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159 (*Featherstone*).)

In light of this showing, Vivanco could only avoid summary judgment by offering "substantial evidence" that Stewart Title's reason was untrue or pretextual, or that Stewart Title acted with a discriminatory animus, or both, "such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant, supra,* 57 Cal.App.4th at pp. 1004–1005.) In doing so, Vivanco " 'cannot simply show that the employer's decision was wrong or mistaken' "; he must show " 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the [*sic*] asserted] non-discriminatory reasons." ' " (*Id.* at p. 1005.)

"Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it 'remains subject to careful scrutiny.' [Citation.] The employee's 'subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.' [Citation.] The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination.' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1159.)

II. Vivanco Failed to Make a Prima Facie Case of Associational Discrimination

In his first cause of action for disability discrimination and second cause of action for age discrimination, Vivanco alleged a violation of the FEHA under a theory of associational discrimination. That is, Vivanco did not contend he was disabled or over 40 years old. Instead, he contended his association with Cox, who had both of those characteristics, resulted in discrimination against Vivanco. Associational discrimination, however, does not apply under these circumstances and summary adjudication as to Vivanco's FEHA claims was proper.

A. The Law on Associational Discrimination

The FEHA prohibits harassment or discriminatory employment actions based on, among other things, an employee's age, physical disability, mental disability, or medical condition. (Gov. Code, § 12940, subd. (a).) The statute equally forbids harassment, retaliation, or discrimination against an employee who "is associated with a person who has, or is perceived to have, any of those characteristics." (Gov. Code, § 12926, subd. (o).) The FEHA must be liberally construed to promote and

accomplish its purposes. (Govt. Code, §§ 12603, 12993; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 223.)

There are very few California cases discussing associational discrimination under the FEHA. Accordingly, we may look to federal law for guidance on this issue. (*Rope v. Auto-Chlor System of Washington Inc.* (2013) 220 Cal.App.4th 635, 656 (*Rope*), superceded by statute on another ground.) To begin, we consider *Larimer v. International Business Machines* (7th Cir. 2004) 370 F.3d 698 (*Larimer*), which has been described as "the seminal authority on disability-based associational discrimination under the ADA (Americans with Disabilities Act of 1990; 42 U.S.C. § 12101 et seq.)." (*Rope, supra,* at p. 656.)

In *Larimer*, the plaintiff was hired by IBM. Nine months later, his wife, who was also an IBM employee, gave birth to premature twin girls who suffered from a variety of serious medical conditions. Three months after their birth and one year after he was hired, IBM terminated him. The plaintiff sued IBM for associational discrimination under the ADA, alleging it terminated him due to his association with his disabled daughters. (*Larimer*, *supra*, 370 F.3d at p. 699.) Summary judgment was granted in favor of IBM and the circuit court affirmed. (*Id.* at p. 703.)

The *Larimer* court identified "[t]hree types of situation [which] are, we believe, within the intended scope of the rarely litigated . . . association section. We'll call them 'expense,' 'disability by association,' and 'distraction.' They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by

association') the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ('distraction') the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours." (*Larimer, supra*, 370 F.3d at p. 700.)

The *Larimer* court found the plaintiff did not assert an associational discrimination claim based on expense due to his daughters' health costs. The court further found plaintiff's situation did not fit into either of the remaining categories. (*Larimer, supra,* 370 F.3d at p. 703.) Instead, the uncontradicted evidence showed the plaintiff failed to obtain an adequate understanding of the product that he had been hired to sell and as a result, failed to sell that product or its related services. (*Ibid.*) Summary judgment was therefore properly granted in favor of IBM. (*Ibid.*)

We next consider the only two California cases discussing associational discrimination under the FEHA.[2] In *Rope, supra,*

---

[2] A few other cases have mentioned associational discrimination but have not addressed it in any depth. (See *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 127 [declined to address the plaintiff's claim that he suffered discrimination based on his association with his disabled spouse];

220 Cal.App.4th at page 642, the plaintiff requested leave to donate a kidney to his sister. He was terminated shortly before a statute guaranteeing paid leave for organ donation came into effect. The plaintiff brought suit under FEHA's associational discrimination provision, alleging the employer knew he was associated with his sister. (*Id.* at p. 643.)

