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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEPH SIMPSON, Plaintiff and Appellant, v. CHARLES DREW UNIVERSITY OF MEDICINE AND SCIENCE, Defendant and Respondent.	B238707 (Los Angeles County Super. Ct. No. BC451120)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Barrera & Associates and Patricio T. D. Barrera, for Plaintiff and Appellant.

Horvitz & Levy, Peter Abrahams and Katherine Perkins Ross; and Bragg & Kuluva and Jill F. Teitelbaum, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Joseph Simpson, appeals from a summary judgment and a post-judgment order denying relief from judgment pursuant to Code of Civil Procedure sections 437c and 473, subdivision (b).[1] He argues it was error to grant the summary judgment motion of defendant, Charles Drew University of Medicine and Science, because he: has a constitutional right to wear a beard; has a medical condition that excused him from shaving; has established a prima facie case of discrimination and retaliation; is entitled to relief from judgment because of his excusable mistake made in reliance on the trial court's tentative ruling at the summary judgment hearing; and mistakenly did not amend his complaint to allege his medical condition because the tentative summary judgment ruling was in his favor as to one of the two causes of action. We affirm the summary judgment and post-judgment order denying relief from judgment under sections 437c and 473, subdivision (b) respectively.

II. BACKGROUND

A. Complaint

On December 29, 2010, plaintiff filed a complaint against defendant asserting two claims for wrongful termination in violation of public policy. Plaintiff alleges he was terminated in retaliation for making complaints about defendant's discriminatory and unfair personnel decisions and discriminated on the basis of physical appearance. Plaintiff alleges he was hired by defendant in June 2008 to work as a security guard. Defendant is a historically Black medical school located in Los Angeles. At the time plaintiff was hired, he was wearing a beard in the form of a goatee. On June 18, 2010, plaintiff and two co-workers, Jason Taylor and Manny Armenta, met with defendant's

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

then president, Dr. Keith Norris, to complain about their manager, Nate Clark. On July 2, 2010, Mr. Taylor e-mailed Dr. Norris and complained about Mr. Clark's personnel decisions. Mr. Clark allegedly learned about plaintiff and Mr. Taylor's complaints and reprimanded them. On July 20, 2010, plaintiff returned from his two-week vacation and was told his beard violated defendant's new policy. He was sent home without pay. On July 23, 2010, plaintiff was fired by defendant after refusing to shave his goatee in compliance with the new policy.

On September 10, 2010, plaintiff filed an administrative discrimination complaint on the basis of physical appearance against defendant with the Department of Fair Employment and Housing. Plaintiff was issued a right-to-sue notice. Subsequently, plaintiff served the right-to-sue notice and administrative complaint on defendant.

Plaintiff alleges the stated reason for termination—for refusing to shave a beard—was pretextual. He asserts defendant wrongfully terminated him in retaliation after he complained about its discriminatory personnel decisions and unfair business practices. In addition, plaintiff asserts the no-beard policy violated his constitutional right to wear a beard and discriminated against him based on his physical appearance.

B. Summary Judgment Motion And Opposition

1. Undisputed facts

The parties agreed on the following undisputed facts. Plaintiff was hired by defendant in June 2008 as a security officer. Plaintiff suffers from a skin condition known as Pseudo Follicullitis Barbe. At the time plaintiff was hired, he wore a goatee with most of his face clean-shaven. Plaintiff was interviewed by a human resources representative prior to being hired. Plaintiff asked whether he could keep his goatee. Plaintiff was told his goatee would not be a problem. At the time plaintiff was hired, defendant did not have a policy requiring that its security officers be clean-shaven. Plaintiff acknowledged most security departments, including his prior employers, ADT

and General Security, required that security guards not wear beards or goatees. Plaintiff testified he brought a doctor's note to ADT and remained employed by them wearing a goatee for 10 years.

On June 10, 2010, plaintiff, Jason Taylor and Mr. Armenta, complained to Dr. Norris about Mr. Clark's personnel decisions. They complained Mr. Clark filled one of the lead officer positions with an external applicant and laid off a receptionist, Brandi Sanders. Plaintiff testified Mr. Clark witnessed their discussion with Dr. Norris in the parking lot. Later, Mr. Clark had a meeting with the security staff, including plaintiff. Mr. Clark told the staff, "The president does not have time to talk to people in the parking lot."

