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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DONALD BAUMAN, Plaintiff and Appellant, v. HANSON AGGREGATES WEST, INC., Defendant and Respondent.	B232643 (Los Angeles County Super. Ct. No. BC424758)

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

Stevens & McMillan, formerly Stevens Carlberg & McMillan, Heather K. McMillan and Janeen Carlberg for Plaintiff and Appellant.

Wilson Turner Kosmo, Robin A. Wofford, Michael S. Kalt and Mary P. Snyder for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Donald Bauman, appeals from an order granting the summary judgment motion of defendant, Hanson Aggregates LLC, in an employment age discrimination case. We conclude there were legitimate nondiscriminatory reasons for plaintiff's termination. Accordingly, we affirm the summary judgment order.

II. EVIDENCE

Plaintiff has bachelor and master's degrees in business with a dual concentration in marketing and finance. Plaintiff worked for Livingston Graham--which later became Hanson Aggregates West, Inc. and then Lehigh Hanson--from 1977 until 1998. Plaintiff sold ready mix concrete and aggregates, a mixture of rock and sand obtained from a quarry. Plaintiff was laid off in 1998 after defendant sold its asphalt operations. Plaintiff was an assistant director of marketing and sales at the time he was laid off. After the layoff, plaintiff was an emergency instructor at California State University, San Bernardino.

In March 2005, plaintiff was rehired by Hanson Aggregates West, Inc. as a sales manager when he was 52 years old. After returning to work, plaintiff was greeted at a golf tournament by Mark Long, who said "Hey, old man, how are you doing?" In 2006, plaintiff was promoted to vice-president of marketing and sales. During that period, he sold aggregate products to Standard Concrete. Standard Concrete purchased defendant's aggregates to mix together with cement and water to make ready-mix concrete.

Plaintiff's main contact at Standard Concrete was Brian Serra, the vice-president and general manager. Renee Hernandez worked for Mr. Serra as a general sales manager at Standard Concrete. Ms. Hernandez had worked for Standard Concrete for two decades and had reported directly to Mr. Serra since 1996. Ms. Hernandez was responsible for

management of ready-mix sales in counties where Standard Concrete had plants. She had direct sales responsibilities in Los Angeles and Orange Counties.

In 2008, Heidenlberg Cement AG, which owned Lehigh Cement and Standard Concrete, purchased Hanson Plc. Prior to the integration, Standard Concrete was defendant's biggest customer in the Los Angeles area. After the integration, defendant and Standard Concrete became Lehigh Hanson. As part of the new company, Mr. Serra headed the combined sales force for Lehigh Hanson in the Los Angeles area, which marketed both aggregates and ready-mix concrete. Mr. Serra supervised plaintiff and Ms. Hernandez. Mr. Serra reported to Mr. Long, a vice-president. Mr. Long reported to David Hummel, the president of the west region of Lehigh Hanson. The parties do not dispute that defendant is plaintiff's employer.

Plaintiff believed Mr. Serra preferred Ms. Hernandez because she was younger. Plaintiff noticed Mr. Serra's staff appeared young, somewhere between 20 to 35 years old. However, Mr. Serra participated in few, if any, hiring decisions of his office staff. Plaintiff commented to Mr. Serra about the office staff's youthfulness. According to plaintiff, Mr. Serra responded, "[H]e said something about us being the only old guys."

In addition, plaintiff questioned Mr. Serra about a general manager opening in the Central Coast area. And they discussed plaintiff's involvement in his wife's business affairs. Mr. Serra was envious because he could not retire. Plaintiff asked whether he and Ms. Hernandez would be retained after the consolidation of the companies, "I went to [Mr. Serra] and I asked him point blank if he intended to keep both [Ms. Hernandez] and myself." Plaintiff testified that Mr. Serra responded, "[H]e said . . . he needed us both."

In June 2008, Mr. Serra announced a new organizational structure for the Los Angeles area sales team. Plaintiff was given the role and title of vice-president of sales and marketing. Ms. Hernandez kept her general sales manager role and title. Plaintiff was told he received the senior position in the office because he was more qualified than Ms. Hernandez. Plaintiff was more experienced in both aggregates and ready-made concrete sales than Ms. Hernandez. By contrast, Ms. Hernandez was experienced only in ready-mix concrete. But Mr. Serra testified Ms. Hernandez had more ready-mix concrete

sales experience in the Los Angeles area. Mr. Serra thought plaintiff's recent Central Coast ready-mix concrete sales and 1998 sales experience in the Los Angeles area were not transferable. This was because the Los Angeles ready-mix concrete market had changed since 1998. Plaintiff became head of the department, with his primary focus on developing the aggregates business. As this occurred, he was to reacquaint himself with the ready-mix concrete business. Ms. Hernandez would continue to primarily focus on the ready-mix concrete business. But she was to learn the aggregates business. She would report directly to plaintiff instead of Mr. Serra. Plaintiff was happy with Mr. Serra's decision. But plaintiff felt he was being asked to train his replacement. Ms. Hernandez thought reporting to plaintiff rather than directly to Mr. Serra was a demotion.