The trial court sustained a demurrer as to all the plaintiff's claims. On appeal, the court reversed, finding he adequately stated causes of action under the FEHA for associational discrimination. (*Rope, supra,* 220 Cal.App.4th at p. 655.) Relying on *Larimer* to provide an "illustrative" list of the kind of circumstances which might trigger a claim of associational discrimination, the *Rope* court concluded the plaintiff pleaded sufficient facts to state a claim under the "expense" category because it could reasonably be inferred that the employer terminated him to avoid the expense of giving him paid leave as a result of his association with his physically disabled sister. (*Id.* at p. 658.)

The *Rope* court warned, however, that "[o]ur holding should not be interpreted as a siren song for plaintiffs who, fearing termination, endeavor to prepare spurious cases by talking up their relationship at work to a person with a disability; such relationships do not, by themselves, give rise to a claim of discrimination." (*Rope, supra,* 220 Cal.App.4th at p. 658.)

The court in *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1044 (*Castro-Ramirez*), found there were triable issues of fact as to whether the employer had discriminated against the employee when it terminated him

---

Conn v. Western Placer Unified School Dist. (2010) 186 Cal.App.4th 1163.)

based on his refusal to work a shift that did not permit him to be home in time to administer his son's dialysis. As a result, summary judgment was not proper on that ground. (*Ibid.*)

B. Analysis

Vivanco has failed to meet his initial burden to establish a prima face case of discrimination because he cannot show he is a member of a protected class under an associational discrimination theory. (*Guz, supra,* 24 Cal.4th at p. 354.) Looking to *Larimer,* there is no category into which Vivanco's situation fits. There is no evidence that Vivanco was terminated due to the expense of Cox's disability, because Stewart Title believed Vivanco would become disabled as a result of his association with Cox, or because he was inattentive at work since Cox's disability required his attention. Indeed, Vivanco acknowledges that his "facts do not fall squarely within the examples set forth by *Larimer*."

Arguing that *Larimer's* categories are merely illustrative and not exhaustive, Vivanco contends his association with Cox nevertheless falls within the ambit of an associational discrimination claim. He relies on *Barrett v. Whirlpool Corp.* (6th Cir. 2009) 556 F.3d 502, 516, which is distinguishable because it discusses the association discrimination provision of Title VII, not FEHA or the ADA. The reason we may look to federal law to evaluate an associational discrimination claim under the FEHA is because the ADA parallels the protections under the FEHA. Title VII does not. Also, at least one court has found no association under similar circumstances under the ADA. (See *Lester v. Compass Bank* (N.D. Ala. Feb. 10, 1997, No. 96-AR-0812-S) 1997 WL 151782 [concluding the plaintiff's claim that he was terminated for advocating to hire a disabled individual was

not properly brought under the association provision of the ADA].)

We likewise decline to extend an associational discrimination claim so far out of the realm of *Larimer's* examples. In each of the *Larimer* examples, there was a close relationship between the disabled person and the person claiming discrimination. This close relationship is demonstrated in *Rope* (brother and sister) and *Castro-Ramirez* (father and son). There is no such close relationship between Vivanco and Cox, who are merely supervisor and subordinate, and Vivanco does not claim any such close relationship. Vivanco has presented no authority, California or otherwise, in which an associational discrimination claim under the ADA has been upheld under such circumstances. Given these circumstances, Vivanco has failed to make a prima facie case for associational discrimination.

For the same reason, we conclude Vivanco's third cause of action for failure to prevent discrimination is subject to summary adjudication. Where there has been no demonstration of discrimination, there is no logic to upholding a claim for prevention of discrimination. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288–289.) Here, Vivanco has failed to demonstrate a triable issue of material fact exists as to his age and disability discrimination claims. As a result, his failure to prevent discrimination cause of action also falls.

