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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CLEON J. LAWSON,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Respondent.

B236447

(Los Angeles County Super. Ct.
No. BC404521)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Law Offices of Denise Eaton May and Denise Eaton May for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, and Gregory P. Orland, Deputy City Attorney, for Defendant and Respondent.

Plaintiff and appellant Cleon J. Lawson appeals from a summary judgment in favor of defendant and respondent City of Los Angeles in this action for discriminatory hiring practices in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).¹ Lawson contends: 1) the trial court erred by excluding two expert reports; and 2) triable issues of fact exist as to whether he met the psychological qualifications for a firefighter position. We conclude, even if the expert reports were considered, no triable issue of fact exists as to the City's legitimate, nondiscriminatory reason for declining to hire Lawson. Therefore, we affirm.

FACTS

Lawson is Black. He served in the United States Army for four years after high school. Lawson continued to serve in the army reserves and returned to school. He felt that his reserve unit was not good, so he joined the naval reserves instead. Lawson received an associate's degree in general education from Cerritos Junior College, followed by a bachelor's degree in Political Science and Sociology from California State University Dominguez Hills, and an associate's degree in Fire Science Technology from Harbor City College. He held a series of jobs while he pursued his educational goals.

In March 2005, while employed by the Los Angeles County Sheriff's Department, Lawson applied to be a firefighter with the Los Angeles Fire Department (LAFD). In June 2005, the City informed him that he had failed the written examination. However, in September 2005, the City notified him that he had actually passed the written exam. Lawson had an oral interview, which he also passed. He considered the interviewers' questions and terminology about the race of his friends to be offensive. Lawson was not contacted for a background check for several months, so he spoke with an organization that advocates racial equality for firefighters. In May 2006, the City notified Lawson that

¹ All further statutory references are to the Government Code, unless otherwise stated.

he had been selected for a background check. Lawson passed his background check and a physical evaluation.

Lawson took standardized written personality tests in December 2006 as part of the psychological screening required for the position. One of the tests was the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The ability to process and report critical information is an essential function of an LAFD firefighter.

Dr. Catherine Delsol is an occupational psychologist employed by the City. She scored and interpreted Lawson's written tests. She noted that two of the tests showed defensiveness, including his MMPI-2. She reviewed Lawson's employment history. She noted that he had multiple prior employers. He had changed branches of service within the military due to dissatisfaction. He was experiencing conflict at his current employment and had been counseled for incorrectly reading instructions.

Lawson was directed to take the MMPI-2 again, because the elevations revealed that he had portrayed himself favorably. Delsol concluded that an oral interview was also required. The test results from Lawson's second MMPI-2 were less defensive, but showed elevations for hypomania and ideas of persecution.

During Delsol's interview with Lawson, she accused him of making marks on a document, which he denied. She later realized that he had not made the marks. Lawson felt that Delsol badgered him by repeatedly asking him the same questions. At one point, Delsol told him that he was difficult. He said that he would give her a straight answer if she would ask him a straight question.

Delsol discussed her observations with her supervisor, Dr. Diane Levitan. Levitan is also an occupational psychologist. In Delsol's opinion, Lawson had difficulty providing clear answers to questions. She found it difficult to follow Lawson's stories. She was concerned about Lawson's ability to expeditiously gather and evaluate information in stressful situations and report the information in a clear, coherent manner. They decided that another interview with a different psychologist would be useful to eliminate or confirm Delsol's concerns.

Levitan chose to conduct the second interview herself, because she has expertise in information processing issues and could conduct specialized testing, if necessary. She asked many of the questions that Delsol had asked. Lawson felt Delsol and Levitan were incredulous of his responses and that Levitan badgered him by repeatedly asking the same questions.

Levitan prepared a written assessment. She did not recommend Lawson for further processing due to concerns about his communication skills and interpersonal suspiciousness. She noted that the MMPI-2 results, consistent with Lawson's interview responses, raised concerns about mistrust and suspiciousness. She stated that Lawson was raised in a violent neighborhood which taught him to be wary. She found his belief system to be very rigid, which had been noted in an evaluation by his employer as well. Because firefighters work in close quarters and interact with unusual intensity, Levitan believed Lawson's inflexibility and mistrust were likely to eventually hinder his performance in a "family" setting.

In addition, in her opinion, Lawson's communication skills and ability to effectively process information were insufficient for the demands of a career in a safety sensitive position. Lawson had experienced repeated misunderstandings in his interpersonal relationships. In her observation, Lawson had remarkable difficulty relating stories in a coherent and organized manner during his interviews. She provided examples of comments he had made that were nonsensical. She found that Lawson's writing samples raised concerns about his written communication skills as well.