Plaintiff thought Ms. Hernandez was the weak point in the sales group because: she could not be reached in a timely manner; she did not return phone calls; she was late to every meeting; and she was not prepared to run meetings. Plaintiff believed Ms. Hernandez had limited product knowledge and was a poor manager. On one occasion, plaintiff asked Ms. Hernandez to join him in a meeting with one of defendant's largest aggregate accounts. Ms. Hernandez told plaintiff she wanted to leave to avoid rush hour traffic on her way back to her office. Ms. Hernandez attended the meeting for only 10 minutes. During the meeting, she worked on her Blackberry and ignored the customer. Plaintiff was upset by Ms. Hernandez's treatment of the customer and excused her from the meeting. When plaintiff tried to contact her by phone and e-mail, she did not respond. Plaintiff complained to Mr. Serra that Ms. Hernandez was unresponsive. Ms. Hernandez complained to Mr. Serra that plaintiff tried to undermine her. Mr. Serra thought these complaints arose from the stresses of organizational changes and did not take any actions based on the complaints.

In August 2008, Mr. Hummel, the president of the west region of Lehigh Hanson, concluded there were too many layers of management within the Los Angeles area. Mr. Hummel asked Mr. Long, Mr. Serra's supervisor, whether the company could eliminate either plaintiff's or Ms. Hernandez's position. Mr. Long discussed the issue

with Mr. Serra. The subject was raised whether business operations could be conducted without plaintiff or Ms. Hernandez. Mr. Serra told Mr. Long that it was possible to do so. Mr. Serra was asked whom he would like to keep. Mr. Serra testified he answered: "I would prefer to keep [Ms. Hernandez] because I felt our exposure was greater on the concrete side than it was on the aggregate side. [¶] . . . The customer list on the concrete side was far more extensive than the customer list on the aggregate side. . . . [A]nd with who the major accounts were for the remainder of the aggregate sales, that between my business accounts and [Ms. Hernandez's sales accounts] that we would be better able to cover the aggregate sales accounts than would we have been able to cover the concrete accounts with [plaintiff] and me."

Mr. Serra recommended dividing plaintiff's managerial responsibilities between himself and Ms. Hernandez and delegating direct sales to the staff. Mr. Long approved of Mr. Serra's decision. Mr. Long conveyed their joint recommendation to Mr. Hummel.

On October 3, 2008, plaintiff was told that his position would be eliminated. When the termination decision was made: Mr. Serra was 61 years old; plaintiff was 55 years old; Mr. Hummel was 52 years old; Mr. Long was 49 years old; and Ms. Hernandez was 38 years old. After the decision was made to eliminate plaintiff's position, no additional sales staff was hired or transferred to the Los Angeles area. Of the 28 people defendant laid off from 2007 to 2009, including plaintiff, 11 were over the age of 40. Seventeen people who were laid off were under the age of 40.

III. PROCEDURAL HISTORY

On October 27, 2009, plaintiff filed a complaint alleging claims for: age discrimination in violation of Government Code[1] section 12940, subdivision (a); failure to prevent discrimination (§ l12940, subd. (k)); and wrongful termination in violation of public policy. Plaintiff subsequently filed a first amended complaint on December 9,

[1] Unless otherwise indicated, future statutory references are to the Government Code.

2009 asserting the same causes of action. Defendant answered the first amended complaint on May 10, 2010.

On November 12, 2010, defendant filed a summary judgment or adjudication motion. Plaintiff filed his opposition to the summary adjudication motion on January 14, 2011. On January 28, 2011, the trial court granted defendant's summary judgment motion.

IV. DISCUSSION

A. Standard of Review

A summary judgment motion may be granted only if there is no triable issue of material fact and the party is entitled to a judgment as a matter of law. (Code Civ. Proc., § l437c, subd. (c).) A defendant moving for summary judgment has the burden of presenting evidence that negates an element of plaintiff's claim. Or a defendant may show that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to support an element of the claim. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) If the defendant makes this showing, the burden shifts to the plaintiff to set forth "specific facts" showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).) We review de novo the trial court's grant of summary judgment. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039; *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) Our Supreme Court has stated, "[A]ny doubts as to the propriety of granting a summary judgment motion should be resolved in favor of the party opposing the motion." (*Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 535; accord *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874.)