In late June, Mr. Clark had a meeting with plaintiff and other security staff. At the meeting, plaintiff, Mr. Taylor and Mr. Armenta expressed disappointment that Mr. Clark had filled one of the two lead officer positions with an external applicant. This was contrary to what Mr. Clark had told staff earlier. Plaintiff also questioned why Mr. Clark was hiring two lead officers when Ms. Sanders was being laid off for a second time.

In addition, plaintiff and two co-workers, Dave Martin and Mr. Taylor, met with Mr. Clark. The meeting's purpose was to discuss Mr. Clark's personnel decisions. Plaintiff stated he felt it was unfair Ms. Sanders was laid off for a second time. In addition, plaintiff believed it was unfair for Mr. Clark to demote Mr. Armenta. Mr. Armenta had been plaintiff's supervisor. Plaintiff felt there was no good reason to demote Mr. Armenta. Mr. Armenta had never been disciplined and no one had any complaints about him.

On July 2, 2010, Mr. Taylor e-mailed Dr. Norris to complain about Mr. Clark's "unfair labor practices." Mr. Taylor's e-mail focused on: Mr. Armenta's demotion; Ms. Sanders' layoff; and Mr. Clark's failure to choose Mr. Taylor or Mr. Armenta for the two lead officer positions. Mr. Taylor's e-mail to Dr. Norris states in part: "As you know, security supervisor Manny Armenta was unfairly phased-out from his position by Nate Clark. Shortly after, Mr. Clark notified the security officers that three positions

(two lead officers and one manager) had been created and that Mr. Armenta would be allowed to apply. Mr. Clark also informed us that the manager position would be advertised internally as well as externally, while the lead positions would be made available internally only. . . . Mr. Armenta, [plaintiff], and myself expressed our concerns within a staff meeting . . . held by Mr. Clark. We explained that we were disappointed that he had filled one of the lead positions externally, contrary to what he'd previously said. We felt that Mr. Armenta was clearly qualified yet not chosen for one of the positions; we even knew it to be true that there were people on our staff qualified to fill both positions. Moreover, within the same meeting we expressed our disappointment in the fact that Brandi Sanders, our receptionist was being laid off for a second time. Mr. Clark disagreed. . . . Dr. Norris, it is evident that Mr. Clark has retaliated against Manny and I. Since we not only expressed our disagreement with him, but that we also mentioned it to you as his superior. . . . Honestly, to know that I have been passed over for a promotion as [a] form of retaliation is deeply disheartening. I also feel that this is only the beginning of the retaliatory acts for Mr. Armenta, [plaintiff], and I from Mr. Clark. I implore you to take all necessary steps to prevent ***any*** and all further retaliatory and unfair labor practices so that we do not have to seek help outside of the university."

Prior to the e-mail being sent to Dr. Norris, Mr. Taylor discussed its contents with plaintiff. Plaintiff approved of Mr. Taylor's e-mail. But plaintiff admitted he never told anyone that the e-mail was from him or spoke to anyone else about it. Plaintiff also never told anyone Mr. Armenta was demoted because of discrimination based on national origin, ancestry, sexual orientation or marital status. Mr. Taylor and Mr. Armenta were not terminated as a result of their complaints about Mr. Clark and are still employed by defendant. Neither Mr. Clark nor Dr. Norris placed any written documentation in plaintiff's personnel file about the e-mail or complaints about how other employees were treated.

On July 1, 2010, Nathaniel Brown started employment with defendant as the new security manager. Mr. Brown was hired by Mr. Clark. On July 2, 2010, Mr. Brown

notified the security staff, including plaintiff, of a new grooming policy requiring officers to be clean-shaven. There was an exception when an officer had a medical condition. In addition, the new policy required security officers to have clean uniforms and shined shoes. Mr. Brown excused Mr. Lewis from having to comply with the policy. This was because Mr. Brown noted Mr. Lewis's skin condition. Plaintiff testified he spoke to Mr. Lewis about the issue. Mr. Lewis said he did not have to provide medical documentation for his skin condition.

