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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PEDRO MUNOZ, Plaintiff and Appellant, v. PACIFIC MARITIME ASSOCIATION et al., Defendants and Respondents.	B235771 (Los Angeles County Super. Ct. No. BC434242)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed.

The Luti Law Firm, Anthony N. Luti; Wilson Trial Group and Dennis P. Wilson for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Clifford D. Sethness and Jason M. Steele for Defendant and Respondent Pacific Maritime Association.

Holguin, Garfield, Martinez & Quinonez, Steven R. Holguin and Gillian B. Goldberg for Defendant and Respondent International Longshore and Warehouse Union, Local 13.

This appeal arises from an employment discrimination claim filed by Pedro Munoz. Summary judgment was entered in favor of the defendants on the grounds that Munoz failed to raise a triable issue of material fact concerning his purported disability and any knowledge of a disability on the part of the defendants. We affirm the grant of summary judgment.

FACTS

Respondents and defendants in this matter are Pacific Maritime Association (PMA) and International Longshore and Warehouse Union, Local 13 (Local 13) (collectively Defendants). PMA is the payroll agent and collective bargaining representative for the stevedoring companies, terminal operators and shipping companies that employ longshore workers at ports in California, Oregon and Washington. Local 13 represents all longshore workers at the ports of Los Angeles and Long Beach. A collective bargaining agreement (CBA) negotiated between PMA and the International Longshore and Warehouse Union, of which Local 13 is a member, governs the employment of longshore workers in California, Oregon and Washington.

Munoz was hired in April 1998 to work as a temporary longshore worker in Port Hueneme. In 2003, Munoz was hit in the head by rigging while he worked aboard a vessel in Port Hueneme. He suffered injuries to his head, cerebellum and cerebrovascular system. He also suffered a stroke. His injuries prevented him from working five full days a week. Munoz sought workers compensation benefits as a result of this injury and the litigation was settled. He continued to take blood thinning medication as a result of the stroke and was taking it in 2007 and 2008.

Munoz transferred to the ports of Long Beach and Los Angeles in 2004. He was promoted to a permanent position as a Class B worker in April 2007. Under the CBA, a Class B worker is required to work full time and be available for work 70 percent of a payroll month. This requirement is referred to as the 70 percent rule. A Class B worker is excused from the 70 percent rule "when on leave of absence for illness, disability or for other reason approved by the JPLRC." The JPLRC is the Joint Port Labor Relations Committee, which is comprised of representatives of Local 13 and the ports' employers.

Class B workers are subject to graduated penalties for violating the 70 percent rule: a letter of reprimand is issued for the first offense, a worker receives 30 days off without pay for the second offense, and he is terminated for the third offense. A Class B worker who repeatedly violates the 70 percent rule due to a drug or alcohol problem may be asked to submit to "last chance stipulations" to ensure continued employment. Munoz knew about the 70 percent rule when he was hired.

Munoz violated the 70 percent rule in 2007 during the months of July, September, and November. He again violated the 70 percent rule in January 2008 and took a leave of disability from February 17, 2008, to March 24, 2008. The record does not show what disability precipitated his leave in February and March. On March 20, 2008, Munoz told the JPLRC that he had an alcohol problem in order to take advantage of the "last chance stipulation" provision. According to Munoz, he did not have an alcohol problem but felt it was the only way to save his job. The JPLRC terminated Munoz but agreed to reinstate him if he entered alcohol rehabilitation. The JPLRC also required that Munoz stipulate to living in a sober living environment for at least a year and continue to work a minimum of five days per week, among other things. Munoz was told that any violations of the stipulations would result in his automatic termination with no right to appeal. After his disability leave ended, Munoz entered a 21-day inpatient alcohol treatment, which lasted until April 17, 2008, as a requirement under his last chance stipulation agreement.

Munoz apparently continued to be employed at the ports but was terminated on October 13, 2008, for failing to inform the JPLRC of the name and address of the sober living facility in which he was supposed to live. His termination was reversed when Munoz explained that he believed it was the facility manager's responsibility to provide this information. Munoz again failed to comply with the 70 percent rule in November 2008. He was terminated as a result.

Munoz claims that he verbally communicated his disabilities to Defendants throughout the JPLRC hearings and requested accommodations, which were not met. Munoz filed a wrongful termination suit against Defendants on March 22, 2010, alleging they discriminated and retaliated against him due to his disabilities. Defendants moved

for summary judgment on all of Munoz's claims on February 3, 2011, on the grounds that Munoz did not suffer from a legally protected disability, did not inform Defendants of his purported disabilities and was properly terminated for failure to comply with the CBA's attendance requirements. The trial court granted Defendants' motion and summary judgment was entered against Munoz on July 11, 2011. Munoz filed his notice of appeal on September 7, 2011.

DISCUSSION

On appeal, Munoz contends that genuine issues of material fact preclude summary judgment on each of his causes of action. We disagree. Munoz has failed to present any evidence which creates a triable issue of fact with respect to whether he is disabled or whether Defendants knew about his purported disability. These two facts are necessary elements to each of his causes of action. We also reject Munoz's contention that the trial court erred in its evidentiary rulings.

