Filed 12/3/18 Ndjongo v. Los Angeles World Airports 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| JEAN NDJONGO,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>LOS ANGELES WORLD AIRPORTS,<br><br>Defendant and Respondent. | B282817<br><br>(Los Angeles County Super. Ct. No. BC620618) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Jean Ndjongo, in pro. per., for Plaintiff and Appellant.

Vanderford & Ruiz, Rodolfo F. Ruiz and Tyler J. Lindberg for Defendant and Respondent.

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Plaintiff Jean Ndjongo sued his employer, defendant Los Angeles World Airports, alleging causes of action for retaliation, discrimination, and unlawful termination based on his race, color, national origin, age, disability, and medical condition. This is plaintiff's third lawsuit against defendant, arising from conduct which had been resolved against plaintiff in the earlier lawsuits, first by nonsuit, and second by dismissal with prejudice following settlement and a release of all claims by plaintiff in exchange for a waiver of costs.

Defendant demurred, arguing that plaintiff's claims were barred by res judicata. In response, plaintiff admitted that defendant's conduct occurring before the dismissal of his second lawsuit was not actionable, but argued nonetheless that his termination (which occurred after the second lawsuit was dismissed) could form the basis of a viable claim. Accordingly, plaintiff was granted leave to amend to state a claim for wrongful termination based on conduct occurring after the dismissal of his second case. Plaintiff's first amended complaint stated a single cause of action for wrongful termination in violation of public policy. The trial court sustained defendant's demurrer to that claim, finding that common law claims cannot be stated against a public entity such as defendant. We affirm.

## BACKGROUND

### 1. *Ndjongo I* – The First Lawsuit

On August 25, 2011, plaintiff sued defendant and two individuals, alleging race and national origin discrimination, harassment, retaliation, and failure to prevent harassment. Plaintiff is an African-American man. He began his employment with defendant in 2002. He alleged that he was treated differently from other employees because of his race and national

origin, citing incidents occurring throughout his employment with defendant. He had filed a Department of Fair Employment and Housing (DFEH) charge in March 2011, complaining about the discrimination. In June 2011, a couple of months before he filed his lawsuit, plaintiff went on medical leave because of a "work-related posttraumatic stress disorder."

While he was on medical leave, and while his civil action was pending, defendant investigated allegations that plaintiff engaged in misconduct at work. The investigation concluded that plaintiff had committed six policy violations and imposed a disciplinary suspension of 45 days. Plaintiff was allowed to serve his suspension during his unpaid medical leave.

The case proceeded to trial. At the conclusion of plaintiff's case-in-chief, defendant moved for nonsuit, on the basis that the discriminatory conduct occurred more than one year before plaintiff filed his DFEH complaint, there was no continuing violation, and in any event, the evidence was insufficient to establish a discriminatory motive by defendant.

The trial court granted the motion, finding there was no evidence of adverse employment action, nor evidence of a discriminatory motive, and the witnesses who testified during plaintiff's case offered legitimate nondiscriminatory reasons for defendant's conduct.

Plaintiff appealed, and on May 1, 2015, Division Three of this court affirmed the grant of nonsuit in its entirety. (*Ndjongo v. Los Angeles World Airports* (May 1, 2015, B248942) [nonpub. opn.] (*Ndjongo I*).)

**2. *Ndjongo II* – The Second Lawsuit**

On December 2, 2013, while *Ndjongo I* was still pending on appeal, plaintiff filed a second action against defendant in federal

district court, alleging discrimination based on his race and national origin, disability discrimination, retaliation based on plaintiff's complaints of discrimination, and whistleblower retaliation based on his complaints of discrimination. (*Ndjongo II*.) He reiterated the same claims of discrimination alleged in *Ndjongo I*, and newly alleged that he had been on a continuous medical leave of absence since June 10, 2012, and defendant failed to engage in the interactive process to reasonably accommodate him and facilitate his return to work.

On May 15, 2015, the parties entered into a settlement agreement. Plaintiff agreed to dismiss the action with prejudice in exchange for a waiver of costs and fees by defendant. Plaintiff agreed to release all claims, including for hostile work environment, disparate treatment, retaliation, constructive discharge, denial of equal protection, among other claims. The action was dismissed with prejudice on May 18, 2015.

**3. *Ndjongo III* -- These Proceedings**

Plaintiff filed this action on May 16, 2016. The complaint repeated many of the same acts of discrimination on which his earlier complaints had rested, and also recited the procedural history of the earlier cases. The complaint newly alleged that on May 21, 2015, after the settlement of *Ndjongo II*, defendant issued a notice of discharge to plaintiff, with an effective date of June 3, 2015. The notice purported to terminate plaintiff due to "[u]nexcused and excessive absenteeism and failure to be available to perform work assignments adequately or promptly."

Plaintiff alleged retaliation, based on his prosecution of the two earlier cases; and a number of theories of discrimination based on his termination, such as disparate treatment on the basis of his race; disparate treatment based on his color;

disparate treatment based on his disabilities; disparate treatment based on his national origin; disparate treatment based on his age; disparate treatment based on his medical condition; failure to engage in the interaction process; and wrongful termination in violation of public policy. He also alleged that defendant was a public entity.