Plaintiff went on a two-week vacation and returned to work on July 20, 2010, wearing his goatee. On the same day, Mr. Brown spoke to plaintiff about the new policy. Plaintiff was told he would be "written up" for failing to comply with the no-beard policy. But Mr. Brown permitted plaintiff to remain at work for the day. Plaintiff responded there was no policy yet. This was because he had not been presented with a written policy. Plaintiff admitted failing to obey Mr. Brown's order to shave. Plaintiff refused to obey the order because there was no written policy in place.

The next day, plaintiff reported to work unshaven. Mr. Brown took plaintiff to the human resources department. Plaintiff was given a written warning for July 20, 2010, which he refused to sign. Mr. Brown again reprimanded plaintiff. Then, plaintiff was sent home without pay. According to the written warning provided to plaintiff, he had been provided with the no-beard policy. Mr. Brown admitted that in fact plaintiff was not provided with a copy of the written policy.

On July 22, 2010, Mr. Brown met with all of the security guards except plaintiff to distribute the new "Safety & Security Policy and Procedures regarding personal grooming and hygiene." That policy states in part: "In consideration of the need to present a neat, clean and professional appearance . . . . [¶] . . . Goatees and full beards are not allowed except for documented medical or religious purposes."

Plaintiff did not come to work on July 22, 2010. Plaintiff believed he needed to receive a call from human resources manager Sabrina Perryman telling him he could return to work. Several hours after his scheduled start time on July 22, 2010, plaintiff sent an e-mail to Ms. Perryman, with a copy to Dr. Norris. In the e-mail, he complained

that he had been written up for failing to shave his goatee. In plaintiff's e-mail, he did not state he had a medical condition that prevented him from shaving. Plaintiff sent a second e-mail directly to Dr. Norris. In the second e-mail, plaintiff discussed the July 20, 2010 conversation with Mr. Brown. In that conversation, they spoke about plaintiff's goatee. Further, plaintiff related that he had been issued "a write-up" on July 21, 2010 and was sent home without pay for failing to shave his beard. In this second e-mail, plaintiff did not state that he suffered from any medical condition that would prevent him from shaving his goatee. Plaintiff felt it was unnecessary to tell Ms. Perryman and Dr. Norris about any medical condition.

After plaintiff received an e-mail from Ms. Perryman telling him he was expected to return for his shift that day in compliance with the no-beard policy, he appeared for his afternoon shift unshaven. Plaintiff arrived to work and met with Mr. Brown. Mr. Brown instructed plaintiff to meet with Ms. Perryman in the human resources department. Plaintiff was terminated on July 23, 2010. On September 1, 2010, plaintiff filed an administrative complaint with the Department of Fair Employment and Housing. Plaintiff alleges he was terminated and retaliated against on the basis of "personal grooming and hygiene." Plaintiff's administrative complaint explains why he believes he was the subject of discrimination, "The fact that I was the only employee among my peers that was written up, sent home without pay, also terminated while other employees were able to continue wearing beards without the same consequence."

2. Disputed facts

The parties agreed plaintiff has a skin condition, Pseudo Follicullitis Barbe, but they disputed whether defendant was notified of his medical condition. Plaintiff testified he told Mr. Brown about his skin condition. In that conversation, plaintiff said he was hired with a goatee and he could not shave because of his medical condition on July 20, 2010. When deposed, plaintiff testified as to Mr. Brown's comment about the medical condition, "His response was he didn't care." Plaintiff further testified he did not provide

defendant with a medical note because, "There was no need to until the policy was completed and official." When asked why he believed so, he responded: "I believe that just for the simple fact that, in order for everyone to be on the same page, this is why policies are created. Most places that I worked for, they don't go by [verbal statements]. They go by what's in a policy and what's official."

The parties also disputed whether the no-beard policy was in place on July 2, 2010. Plaintiff asserted the new policy required approval from the defendant's human resources department. Defendant disputed that human resources department needed to approve the new policy. In addition, defendant contended the human resources department approved the new policy. This was because a human resources representative signed the written warnings and was present when plaintiff was presented with one of them.

In addition, the parties disputed whether Mr. Clark knew about Mr. Brown's termination of plaintiff's employment. Plaintiff contended Mr. Clark testified inconsistently about knowledge of plaintiff's termination. Mr. Clark's declaration indicated he learned about the termination after it occurred. Yet, when deposed, Mr. Clark admitted speaking to Mr. Brown about plaintiff's situation prior to the termination. The following transpired: "Q You testified [Mr. Brown] did discuss with you his decision to terminate [plaintiff] before he terminated [plaintiff], right? [¶] A I believe that was my testimony. . . . [¶] Before the termination I recollect Nate mentioning steps that he was taking, yes." The parties also disputed whether Mr. Brown had the authority to fire plaintiff given defendant's progressive disciplinary policy. This policy required Mr. Brown to contact the human resources director and Mr. Clark before terminating plaintiff.