III. Stewart Title Met its Burden to Show a Nondiscriminatory Reason for Vivanco's Termination

In his fourth and fifth causes of action for wrongful termination, Vivanco alleged claims for unlawful retaliation in violation of the FEHA and California public policy. According to

Vivanco, Stewart Title's stated reason in support of his termination was a pretext for retaliation for his refusal to terminate Cox. We find Vivanco has failed to meet his burden to demonstrate pretext or discriminatory motive.

A. The Law on Unlawful Retaliation

Under the FEHA, an employer is forbidden "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Gov. Code, § 12940, subd. (h).) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).)

The California Supreme Court has held "that an employee's refusal to follow a supervisor's order that she reasonably believes to be discriminatory constitutes protected activity under the FEHA and that an employer may not retaliate against an employee on the basis of such conduct when the employer, in light of all the circumstances, knows that the employee believes the order to be discriminatory, even when the employee does not explicitly state to her supervisor or employer that she believes the order to be discriminatory." (*Yanowitz, supra,* 36 Cal.4th at p. 1036.)

Generally, an employer moving for summary judgment under the *Martin* burden shifting test has the burden to demonstrate a legitimate nondiscriminatory reason for its employment decision to overcome a presumption of retaliation

arising from the plaintiff's prima facie case. Once it has done so, the plaintiff bears the burden to prove the employer's reasons are not believable or offer other evidence of discriminatory motive. (*Yanowitz, supra,* 36 Cal.4th at p. 1042.) If the evidence, when examined in the aggregate, raises only a "weak suspicion" that discrimination was a basis for the employment decision, that evidence may sustain the plaintiff's burden to prove a prima facie case, but it does not amount to substantial evidence of discrimination necessary to defeat summary judgment. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 868.)

B. Analysis

Vivanco contends Stewart Title retaliated against him for his refusal to terminate Cox because he believed it would be discriminatory. Under *Yanowitz*, it would appear that Vivanco has fulfilled his burden to demonstrate a prima facie case of retaliation. We next examine whether Stewart Title has met its burden to demonstrate it had a legitimate, nondiscriminatory reason for Vivanco's termination to overcome the presumption of retaliation. We find it has.

The evidence demonstrates that Vivanco's region was severely underperforming as compared to the other regions under Clement's supervision and he refused to meet with Clements to discuss how to improve. Clements terminated him for poor performance and insubordination. These are legitimate, nondiscriminatory reasons which explain Vivanco's termination and are sufficient to shift the burden to Vivanco. (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1149 [a failure to meet performance standards is a legitimate reason for termination].) Thus, our analysis will focus on whether Vivanco

has satisfied his burden to show a triable issue exists as to the falsity of Stewart Title's reason or its discriminatory motive.

To discredit Stewart Title's asserted reason for his termination, Vivanco contends he did not have any performance evaluations which did not meet expectations until after he refused to terminate Cox. Further, Vivanco views STCA's profit margin of 3 percent in 2012 and forecasted 2.5 percent profit margin in 2013 as indications that he was performing his job well. The evidence is to the contrary.

It is undisputed that Clements advised Vivanco in his 2011 performance review that there are "[i]mprovement needed in making your budget and attaining desired margins." Thus, Clement's initial impressions of Vivanco's performance were not all positive. It is also undisputed that Vivanco's region was the least profitable throughout the relevant time period by a wide margin. In 2012, the profit margin objective at Stewart Title was 20 percent with all the other regions in Stewart Title reaching a profit margin of at least 19.5 percent. STCA's three percent profit margin was well below the other regions' and the target margin. It is undisputed that STCA lost almost $1 million during the first two months of 2013. As a result, Clements warned Vivanco that he was "way underperforming as compared to [his] peers."

Although Clements was complimentary to Vivanco in some ways in his 2012 performance review, he concluded that there was "lot's [*sic*] of heavy lifting to be done." Further, Clements and Stewart Title's CEO met with Vivanco in October 2013 to discuss his performance and ways to improve. Having reviewed Vivanco's evidence and arguments, a trier of fact could not reasonably conclude that Stewart Title's stated reasons for

terminating him "were implausible, or inconsistent or baseless." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.)