B. Evidentiary Objections

In reviewing the trial court's summary judgment ruling, we consider all evidence except those matters as to which objections were made and sustained. (Code Civ. Proc. § 437c, subd. (c); *Lonicki v. Sutter Health Central, supra,* 43 Cal.4th at p. 206.) Rather than challenge the trial court's evidentiary rulings, plaintiff ignores them and refers to excluded evidence in his opening brief. Plaintiff has failed to affirmatively challenge the trial court's evidentiary rulings. Thus, we consider the evidence to have been properly excluded and it cannot serve as a basis for review on appeal. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196; *Roe v. McDonald's Corporation* (2005) 129 Cal.App.4th 1107, 1113.)

In the opening brief introduction, plaintiff, without citation to authority, makes various arguments concerning how the trial court handled evidentiary objections. Defendant argues plaintiff's evidentiary objection contentions have been forfeited. Defendant argues that plaintiff may not raise these issues because there is no separate assignment of error nor discussion relating the facts to controlling legal principles. We agree. (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956; *Roe v. McDonald's Corporation, supra,* 129 Cal.App.4th at p. 1113.) The issue as to how the trial court resolved the evidentiary objections has been forfeited.

C. Plaintiff's Claims

Section 12940, subdivision (a) provides in pertinent part: "It is an unlawful employment practice . . . [f]or an employer because of the . . . age . . . of any person, . . . to discharge the person from employment." Our Supreme Court summarized the standard to apply in trying discrimination cases: "At trial, the employee must first establish a prima facie case of discrimination, showing '"'actions taken by the employer from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion . . . ."'"'

[Citation.] Once the employee satisfies this burden, there is a presumption of discrimination, and the burden than shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is '"legitimate"' if it is '*facially unrelated to prohibited bias*, and which if true, would thus preclude a finding *of discrimination*.' [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. [Citation.]" (*Reid v. Google, supra*, 50 Cal.4th at p. 520, fn. 2, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-356.)

Here, defendant's decision to lay off plaintiff was based on legitimate business reasons that are unrelated to age discrimination. In August 2008, Mr. Hummel determined there were too many layers of management among the company's Los Angeles sales staff. Mr. Hummel asked Mr. Long whether the company could eliminate either plaintiff or Ms. Hernandez's position. Mr. Long in turn discussed the issue with Mr. Serra, plaintiff's supervisor. Mr. Serra believed the existing sales force could more easily absorb plaintiff's duties. The loss of clients was bigger for the ready-mix concrete side, Ms. Hernandez's area of sales, than for the aggregates market which plaintiff supervised. A large portion of plaintiff's sales were to internal customers. The ready-mix concrete sales representatives were used to working with Ms. Hernandez and would have to adapt to plaintiff's new work style. Mr. Serra was concerned a change of business direction and the way the sales staff would be directed could impact productivity. Further, Mr. Serra believed he and Ms. Hernandez had worked together for 12 years. By winter, plaintiff was still learning how to work with Mr. Serra. And Mr. Serra thought he and Ms. Hernandez could maintain the business and continue to secure new work with the existing aggregates sales staff. It is undisputed no additional sales staff was hired or transferred to the Los Angeles area. Instead, all of plaintiff's duties were redistributed to Mr. Serra and Ms. Hernandez. Defendant's reasons for retaining Ms. Hernandez, rather than plaintiff, are legitimate and nondiscriminatory. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 358*; Horn v. Cushman &*

Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, 806-807; *Hersant v. Dept of Social Services* (1997) 57 Cal.App.4th 997, 1001.) Further, plaintiff does not refute defendant's showing that 28 individuals including plaintiff were laid off between 2007 and 2009. The employees laid off varied in age. Of the 28 people defendant laid off from 2007 to 2009, including plaintiff, 11 people were over the age of 40 while 17 people were under the age of 40.

The foregoing evidence of legitimate, nondiscriminatory reasons for plaintiff's layoff shifts the burden of production to plaintiff to show defendant's reasons are pretextual, or to offer other evidence of age discrimination. This evidence must be specific. (*Reid v. Google, Inc., supra*, 50 Cal.4th at p. 520, fn. 2; *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 356.) Plaintiff argues defendant's decision to retain Ms. Hernandez instead of him is suspect. Plaintiff argues he was a more qualified and better employee than Ms. Hernandez. Plaintiff believed Ms. Hernandez was an inferior employee because: she could not be reached in a timely manner; she did not return phone calls; she was late to every meeting; she was not prepared to run meetings; she was rude to an aggregates client; she had limited product knowledge; and she was a poor manager. But plaintiff's opinion of his superior qualifications and work performance does not raise a genuine issue of material fact. (*Horn v. Cushman & Wakefield Western, Inc., supra,* 72 Cal.App.4th at p. 816 ["an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact"]; *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 76.) No doubt, there is evidence plaintiff had more sales experience in aggregates than Ms. Hernandez. But Mr. Serra felt Ms. Hernandez had more ready-mix concrete sales experience in the Los Angeles area than plaintiff. Mr. Serra believed plaintiff's recent Central Coast ready-mix concrete sales experience and prior concrete sales experience from 1998 in the Los Angeles area were not transferable because of market changes. Plaintiff emphasizes his 24 years of experience in the construction materials industry; but, Ms. Hernandez also has over 20 years of experience working in that industry. Plaintiff argues he has a master's degree in marketing and finance. But Ms. Hernandez has both a masters of business administration