C. Summary Judgment Hearing And Ruling

On October 5, 2011, a lengthy hearing was held on defendant's summary judgment motion. The tentative ruling expressed an intention to deny defendant's

summary adjudication motion on the second cause of action for wrongful termination in violation of public policy based on physical appearance discrimination. The trial court tentatively stated plaintiff's beard was not per se constitutionally protected but he had presented the following evidence: he was suspended before the policy was approved by the human resources staff; he had an expectation there would be a human resources policy; defendant did not give him a chance to provide a note for his medical condition, Pseudo Follicullitis Barbe; and the policy had a disparate impact on African-American males who suffer disproportionately from this medical condition. The trial court took under submission defendant's summary adjudication motion on the retaliation cause of action.

On November 30, 2011, the trial court issued a minute order stating the summary judgment motion was granted. The trial court ruled plaintiff's first cause of action, wrongful termination in violation of public policy based on retaliation, had no merit. The trial court ruled: "Plaintiff has failed to raise a triable issue. He was not terminated in retaliation for complaining about personnel decisions that affected other employees. Plaintiff did not complain of any protected activity with respect to his complaints about other employees. . . . Plaintiff was not discriminated against based on his physical appearance."

The trial court reconsidered its October 5, 2011 tentative ruling which would have denied defendant's summary adjudication motion as to plaintiff's second cause of action. The trial court explained: "Plaintiff's complaint does not allege that plaintiff should have been allowed to keep his beard because of a medical condition. Instead, plaintiff's complaint alleges that [defendant's] decision to termination plaintiff for failing to shave his beard was 'pretextual.' . . . [¶] The Court pointed out the failure to plead plaintiff's medical condition at the hearing on the motion on 10/5/11. [¶] To date, plaintiff has not filed a motion to amend [his] complaint. . . . [¶] Plaintiff has not requested leave to amend his complaint to include allegations that plaintiff had a medical condition that would have justified an exception to the no beard policy. [¶] Considering only the allegations of the operative complaint, defendant has met its initial burden of showing

that there is no triable issue of material act and it is entitled to judgment as a matter of law. [Defendant] was entitled to establish a no beard, shined shoes[,] clean uniform policy at any time. Plaintiff was not entitled to disobey the policy. His supervisor advised him of the policy, he was warned about his non-compliance with the policy and sent home to comply with the policy. He refused to do so and was terminated." Judgment was entered in defendant's favor on November 30, 2011.

D. Plaintiff's Motion For Relief From Judgment

On December 21, 2011, plaintiff moved for relief from judgment pursuant to section 473, subdivision (b). Plaintiff argued good cause existed to grant relief from judgment based on mistake and excusable neglect. Plaintiff reasoned he believed his complaint was sufficient to survive summary judgment based on the trial court's tentative remarks during the October 5, 2011 summary judgment hearing. In addition, plaintiff contended relief from judgment should be granted because of newly discovered evidence. On November 29, 2011, Ms. Perryman testified in her deposition that Mr. Clark withheld information about plaintiff. Ms. Perryman testified, "Nate Brown felt that Mr. Clark was going to try and pin this whole lawsuit on himself and I, that Mr. Clark had withheld information from Nate Brown and myself and that [plaintiff] had indeed communicated to Dr. Norris about a discrimination." Furthermore, defendant's recently produced e-mails indicated the grooming policy was still in draft form as of July 21, 2010. Finally, plaintiff asserted good cause existed to grant relief from judgment to resolve new discrimination claims against defendant. Plaintiff contended defendant refused to re-hire him for an open security officer position despite his qualifications. Defendant allegedly violated the Fair Employment and Housing Act because it refused to accommodate plaintiff's documented medical condition for wearing a beard.