Defendant demurred to the complaint and filed a motion to strike. In support of its motions, defendant included a request for judicial notice, which included the prior pleadings, settlement agreement, appellate opinion, and order dismissing the federal case. The demurrer and motion to strike both rested on the contention that all allegations of misconduct arising before May 18, 2015, the date of dismissal of *Ndjongo II*, were barred by res judicata. Defendant demurred to all causes of action except the ninth cause of action for unlawful termination in violation of public policy.

In opposition, plaintiff conceded that "claims for acts occurring prior to May 18, 2015 . . . would have been barred under [the] doctrines of claim and/or issue preclusion." He argued that his claims arose from new conduct occurring after the dismissal of *Ndjongo II*. Plaintiff argued that he was terminated six days after the dismissal of *Ndjongo II*, creating an inference that defendant harbored a discriminatory/retaliatory motive.

The trial court sustained the demurrer, without leave to amend, as to all causes of action except the claim for wrongful termination in violation of public policy (to which defendant had not demurred). The trial court granted the motion to strike allegations occurring before dismissal of *Ndjongo II*. The court

granted leave to amend the ninth cause of action to include conduct occurring after dismissal of the federal case.

Plaintiff filed a first amended complaint, stating a single cause of action for wrongful termination in violation of public policy. He alleged that prior to his termination, defendant was informed by plaintiff's healthcare providers that he was released to return to work. He alleged that notwithstanding his desire to return to work, defendant failed to engage in the interactive process to accommodate plaintiff. He alleged that his employment was "terminated in violation of fundamental public policies of the State of California with respect to discrimination upon the bases of disability, failure to engage in an interactive process to reach accommodation of plaintiff's disabilities, race, skin color, and national origin. Said policies are stated in FEHA, the Labor Code, the California Constitution, and in other statutes and in criminal and common laws."

Defendant demurred to the first amended complaint, on the basis that plaintiff cannot state a claim against a public entity for common law wrongful termination.

Plaintiff did not file an opposition, and did not appear at the demurrer hearing. The trial court sustained the demurrer without leave to amend. A judgment of dismissal was entered, and plaintiff filed a timely notice of appeal.

## DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v.*

*Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Ibid.*)

"The plaintiff bears the burden of proving there is a reasonable possibility of amendment. . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.'. . . The plaintiff must clearly and specifically set forth the 'applicable substantive law' . . . and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. . . . Allegations must be factual and specific, not vague or conclusionary. . . . [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. . . . Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*), citations omitted.)

We must first clarify the scope of this appeal. Plaintiff has not argued the trial court erred in sustaining the demurrer or motion to strike portions of his initial complaint. His briefs contain no argument that the court erroneously found res

judicata barred claims arising before the dismissal of *Ndjongo II*. Plaintiff concedes that he is "only making claims for actions taken by [defendant] after [settlement of *Ndjongo II*] for disparate discrimination due to wrongful termination" and that any facts included in his pleading regarding earlier discrimination were merely background facts.[1]

The law is well settled that such a cause of action for wrongful termination in violation of public policy may not be stated against a public entity such as defendant. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170.)

Plaintiff contends the label attached to his wrongful termination claim was a "misnomer because it is a statutory violation for [defendant] to refuse employee reinstatement returning with certification to return to work . . . ." He contends the court abused its discretion by denying leave to amend his complaint, reasoning he could state claims for wrongful termination or discrimination based on his right to reinstatement in his union contract, or under the federal Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). However, plaintiff does not tell us any facts, occurring after dismissal of his federal

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[1] Plaintiff does, in at least one point in his briefs, inconsistently claim that he is appealing the demurrer rulings for both the initial and first amended complaints. However, his briefs contain no argument or analysis concerning the trial court's ruling as to his initial complaint, and therefore any purported error has been forfeited. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

case, that he can allege to support such claims. For instance, he does not describe or quote any provision in the union contract that he contends defendant breached, nor any act or omission by defendant in violation of the Family and Medical Leave and Americans with Disabilities Acts. Instead of providing facts on which these claims could be based, plaintiff argues the "sufficiency of evidence to support the plaintiff's claims are premature issues at the demurrer stage." Plaintiff has failed to demonstrate how his pleading can be amended, and therefore has not met his burden on appeal. (*Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.)[2]

Plaintiff also claims the trial court violated his due process rights because the court dismissed his case without taking any evidence. He misunderstands the function of a demurrer. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [the limited function of a demurrer is to test the legal sufficiency of a complaint, but not the truthfulness of the allegations].)

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[2] After this case was fully briefed, plaintiff filed two requests for judicial notice with this court, seeking judicial notice of the settlement agreement resolving his federal case, the dismissal of the federal case, his pleadings in this action, the demurrer to his initial complaint in this action, the demurrer to his first amended complaint, an excerpt from his union's Memorandum of Understanding, and an excerpt from the Rules of the Board of Civil Service Commissioners, City of Los Angeles. All but the civil service and union documents are already part of the record on appeal. The incomplete union and civil service documents, absent any cogent argument in plaintiff's appellate briefs, do not aid this court. We therefore decline to take judicial notice of the incomplete union and civil service documents. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 295, fn. 21 [a court need not take judicial notice of irrelevant documents].)

## DISPOSITION

The judgment is affirmed. Appellant's requests for judicial notice are denied. Respondent is awarded its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

DUNNING, J.*

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