and organizational leadership. Given their similar qualifications, plaintiff fails to raise a triable issue of matter fact that defendant's reasons for retaining Ms. Hernandez over plaintiff were pretexts for age discrimination. (See *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 675 [disparity in qualifications must be substantial to support an inference of age discrimination].)

Plaintiff also contends Mr. Serra and Mr. Long's age-related comments show defendant's layoff decision was based on age discrimination. In 2005 and three years before the layoff, Mr. Long greeted plaintiff at a golf tournament by saying, "Hey, old man, how are you doing?" In addition, Mr. Serra inquired about plaintiff's retirement eligibility. And Mr. Serra stated they were the only "old guys" because people do not generally stay in their industry as long as they have. These age-related comments do not support an inference of discriminatory intent because they are ambiguous and unrelated to Mr. Serra's decision to eliminate plaintiff's position. Plaintiff has presented no evidence that Mr. Serra, Mr. Long and Mr. Hummel factored age into their joint layoff decision.

In addition, plaintiff argues Mr. Serra's association with younger employees is evidence of age discrimination. Plaintiff noticed Mr. Serra's office staff was young, somewhere between 20 and 35 years of age. There is no evidence Mr. Serra participated in any hiring decisions of his office staff. The age of Mr. Serra's office staff does not create an inference of age discrimination. Plaintiff also relies on excluded evidence that Mr. Serra enjoys whitewater rafting. Plaintiff characterized the sport as a young person's avocation. Plaintiff also argues Mr. Serra previously discharged an older worker in favor of Ms. Hernandez. These matters were excluded in the trial court. Plaintiff has not challenged the trial court's evidentiary rulings. Thus, we deem the evidence to have been properly excluded and do not consider it for reasons we have explained. (*Villanueva v. City of Colton*, *supra*, 160 Cal.App.4th at p. 1196*; Roe v. McDonald's Corporation, supra,* 129 Cal.App.4th at p. 1113.)

Plaintiff also contends defendant's failure to consider him for other unidentified positions is probative evidence of discriminatory intent. Plaintiff asserts two younger

men, both of whom had poor reviews, were given opportunities to make positions for themselves. But this evidence was excluded by the trial court as hearsay and the ruling has not been challenged by plaintiff on appeal. In addition, plaintiff argues there were two available positions in the northern part of the state Mr. Serra should have offered to plaintiff because plaintiff was qualified for either position. However, there is no evidence Mr. Serra was aware plaintiff was interested in either position. Also, there is no evidence plaintiff applied for either position.

Plaintiff also contends defendant did not follow an appropriate selection process because there was nothing in writing directing Mr. Serra to eliminate anyone in the sales group. Nor, according to plaintiff, was there any written documentation of defendant's decision to terminate plaintiff. However, there is no evidence defendant had a particular process for eliminating plaintiff's vice-president position. The instructive management decision was handled orally—that is not evidence of discrimination.

Finally, plaintiff argues defendant's changing explanations for terminating him is evidence of pretext. At plaintiff's exit interview, Mr. Serra stated Ms. Hernandez would not assume all of plaintiff's responsibilities. But plaintiff argues the balance of his responsibilities was assigned to Ms. Hernandez upon his termination. However, Mr. Serra's statement is not false. Plaintiff acknowledges Mr. Serra took on plaintiff's duties relating to a manufacturer account. Plaintiff has failed to present specific evidence his termination was premised on age so as to create a triable controversy that defendant's legitimate business decision to lay him off was a pretext for age discrimination.

As to plaintiff's other claims, he admits these causes of action are derivative of his age discrimination cause of action. As we have explained, summary judgment was properly granted as to plaintiff's age discrimination claim. Thus, defendant is entitled to summary judgment on the claims for failure to prevent discrimination and wrongful termination in violation of public policy.

V. DISPOSITION

The judgment is affirmed. Defendant, Hanson Aggregates LLC, is to recover its appeal costs from plaintiff, Donald Bauman.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.