In opposition, defendant argued: plaintiff was not entitled to mandatory or discretionary relief from judgment under section 473, subdivision (b) because any neglect was inexcusable; the request for relief was untimely; and no new facts came to light, just

new arguments based on allegations previously made by plaintiff. The e-mails indicated the written handbook was not finalized until July 21, 2010. But according to defendant, Ms. Perryman testified Mr. Brown could implement the no-beard policy without first putting it in writing. Finally, defendant argued leave to file a first amended complaint should be denied because the proposed amendments were futile.

E. Ruling On Motion For Relief From Judgment

On January 23, 2012, the trial court held a hearing on plaintiff's motion for relief from judgment. The trial court denied plaintiff's motion after issuing its tentative ruling and hearing argument from the parties. The trial court ruled: "This case is similar to *Cochran* [*v. Linn* (1984) 159 Cal.App.3d 245, 251], in that motions for summary judgment were granted against both plaintiffs, in part, for their failure to plead respective complaints properly. Additionally, it is evident that the alleged new evidence proffered by plaintiff's counsel, as in *Cochran*, was available to him prior to the motion for summary judgment hearing date. As defendant points out, 'Plaintiff had contact with Perryman before he filed his opposition to [defendant's] summary judgment motion. Plaintiff attached a declaration from Perryman to his opposition. Plaintiff could have discovered any additional information in Perryman's possession and had Perryman attest to that in her declaration. Indeed, Perryman testified that plaintiff's counsel prepared her declaration for her signature.' [Citation.] [¶] Plaintiff's failure to secure this information, then, was not the result of excusable neglect . . . . [¶] It should also be noted that plaintiff's motion is based on mistake, inadvertence, surprise and excusable neglect, in which relief is discretionary. . . . The affidavit of fault does not meet the criteria set forth in [section] 473. So the motion is denied." The trial court noted it changed its tentative ruling on the summary judgment motion after extensive argument by the parties. However, plaintiff knew when he filed his opposition brief that the case had not been properly pled but he never moved to amend the complaint. The trial court added: "Then what I did is I took the case under submission thinking, well, maybe

they'll come in ex-parte and file an ex-parte application to move to amend the complaint on some emergent basis. Nothing was ever done about this issue."

Plaintiff filed his notice of appeal on January 25, 2012.

III. DISCUSSION

A. Summary Judgment Standard Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's burdens on summary judgment motions as follows: "[F]rom commencement to conclusion, 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. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] 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. . . . [¶] [T]he 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 . . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted; see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court's decision to grant the summary judgment motion de novo. (*Coral Const., Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra,* 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus*

Line, Inc. (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.) Those are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250 (*Conroy*); *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

B. Wrongful Termination-Retaliation

It is an unlawful employment practice for an employer "to discharge, expel, or otherwise discriminate" against any person because an employee complains about actions made unlawful by the Fair Employment and Housing Department Act. (Gov. Code § 12940, subd. (h).) Courts apply "a three-stage burden-shifting test" for discrimination and retaliation claims. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) At trial, the plaintiff bears the initial burden of establishing a prima facie case of discrimination or retaliation: "In order to establish a prima facie case of retaliation under the [Fair Employment and Housing Act] 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, supra,* 36 Cal.4th at p. 1042; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 209.) The retaliation right extends to conduct the employee reasonably believes is subject to Fair Employment and Housing Act protection. (*Yanowitz, supra,* 36 Cal.4th at p. 1043; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 473.)

A presumption of discrimination or retaliation arises if a plaintiff establishes a prima facie case. (*Yanowitz, supra,* 36 Cal.4th at p. 1042; *Guz, supra,* 24 Cal.4th at p. 354.) The burden then shifts to the employer to rebut the presumption by producing

admissible evidence that its adverse employment action was taken for a legitimate, nondiscriminatory or nonretaliatory reason. (*Yanowitz, supra,* 36 Cal.4th at p. 1042; *Guz, supra,* 24 Cal.4th at p. 355-356.) If the employer does so, the burden shifts back to the plaintiff. The plaintiff must "attack the employer's proffered reasons as pretexts for discrimination" or retaliation, or to offer other evidence of intentional discrimination or retaliation. (*Guz, supra,* 24 Cal.4th at p. 356; see *Yanowitz, supra,* 36 Cal.4th at p. 1042.)