Levitan stated that the essential job duties of a firefighter required expeditiously gathering, comprehending, and evaluating information, then relaying the information in a clear and coherent manner. Citizens must be able to understand and rely on a firefighter during emergencies. In her opinion, Lawson's information processing and communication skills were insufficient to meet the demands of the position.

On March 6, 2007, the City informed Lawson that he had not passed the psychological assessment. Lawson appealed the decision. He had an independent psychological evaluation completed by Dr. Ronette Goodwin in May 2007. Goodwin's

report was submitted to the City. She noted that Lawson had an ongoing conflict with his most recent supervisor. Among other incidents, the supervisor had given Lawson a low rating on his ability to follow instructions. Goodwin administered a different personality test which showed Lawson's score for feelings of persecution or inequitable treatment by others was in the average range, although borderline high. Goodwin attributed the borderline score to the conflict in Lawson's current work environment.

Lawson's results on another test measuring academic achievement were significantly below expected performance given his years of education and post-secondary degrees. Goodwin observed that he appeared not to know math facts, because he used his fingers when computing mathematical equations.

Goodwin found Lawson to be open and responsive to questions, although she admitted that he sometimes addressed questions in a circumstantial manner and exhibited difficulty giving a direct response. He was cooperative overall, but required some redirection for test taking instructions because he was not following the instructions indicated for the test.

In summary, Goodwin agreed that Lawson exhibited a certain level of interpersonal mistrust or suspiciousness. However, Goodwin believed the mistrust was related to Lawson's work style in the military and his conflict with his current supervisor, rather than an enduring personality trait that might affect his ability to work in a "family structured" environment. She was also of the opinion that Lawson's low verbal and written communication skills required improvement, but could be strengthened. Therefore, she recommended that Lawson be evaluated again for the position.

Lawson's appeal was considered by a panel of two psychologists employed by the City, Dr. Robin Greene and Dr. Ann Phelps. Greene reviewed Lawson's test results, Levitan's report, Goodwin's report, and other materials. Greene prepared a written analysis noting that Lawson had demonstrated difficulty communicating with the examiners in a coherent and organized manner. His work history indicated that he had held 11 jobs over a period of 9 years. Greene also noted that while Goodwin had described Lawson as responsive, she noted that he had difficulty answering directly. The

elevated scores on the personality test administered by Goodwin were consistent with the City's psychologists' initial evaluation, although Goodwin considered the scores to be situational. Goodwin also found Lawson's academic scores low, which was consistent with the findings of the City's psychologists. Based on this review, Greene recommended the original disqualification remain in place. During the panel meeting, Greene and Phelps discussed Lawson's difficulties with cognitive processing of information, communicating in a concise and coherent manner, suspiciousness toward others, including the examiners, and his low range of cognitive functioning overall. Greene concluded that Lawson was not psychologically suitable for the position of firefighter with the LAFD. On August 14, 2007, the City notified Lawson that the appeal panel had upheld the psychological disqualification.

Lawson arranged for a second independent psychological evaluation by Dr. E.M. Abdulmumin. In his report, Abdulmumin opined that Lawson was suitable for the position and he recommended further processing. Abdulmumin stated that Lawson met the minimum psychological qualifications under the law and was free from any mental or emotional condition which might adversely affect the safe and effective performance of a firefighter. He found Lawson to have above-average verbal communication skills. He considered Lawson's thought content to be clear and his judgment good. He noted that Lawson appeared to have below average written and spelling skills, but concluded that Lawson would be capable of writing fire incident and investigation reports. His deficits in written communication could be overcome with a writing class and use of a device that had a word processing program. Since Lawson had successfully earned higher degrees, Abdulmumin reasoned that he would be capable of improving his writing abilities. Abdulmumin noted that Lawson had received positive job performance evaluations from all of his previous employers, with the exception of his current position.

Abdulmumin explained that a score of "65T" or greater on the MMPI-2 was considered significant. He stated that Lawson's scores on his second MMPI-2 were all below the significant level of "65T" except for hypomania, on which he scored "69T." Abdulmumin explained that hypomania is characterized by elevated mood, accelerated

speech and motor activity, irritability, and flight of ideas. Lawson displayed none of the characteristics of hypomania during his two interviews with Abdulmumin. Therefore, Abdulmumin concluded Lawson was psychologically suitable and met the minimum psychological qualifications under the law. Abdulmumin did not address Lawson's score on the second MMPI-2 for ideas of persecution, which was "65T."

Lawson provided Abdulmumin's report to the City in a second appeal of the City's decision. However, the City ultimately denied his appeal on December 17, 2007.

