Filed 10/31/17 Barrett v. Twentieth Century Fox Film Corp. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KEVIN B. BARRETT, Plaintiff and Appellant, v. TWENTIETH CENTURY FOX FILM CORPORATION, Defendant and Respondent.	B276023 (Los Angeles County Super. Ct. No. BC558765)

APPEAL from a judgment of the Superior Court of Los Angeles County. Soussan G. Bruguera, Judge. Affirmed.

Law Offices of Alvin L. Pittman and Alvin L. Pittman for Plaintiff and Appellant.

21st Century Fox Legal LA, Timothy S. Lykowski and Christiane A. Roussell for Defendant and Respondent.

Plaintiff and appellant Kevin B. Barrett (Barrett) challenges a judgment entered in favor of defendant and respondent Twentieth Century Fox Film Corporation (Fox) following Fox's successful motion for summary judgment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Fox hires Barrett; Barrett's initial job duties

Fox hired Barrett, who is African-American, in 2003, when Barrett was 48 years old, as associate director of film preservation in Fox's preservation and restoration department. Barrett was hired by Schawn Belston (Belston) and reported to Belston for several years. In 2005, Belston promoted Barrett to director of film preservation. Throughout his employment with Fox, Barrett managed two direct reports, Barbara Crandall (Crandall) and Michael MacKinnon (MacKinnon).

In 2005, Fox transferred Caitlin Robertson (Robertson), a Caucasian woman allegedly in her early 30's,[1] from the finance department into the restoration and preservation department, where she worked alongside Barrett. In 2008, Robertson was promoted to executive director; soon after, Barrett began reporting to her.

For the first few years he reported to Robertson, Barrett performed at a satisfactory level and Robertson gave him solid performance reviews.

---

[1] Barrett asserts that Robertson was "in her early 30s." The parties do not direct us to any portion of the record confirming Robertson's age.

According to Barrett, from the beginning of his employment until approximately 2011, his job duties remained constant. Those duties included restoring audio and restoring picture for mastering for Fox film properties. Barrett testified that these were his only job duties during that time and they were all photochemical duties. Prior to 2011, Barrett did not have digital duties and did not produce electronic deliverables.

Transition to digital preservation

Several years ago, Barrett's department began updating its processes in light of changes in technology. This resulted in two notable changes: (1) Fox implemented a new electronic system for purchase orders (PO's); and (2) Fox began to transition all film restoration from photochemical to digital. Digitization altered the nature of Barrett's work and also increased the volume of his work because Fox's film library was now going to be digitized.

Barrett's performance problems and termination

Barrett could not keep up with the transition to an electronic PO system and, thus, his performance under the new system deteriorated.[2] He repeatedly failed to complete PO's accurately or in a timely manner. By his own testimony, he was "always" delayed in completing his PO's. Despite Robertson's repeated requests that he complete PO's before vendors

---

[2] According to Barrett, he repeatedly asked Robertson for assistance, including a data input person to free Barrett to discharge his other duties, but she refused. He complained to Robertson that the treatment of him, the only African-American director, was unfair when compared to other departments. Barrett contends that Caucasian directors were given "significantly more staff and resources."

performed work for Fox, Barrett regularly failed to do so. Moreover, when he did complete PO's, he often did so incorrectly. Barrett also failed to complete his other work assignments timely, as he routinely failed to meet deadlines for his digital deliverables. Robertson often had to e-mail Barrett multiple reminders to complete his assigned tasks. And, Barrett exhibited poor communication skills. He often did not communicate clear expectations to vendors, would not follow up, and would not respond to requests for updates or actions in a timely manner, resulting in confusion and delays in his work flow and completion of assignments.

In addition, Barrett did not manage his subordinates effectively. For example, he did not train either of his subordinates on the PO system so that they could provide meaningful assistance. He also failed to hold his direct reports accountable for their work. For example, when Crandall made mistakes in her PO's, Barrett simply corrected them without telling her what she did wrong. Robertson told Barrett that she needed him to improve his management of his direct reports. Barrett acknowledged in an e-mail to Robertson that he needed to manage Crandall better, but he never identified any steps that he took to do so, aside from telling Crandall that "the pressure . . . was on" and she should do the best she could.

Robertson was patient with Barrett and tried to give him time to come around, but Barrett was resistant. Robertson eventually placed him on a performance improvement plan (the plan). Robertson met with Barrett and Kellie Kluchinsky (Kluchinsky) in Fox's human resources department on April 1, 2013, to discuss the plan and review a written warning. The written warning outlined the performance problems set forth

above, including poor communication skills and failure to complete work in a timely fashion. The warning gave specific examples of Barrett's performance issues and set forth Robertson's expectations of how he needed to improve his communication and performance deficiencies. In an effort to help track Barrett's workflow and improve his performance, Robertson asked Barrett to send her a weekly e-mail update and scheduled a weekly meeting with him to discuss his work.

Barrett did not rebut the written warning, acknowledging at his deposition that he understood that if he did not improve his performance, he would face further disciplinary action, including termination. Despite this, Barrett admitted that his performance did not improve. At his deposition, he stated that he "basically [kept] doing [his] job the same as [he] had always done" and that he did "nothing but try to do the same that [he had] always done."