Plaintiff argues he established a prima facie case of retaliation. Plaintiff relies on the conversations with Dr. Norris and Mr. Clark. In those conversations, plaintiff complained about Mr. Clark's unfair personnel decisions. Thereafter, plaintiff refused to comply with an unlawful grooming policy and was terminated. Thus, he argues a causal link exists between his opposition to the unfair personnel decisions and his termination. Plaintiff argues the complaints about Mr. Clark's decision to demote Mr. Armenta and lay off Ms. Sanders were protected activity.

But plaintiff failed to provide any evidence that Mr. Clark's personnel decisions were discriminatory within the meaning of the Fair Employment and Housing Act or reasonably would have been considered such. Mr. Clark testified the demotion resulted for neutral non-discriminatory reasons. Mr. Clark testified, "I concluded that he did not have the necessary background and skills to be in that position." Plaintiff testified he believed the demotion was unfair. Plaintiff reasoned Mr. Armenta had never been disciplined. Further, no complaints were made against Mr. Armenta while he was the security supervisor. Plaintiff also felt it was unfair to lay off Ms. Sanders for a second time at the same time Mr. Clark hired two new lead officers. Plaintiff admitted his complaints did not involve discrimination based on national origin or ancestry, sexual orientation, or marital status. Plaintiff failed to establish a prima facie case of retaliation. Plaintiff's complaints did not relate to conduct protected by the Fair Employment and Housing Act. Nor was there a good faith reason for believing defendant's actions were covered by California's anti-discrimination statutes. (*Yanowitz, supra,* 36 Cal.4th at p. 1043; *Miller v. Department of Corrections, supra*, 36 Cal.4th at p. 473.)

C. Wrongful Termination-Discrimination Based On Wearing A Beard

Plaintiff argues defendant discriminated against him based on physical appearance because he wore a beard. He contends he has a constitutional right to wear a beard under *King v. Cal. Unemployment Ins. Appeals Bd.* (1972) 25 Cal.App.3d 199, 205 (*King*) and *Finot v. Pasadena City Bd. of Education* (1967) 250 Cal.App.2d 189, 197-199 (*Finot*). We disagree.

Plaintiff's reliance on *Finot* is misplaced. In *Finot*, a high school teacher was transferred from the classroom to home teaching because he insisted on wearing a beard in violation of the school's administrative policy. (*Finot*, *supra*, 250 Cal.App.2d at p. 191.) The appellate court held plaintiff possessed a constitutional right to wear a beard while teaching in a high school classroom. (*Id.* at pp. 195, 197.) The *Finot* court found plaintiff's wearing of his beard was protected by the due process clauses of the federal and state Constitutions. (*Id.* at p. 197.) The federal and state due process clauses prohibited the state and its agents, including the education board, from depriving plaintiff of his liberty to wear his beard without due process of law. (*Ibid.*) The appellate court explained: "A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of nonconformity and rebellion. But symbols, under appropriate circumstances merit constitutional protection." (*Id.* at p. 201.) In *Finot*, the appellate court considered whether the state or governmental agency may restrict a public employee's constitutional right of personal liberty as a condition of employment. (*Id.* at pp. 199-200.) Here, there is no evidence in the record to suggest defendant is a governmental agency. Thus, *Finot* is inapplicable.

Likewise, *King* is distinguishable from the present case. In *King*, a service technician grew a beard during vacation and wore it when he returned to work. (*King*, *supra*, 25 Cal.App.3d at p. 202, fn. 3.) The employer terminated the plaintiff's employment because he insisted on wearing a beard. (*Id.* at p. 201.) The plaintiff applied but was denied unemployment benefits by the Department of Employment. (*Ibid.*)

Relying on *Finot, supra,* 250 Cal.App.2d at page 201, the appellate court found the plaintiff was entitled to constitutional protection. (*King, supra,* at pp. 201, 204-205.) Thus, the department must show a "'compelling state interest'" to justify "'substantial infringement'" of plaintiff's constitutional right to wear a beard. (*Id.* at p. 206, quoting *Sherbert v. Verner* (1963) 374 U.S. 398, 406.) The Court of Appeal stated: "*Finot* involved the constitutional rights of a bearded public employee (a high school teacher), as distinguished from one employed in the private sector, but we perceive no essential distinction. . . . [¶] [T]he state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected . . . ." (*King, supra,* 25 Cal.App.3d at p. 206.)