PROCEDURAL BACKGROUND

Lawson filed a complaint against the City on December 29, 2008. On November 2, 2009, Lawson filed an amended complaint for race discrimination in violation of section 12940, subdivision (a); discriminatory psychological examination in violation of section 12940, subdivision (e); aiding and abetting discrimination in violation of section 12940, subdivision (l); and failure to prevent discrimination in violation of section 12940, subdivision (k).

The City filed a motion for summary judgment on March 2, 2011, on the grounds that the City had legitimate, nondiscriminatory reasons for not hiring Lawson. The City argued that in the absence of any triable issue of fact as to discrimination, Lawson's ancillary causes of action failed as well. Lawson opposed the motion for summary judgment. The trial court sustained objections to certain statements in Lawson's declaration and the written reports by Goodwin and Abdulmumin.

A hearing was held on May 17, 2011. The trial court found Lawson had failed to raise a triable issue of fact that the City's psychologists were motivated by racial animus or that the City's conclusion that Lawson was not psychologically suitable for the position was pretextual. The court entered an order granting the motion for summary judgment on May 18, 2011. The court entered judgment in favor of the City on September 7, 2011. Lawson filed a timely notice of appeal.

DISCUSSION

Standard of Review

We review an order granting or denying a motion for summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The party moving for summary judgment “bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Id.* at p. 850, fn. omitted.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*, fn. omitted.)

Generally, “the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at pp. 850–851.)

Principles Governing FEHA Claims

The FEHA prohibits discriminatory employment practices. It is an unlawful employment practice for an employer, “because of the race . . . of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” (§ 12940, subd. (a).)

Under the well-established burden-shifting test, the plaintiff must make a prima facie showing of prohibited discrimination. (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 613 (*Nelson*), citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.) “If the employee does so, the burden shifts to the employer to articulate a

legitimate, nondiscriminatory reason for its action. The employee then has the burden of proving the proffered justification was a pretext for discrimination. [Citations.]” (*Nelson, supra*, 74 Cal.App.4th at p. 613.)

A defending employer seeking summary judgment in a discrimination case may meet its burden by showing that one or more of these prima facie elements are lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–356 (*Guz*); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

Legitimate, Nondiscriminatory Reason

The City contends that it had a legitimate, nondiscriminatory reason for not hiring Lawson and no triable issues of fact have been raised concerning discrimination. We agree.

The City submitted evidence that Lawson’s score for ideas of persecution was elevated on the personality tests administered by the City. He also demonstrated significantly lower academic abilities than expected from his educational background. Based on their personal interviews, Delsol and Levitan concluded that Lawson’s ability to communicate was not sufficient for the requirements of the position. These conclusions were consistent with information from his employer that he had difficulty following directions. The City’s evidence was sufficient to show that it had a legitimate business reason for finding Lawson psychologically unfit for a firefighter position.

Even were we to consider the reports excluded by the trial court, Lawson failed to show a triable issue of fact existed as to whether the City’s reason was legitimate. Goodwin did not dispute that Lawson’s MMPI-2 scores were defensive and indicated suspiciousness. In fact, she administered a different personality test that similarly showed Lawson to be borderline high in the same area. Although Goodwin believed Lawson’s mistrust would prove to be situational, she did not disagree that his scores revealed these negative characteristics. Her test results also showed that his academic

abilities were lower than expected. Most important, she observed that at times, Lawson had difficulty giving a direct response. He had to be redirected on one test, because he was not following the test instructions. Goodwin's report confirmed that Lawson had the psychological issues for which the City had declined to hire him as a firefighter.

Abdulmumin's report also fails to establish a triable issue of material fact. Abdulmumin administered a different personality test to Lawson, but he did not dispute the validity of the MMPI-2 for the purpose of a psychological assessment. He does not appear to have addressed Lawson's elevation for ideas of persecution on the MMPI-2. Abdulmumin confirmed that Lawson had poor writing and spelling skills. In his view, Lawson would need to take a writing course to improve his skills or rely on computer software to make spelling corrections. Nothing in Abdulmumin's report contradicts the City's evidence that the City's psychologists assessed Lawson's psychological suitability for the position based on his scores on legitimate standardized tests, circuitous or incoherent responses to their interview questions, and view of his employment history. Lawson failed to raise a triable issue of fact that the reason given by the City for denying him employment as a firefighter was false or pretextual. Nor did Lawson submit any evidence from which a trier of fact could conclude that the City employees who decided not to hire him were motivated on the basis of his race. Lawson does not contend that any triable issues of material fact remain on his causes of action in the absence of a triable issue of fact as to discrimination. Therefore, the trial court properly granted summary judgment as to all causes of action.

DISPOSITION

The judgment is affirmed. Respondent City of Los Angeles is awarded its costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.