I. Standard of Review

The standards by which we review a motion for summary judgment are well established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853-856.) We determine de novo whether a triable issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. (*Id.* at p. 860.) A triable issue of fact exists when the evidence reasonably permits the trier of fact, under the applicable standard of proof, to find the purportedly contested fact in favor of the party opposing the motion. (*Id.* at pp. 853-856.) Accordingly, we must consider all of the evidence and inferences which may reasonably be drawn from them. We must also view such evidence in the light most favorable to the opposing party. (*Ibid.*; *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 876-877.)

In an employment discrimination case, summary judgment is warranted where a defendant employer is able to show either that the plaintiff employee could not establish one of the elements of his claim, or there was a legitimate, nondiscriminatory reason for the decision to terminate his employment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355-356; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253

(*Nazir*).) To defeat summary judgment, the employee must show that a triable issue of material fact exists as to a particular cause of action. (*Nazir*, at p. 253; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 956.)

II. Munoz Failed to Raise a Triable Issue of Material Fact

Munoz has alleged seven causes of action, all of which relate to disability discrimination. His claims are primarily based on the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900, et seq.)[1]. FEHA proscribes certain unlawful employment practices, including when an employer:

(1) discriminates against an employee with a physical or mental disability (§ 12940, subd. (a); first cause of action); or

(2) fails to make reasonable accommodation for the known physical or mental disability of an or employee (§ 12940, subd. (m); second cause of action); or

(3) fails to engage in a timely, good faith, interactive process with the employee to determine effective reasonable accommodations (§ 12940, subd. (n); third cause of action); or

(4) fails to prevent discrimination and harassment of an employee based on a disability (§ 12940, subds. (j)-(k); fourth cause of action).

Munoz's remaining causes of action rest on allegations of wrongful termination (fifth and sixth causes of action) and retaliation (seventh cause of action) based on his disability. Necessary elements of all of Munoz's causes of action are that he have a qualifying disability and that Defendants knew of the disability. (§ 12940, subd. (a); *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1248; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1006; *King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 442.) "[T]o qualify as physically 'disabled' under [FEHA] the claimant must have, or be perceived as having, a 'physiological' disorder that affects one or more of the basic bodily 'systems' and limits the claimant's ability 'to

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1 All further statutory references are to the Government Code.

participate in major life activities.'" (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1059; see also § 12926, subd. (*l*).)

The trial court below found that Munoz failed to raise a triable issue of material fact concerning his purported disabilities and Defendants' knowledge of these disabilities. Munoz, on appeal, glosses over the trial court's findings and insists that, "[i]t is undisputed that Mr. Munoz was disabled." Munoz relies solely on the head injury he suffered in 2003 in Port Hueneme as proof that he was disabled. He further contends in his opening brief that Defendants knew about his disability because they were aware of his accident in 2003 and he verbally advised them of his disabilities at the JPLRC hearings. Munoz, however, fails to cite to any evidence in the record to support these arguments. This failure alone provides sufficient grounds to dispense with his appeal. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; Cal. Rules of Court, rule 8.204(a)(1)(C).)

Nonetheless, we have made an independent review of the record to determine what evidence, if any, Munoz presented below in support of his opposition to the summary judgment motion. As the trial court did, we find the evidence[2] presented by Munoz fails to create a triable issue of material fact as to whether he had a qualifying disability or whether Defendants knew about his disability.

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[2] When reviewing a trial court order granting summary judgment, "[w]e consider '"all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence." ' [Citation.]" (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 507.) The trial court sustained 27 of the 44 evidentiary objections submitted by Defendants to Munoz's supporting evidence. Munoz contends this "blanket" ruling is in error and should be reversed. For the reasons stated in part III, we conclude the trial court did not abuse its discretion in sustaining Defendants' objections. However, our analysis remains the same even if we consider all of the evidence submitted by Munoz.

A. Munoz Failed to Raise a Triable Issue of Material Fact Concerning His Disability

In opposition to the motion for summary judgment, Munoz submitted his own declaration which described the injury he sustained in 2003 and that, as a result, he "was diagnosed with the following disabilities: head, neck and cardiovascular disabilities. These disabilities precluded me from working five full days a week." That is the sum total of his description of his disability and its effects. Munoz provides no indication these "head, neck and cardiovascular disabilities" continued beyond 2003. Neither does he mention how these particular disabilities restricted his major life activities. Munoz, in fact, admitted at his deposition that he was able to do all of the jobs required of him after the 2003 injury. He also had the ability to talk and walk after the injury.

Attached to Munoz's declaration was a copy of the workers compensation claim form for the 2003 injury and questionnaires completed by Munoz which listed the medications he took "as a result of [his] neurological disorders." Munoz also included a 2006 evaluation by Defendants' doctor made in connection with his workers compensation claim for the 2003 injury as well as a number of medical records dating from 2003. None of these records demonstrate a disability in 2007 or 2008. More importantly, none of these records indicate that Munoz's major life activities were restricted in any way or that he could not fully perform his job in 2007 and 2008. Indeed, Defendants' doctor noted in his 2006 evaluation that Munoz "remained on temporary total disability for four months and then returned to regular duties in late July or early August of 2003. He is currently performing his regular duties without restriction." Neither Munoz's declaration nor any of these documents raise a triable issue of material fact as to whether Munoz had a qualifying disability in 2007 and 2008.