Plaintiff contends under *King* he is entitled to constitutional protection for wearing a beard regardless of whether he is a public or private employee. Plaintiff's argument is unavailing. The *King* court explicitly limited its holding to the state and its agencies and refused to impose a constitutional obligation on private employers such as defendant: "[W]e neither hold nor suggest that a bearded person has a constitutional right to a job and we do not reach or affect a private employer's right to manage its own business. It may also be acknowledged that payment of unemployment compensation benefits to this claimant (if such result ultimately materializes) could penalize the employer herein to the extent, if any, that its 'reserve account' with the department is affected. . . . Such event, however, may be regarded as part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations; it does not mean that the employer is not free to hire and fire as it pleases." (*King, supra*, 25 Cal.App.3d at pp. 206-207.) Like the *King* court, we decline to impose a constitutional obligation on defendant. As a private employer, defendant is entitled to enforce its no-beard policy which contains religious and medical condition exceptions.

Plaintiff asserts the grooming policy was not yet in place on July 21, 2010, because Mr. Brown needed approval from the human resources department. But it is

undisputed Mr. Brown informed plaintiff of the grooming policy on July 2, 2010. In addition, plaintiff was admonished on July 20, 2010 when he came to work unshaven. On July 21, 2010, plaintiff again appeared for work unshaven and Mr. Brown took him to the human resources department. Plaintiff was provided with a written warning in the presence of a human resources representative. Regardless of when the policy became official, plaintiff challenged Mr. Brown's supervisory authority and was disciplined for insubordination.

Plaintiff further argues he was singled out and discriminated against by defendant because three other employees had facial hair but were not terminated. Plaintiff argues another co-worker, Eddie Lewis, wore a beard but was not asked for medication documentation. But, it is undisputed Mr. Brown excused Mr. Lewis from having to comply with the grooming policy. This was based on Mr. Brown's observation of Mr. Lewis's skin condition. Plaintiff also contends he was singled out because Mr. Clark, who wears a beard, and Mr. Brown, who wears a moustache, were not terminated by defendant for having facial hair. But the grooming policy permitted moustaches, and more importantly, applied only to security officers. As the interim vice-president of administration and risk management, Mr. Clark was not subject to the grooming policy.

D. Discrimination And Retaliation Based On Medical Condition

Plaintiff contends defendant discriminated and retaliated against him because of his medical condition. He argues summary judgment is improper because his medical condition excused him from shaving his beard. However, plaintiff's complaint does not allege wrongful termination in violation of public policy based on his medical condition. Thus, the medical condition issue may not serve as a basis to deny defendant's summary judgment motion: "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the boundaries of the issues to be resolved at summary judgment.' [Citations.]" (*Conroy, supra,* 45 Cal.4th at p. 1250; *Hutton v. Fidelity National Title*

Company (2013) 213 Cal.App.4th 486, 493.) Moreover, plaintiff never amended his complaint before the summary judgment ruling.

E. Motion For Relief From Judgment

As noted, after the trial court ruled on the summary judgment motion, plaintiff sought relief from the order and judgment. Section 473, subdivision (b) provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ." Because plaintiff seeks to set aside a summary judgment, he is not entitled to mandatory relief pursuant to section 473, subdivision (b). (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 219 (*Henderson*); *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1418; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143.)

Nor is plaintiff entitled to discretionary relief under section 473, subdivision (b) which applies to any judgment, dismissal, order, or other proceeding. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254 (*Zamora*); *Henderson,*

supra, 187 Cal.App.4th at p. 229.) In *Zamora*, our Supreme Court discussed when an attorney mistake is excusable under the discretionary relief provision of section 473, subdivision (b): "'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora, supra,* 28 Cal.4th at p. 258; see *Henderson*, *supra*, 187 Cal.App. 4th at pp. 229-230.) We review the ruling for an abuse of discretion. (*Zamora, supra,* 28 Cal.4th at p. 258; *Huh v. Wang, supra,* 158 Cal.App.4th at p. 1425; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007.)