Vivanco next contends he has presented sufficient evidence of discriminatory motive to raise a triable issue: in March 2013, Vivanco told Clements that he believed it was illegal to terminate Cox, who was in two protected classes; in early 2013, he complained about the situation to human resources at Stewart Title, but they did nothing; after he refused to terminate Cox, he received a poor performance evaluation from Clements in April and in October, he was issued a warning and met with Clements and Stewart Title's CEO to discuss his performance; he demoted Cox on November 1; he was terminated on November 15; shortly thereafter, Cox was terminated in December 2013. Again, the evidence is to the contrary.

The crux of Vivanco's retaliation claim lies in his March 15 email to Clements, which we reiterate here. In it, Vivanco advised Clements that Cox "is in two protected classes. If we let him go, he will sue and it will cost us significant money to settle. This goes to a jury and we're looking at a mulit=million [*sic*] dollar judgment. I have consulted with an employment attorney (under privilege) and confirmed. This does not mean I have not looked for a replacement; I actually have three strong folks." According to Vivanco, this is when he alerted Clements to the illegality of terminating Cox and his refusal to do so.

Contrary to Vivanco's characterization, the email does not convey a refusal to terminate Cox. Instead, in the email Vivanco claims he has looked for a replacement and found three strong candidates. The next day, he reassured Clements that he had "a plan to replace Randy . . ." He admitted he had begun his search

by April 17, 2013. Aside from his March 15 email, Vivanco failed to broach the subject of the legality of terminating Cox with Clements again. Instead, he continued to communicate to Clements his efforts to replace Cox through 2013.

Unlike in *Yanowitz,* where the plaintiff refused a direct order to fire an unattractive employee several times (*Yanowitz, supra*, 46 Cal.4th at p. 1038), Vivanco never refused to fire Cox. He instead demoted him and looked for his replacement.

We are similarly not persuaded that Vivanco's conversations with human resources create a triable issue of material fact regarding whether Clements terminated him in retaliation for refusing to fire Cox. As discussed above, Vivanco never told Clements he refused to fire Cox. There is also no evidence that Vivanco told the human resources managers he refused to fire Cox. In his deposition, Vivanco testified that he told them he believed it was illegal and discriminatory, but did not testify he told them he refused to fire Cox. Even if he did, however, there is no evidence that human resources conveyed this message to Clements, who made the decision to terminate Vivanco. Indeed, Vivanco stated the human resources managers did nothing in connection with his concerns.

Finally, the evidence belies Vivanco's claim that he only received a poor performance evaluation after he refused to terminate Cox. The evidence is undisputed that Vivanco's region performed poorly in comparison with the other regions in the country and he was repeatedly warned about it. In his performance review for 2011, Clements warned him that "[i]mprovement [was] needed in making your budget and attaining desired margins." Vivanco testified Clements began demanding he fire Cox "at the very end of 2012." Thus, the

evidence shows his performance reviews were mixed even before Clements began to demand Cox's termination.

In sum, we do not find Vivanco's evidence sufficient to withstand summary adjudication on his wrongful termination claims. "[G]iven the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Guz, supra,* 24 Cal.4th at p. 362.)[3]

V. There is No Triable Issue Regarding a Failure to Pay Wages Upon Termination

Vivanco's sixth cause of action alleged violations of Labor Code sections 201 and 203 for failure to pay his year-end bonus, which he argues was earned and due at the time of his termination. It is undisputed Vivanco was terminated on November 15, 2013. His employment contract specifies his bonus will "be paid semi-annually: a mid-year payment of 75% of the amount due will be made on or before August 31st and a final balance due as soon as practical after the close of the accounting period for the year." It is also undisputed that Vivanco was paid this bonus by February 2014. Given the terms of his employment contract and the timing of his termination, Vivanco's claim fails as a matter of law.

---

[3] Vivanco's seventh cause of action for unfair business practices rests on his unlawful discrimination and wrongful termination claims. Because we have determined that summary adjudication was properly granted as to these claims, his unfair business practices cause of action necessarily falls as well.

DISPOSITION

The judgment is affirmed. Stewart Title to recover its costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.