B. Munoz Failed to Raise a Triable Issue of Material Fact as to Defendants' Knowledge

Munoz also stated in his declaration that he "notified Defendants of this [disability] numerous times (a) in May of 2003 when he sought workers compensation benefits from them, (b) when defendants settled the workers compensation litigation

delineating this exact same mental based disabilities, (c) at my physical examinations when I was elevated to a Class B registration by delineating my written questionnaire delineating his blood thinning medicines I was forced to continually take as a result of the stroke, and (d) orally at each of the Labor Relations Committee hearings in 2007 and 2008 related to my purported failures to satisfy Defendant 70% availability rule."

" 'An adverse employment decision cannot be made "because of" a disability when the disability is not known to the employer.' " (*Avila, supra,* 165 Cal.App.4th at p. 1247.) For example, in *Avila,* forms submitted by the plaintiff's health care provider showed he had been hospitalized for three days but did not contain sufficient information to put the employer on notice that the plaintiff suffered from a disability. (*Id.* at pp. 1247-1248.) While Defendants may have known Munoz had been injured in 2003, this awareness does not equate to knowledge he was disabled in 2007 and 2008. Even if we consider Munoz's unauthenticated and unexplained medical records to be proof of a disability, there is no evidence that they were given to Defendants. The record shows that members of the JPLRC testified Munoz never told them he had any disability. Rather than submit medical evidence of his disabilities, Munoz submitted documents showing his car had broken down.

Further, it is not self-evident that someone who is taking blood thinning medication is also disabled. Finally, Munoz's oral representations to the JPLRC in 2007 and 2008 that he had a disability, without any medical proof, is insufficient to create a triable issue of fact concerning Defendants' knowledge. Munoz's argument that the duties and protections under FEHA are triggered simply by an unsubstantiated statement of disability is meritless. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 237.) There is no notation in the minutes of the hearings or any other record of the hearings showing Munoz alerted the JPLRC he continued to suffer a disability from the 2003 injuries. Certainly, there are no records to show he offered proof, written or otherwise, to substantiate a continued disability. The record instead shows that Munoz told the JPLRC he had an alcohol problem, which Munoz admits was untrue, which formed the basis for his last minute stipulations.

"While knowledge of [a] disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts." (*Brundage v. Hahn, supra,* 57 Cal.App.4th at p. 237.) Defendants could reasonably infer any problems Munoz was having due to an injury in 2003 were resolved and did not affect any major life activities in 2007 and 2008. In sum, Munoz's evidence fails to raise a triable issue of material fact as to Defendants' knowledge of his purported disabilities.[3]

We further reject Munoz's claim that FEHA applies not only to those persons who actually have a qualifying disability but also to those who are "regarded as" disabled. There is no indication in the record and Munoz has offered no evidence that Defendants regarded Munoz as disabled. As to Munoz's common law claims for wrongful termination, Munoz acknowledges that they are "derivative" of his FEHA claims. Since we have found that Munoz failed to raise any triable issue of material fact as to his FEHA-based claims, we reject his challenge to the trial court's summary judgment on these claims on the same grounds.

III. Evidentiary Rulings

Munoz next contends the trial court erred when it overruled 20 out of the 21 evidentiary objections he made in his response to Defendants' separate statement of material facts. Munoz claims the trial court's ruling on his objections is "wholly problematic" when compared to its ruling sustaining the "vast majority" (27 out of 44) of Defendants' evidentiary objections. Munoz relies on *Nazir, supra,* 178 Cal.App.4th at pages 255-256 to support a reversal of the trial court's "blanket" evidentiary rulings. We review the court's ruling for an abuse of discretion and find none. (*Ibid.*)

In *Nazir*, it was evident the trial court abandoned its duty to make a ruling guided and controlled by fixed legal principles. (*Nazir, supra,* 178 Cal.App.4th at p. 255.) There, the trial court sustained all but one of the defendants' 764 objections to the

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[3] Given our findings, we need not address Munoz's remaining claims that he raised triable issues of material fact regarding whether Defendants made reasonable accommodations and whether they engaged in the interactive process under FEHA.

plaintiff's evidence. (*Id.* at p. 254.) These included objections which were frivolous, objections to the plaintiff's brief and not to any evidence, objections which did not assert any basis for the objection, and objections to plaintiff's testimony about his dates of employment, his religion, his skin color, and his national origin. (*Id.* at p. 256.)

There is no indication that the trial court in this matter similarly abandoned its duty, much less abused its discretion. The objections made by Defendants in this case are supported by legal authority and do not appear frivolous. Indeed, Munoz fails to identify which evidentiary ruling is wrong and why. Instead, he contends they should all be reversed simply because the trial court ruled against him. Munoz has provided no grounds for reversal of the trial court's evidentiary rulings.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

SORTINO, J.*

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