The trial court did not abuse its discretion in denying plaintiff's motion for discretionary relief under section 473, subdivision (b). Here, summary judgment was granted because plaintiff failed to establish a prima facie case for discrimination and retaliation. Plaintiff concedes his complaint does not allege discrimination or retaliation based on his medical condition. But plaintiff argues he did not move to amend the complaint earlier because of his mistaken reliance on the trial court's tentative ruling during the summary judgment hearing. The trial court could well reason plaintiff did not demonstrate excusable mistake or neglect. The pleading defect was expressly raised during the summary judgment motion hearing on October 5, 2011. Despite the fact the issue was raised during the October 5, 2011 summary judgment motion hearing, no oral motion to amend was made. Further, plaintiff's counsel admits a tactical decision was

made based upon the mistaken assumption that the trial court would deny the summary judgment motion given the tentative ruling. Typically, these types of mistakes are not the basis for a finding of excusable neglect. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611-612 ["There is nothing in section 473 to suggest it 'was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal."'].) No abuse of discretion occurred.

Plaintiff argues his case is similar to *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343 (*Mink*). We disagree. In *Mink*, the trial court granted summary adjudication and dismissed several causes of action on the grounds they were barred by a 10-year statute of limitations. (*Id*. at p. 1341.) After summary adjudication had been ruled upon, the plaintiffs' counsel discovered the lawsuit was timely because of an intervening weekend and a court holiday. The intervening weekend and court holiday rendered the plaintiffs' claims timely. (*Id.* at p. 1342.) The trial court denied the plaintiffs' motions for reconsideration and relief from judgment under section 473. (*Ibid*.) The trial court ruled the fact that a weekend and court holiday intervened to keep the statute of limitations from running was not newly discovered evidence. Nor in the trial court's view was the plaintiff's counsel's failure to discover these facts before the hearing on the summary adjudication motion excusable. (*Ibid.*)

Our Fourth Appellate District, Division Three colleagues issued a writ of mandate directing the trial court to grant the plaintiffs' motion for relief under section 473 and for reconsideration under section 1008. (*Mink*, *supra*, at p. 1344.) The Court of Appeal found the plaintiffs were entitled to relief under section 473 because of their counsel's excusable mistake. The appellate court explained: "[Plaintiffs'] counsel asserted his mistake in discovering the statute limitations had not run because of the intervening weekend and court holiday was an excusable mistake entitling them to relief. Given that the effect of the court's ruling was to dismiss a timely filed cause of action as untimely, we agree." (*Id.* at pp. 1343-1344.)

Mink is distinguishable from this case. In *Mink*, the plaintiffs' attorneys made a mistake concerning the statute of limitations period and summary judgment was granted

based on that error. (*Mink, supra*, 2 Cal.App.4th at pp. 1342-1343.) The plaintiffs were entitled to relief under section 473 because the complaint was timely. The Court of Appeal also held defendant was not prejudiced by the discovery of these facts after summary adjudication was granted. (*Id.* at pp. 1343-1344.)

Plaintiff, relying on *Touchtone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 680, argues he should have been permitted to file a post-judgment amendment. That case involves post-judgment motions after a verdict was entered. (*Ibid*.) By contrast, our case involves the failure to move to amend until after the summary judgment motion was granted and judgment was entered. Under these narrow circumstances, the failure to move to amend constitutes a forfeiture of the issues not presented in an amended pleading. (*Conroy, supra,* 45 Cal.4th at p. 1254; *Hutton v. Fidelity National Title Company, supra*, 213 Cal.App.4th at p. 493.)

Plaintiff also argues newly discovered evidence—Ms. Perryman's deposition testimony and recently produced e-mails between Ms. Perryman and Mr. Brown—justified granting him relief from judgment under section 473, subdivision (b). But plaintiff communicated with Ms. Perryman before her deposition. Ms. Perryman provided a declaration as part of plaintiff's summary judgment opposition. In addition, there was evidence presented in the summary judgment papers that the no-beard policy was not distributed until July 22, 2010. On that day, Mr. Brown met with all of the security guards, except plaintiff, to distribute the new grooming policy. Plaintiff fails to explain why the July 21, 2010 e-mails about the final written policy and Ms. Perryman's deposition are newly discovered evidence. This information could have been obtained from Ms. Perryman before the summary judgment motion hearing. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1128; *Cochran v. Linn, supra,* 159 Cal.App.3d at p. 252.) None of the authority cited by plaintiff supports a finding an abuse of discretion occurred.

IV. DISPOSITION

The summary judgment and order denying relief from the judgment are affirmed. Defendant, Charles Drew University of Medicine and Science, shall recover its costs incurred on appeal from plaintiff, Joseph Simpson.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.