In light of Barrett's continued performance deficiencies, in June 2013, Robertson gave Barrett a written warning addendum and again met with him and Kluchinsky to discuss his deficiencies and Robertson's expectations. In that meeting, Robertson explained the performance issues outlined in the addendum, encouraging Barrett by acknowledging some improvements while also itemizing the additional areas that needed to improve. Barrett did not respond well, admitting that he "had a very smug attitude in that meeting." He understood that he could be terminated if he did not improve his performance, and yet, he refused to do so, testifying that even the second meeting with Robertson and Kluchinsky, "I don't feel that I improved. . . . Sometimes work would get out and sometimes it didn't."

Barrett's subpar performance negatively impacted Fox's business. For example, Barrett admitted that Robertson saved the company money by catching his errors. Additionally, he was causing the entire department to function inefficiently since he was not properly managing his subordinates or holding them accountable, he was not completing his own assignments in a timely manner, and Robertson had to spend a significant amount of time correcting his errors, to no avail. Moreover, as Barrett admitted, his inability to keep up with the work caused a "domino effect," and Barrett's department thus impeded work that other departments at Fox needed to complete.

As a result of Barrett's ongoing unsatisfactory performance, his employment was terminated on September 13, 2013.

Improvement of the department

For more than nine months after Barrett's termination, Robertson did not replace Barrett; rather, she handled the bulk of his former job duties herself, with the assistance of Barrett's former subordinates, Crandall and MacKinnon. While handling his former duties, Robertson realized that they were not as complex as Barrett had made them seem, and concluded that the position could be handled by someone at a more junior level. She thus downgraded the position two levels before hiring Barrett's replacement, Victoria Stevenson, who was in her 50's when she was hired.

Since Barrett's employment was terminated, the department has run more smoothly, management and communication have improved, and work has been completed in a more timely manner.

Alleged discrimination

According to Barrett, Robertson made allegedly discriminatory remarks to him. Specifically, Barrett alleges age discrimination based upon Robertson's comment to him and his crew: "It's a new day. It's not like the old days in film when you guys handled it." He alleges race discrimination based upon the following two remarks. In around 2009, Robertson told Barrett that, "as a Black man, you should be commended for reaching the level of Director at Fox, without a college degree." Also that year, as a Fox employee, Robertson attended a high school career day in "South Central Los Angeles," and returned saying that school teachers deserved "hazard pay." After the event, she called the South Central parents that she met "ignorant" and referred to the community where the school was located as "the ghetto." Robertson had said, "I doubt that the kids attending the school will ever get out of the ghetto."

Procedural Background

Barrett filed the instant lawsuit against Fox on September 25, 2014, alleging claims for employment discrimination on the basis of age, race, and sexual orientation and retaliation in violation of the Fair Employment and Housing Act (FEHA) and wrongful termination in violation of public policy. On October 1, 2015, Fox filed a motion for summary judgment. Barrett opposed the motion.

After entertaining oral argument, the trial court granted Fox's motion, finding that Fox had a legitimate, nondiscriminatory reason for terminating Barrett's employment and that Barrett could not establish discriminatory motive, pretext, or causation. Additionally, regarding Barrett's retaliation cause of action, Barrett did not establish that he was

engaged in a protected activity and/or that there was a causal link between any protected activity and the termination of his employment.

Judgment was entered for Fox, and Barrett's timely appeal ensued.

DISCUSSION

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

In exercising our de novo review, we 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.'" (*Artiglio v. Corning Inc.* (1998) 18

Cal.4th 604, 612; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) We review a trial court's ruling on the exclusion of evidence in a summary judgment proceeding for abuse of discretion. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427.)

II. *The Judgment is Affirmed*

A. Barrett's Discrimination Claims[3]

Barrett's claims for discrimination on the basis of age, race, and sexual orientation are governed by the FEHA. Government Code section 12940, subdivision (a), provides, in relevant part: "It is an unlawful employment practice, . . . [¶] (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).)

---

[3] Barrett spends much time in his opening brief arguing that the trial court erred in sustaining objections to certain evidence he offered in opposition to Fox's motion. We need not decide whether the objections were wrongly sustained. Even if we considered all of the purported evidence that was excluded by the trial court, we would still conclude, for the reasons set forth below, that the trial court properly granted Fox's motion for summary judgment.

California courts have adopted a three-part burden shifting test for adjudicating claims of discrimination under the FEHA. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) Under this test, the plaintiff bears the initial burden of proving a prima facie case of discrimination. (*Ibid.*) Generally, the plaintiff must provide evidence that he (1) was a member of a protected class, (2) was qualified for the position sought or was performing competently in the position held, (3) suffered an adverse employment action, such as denial of an available job, and (4) some other circumstance suggests discriminatory motive. (*Ibid.*) If the plaintiff establishes a prima facie case, a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption. (*Ibid.*)

An employer seeking summary judgment in a FEHA discrimination case meets its burden by showing that one or more elements of a prima facie case is lacking, or that legitimate, nondiscriminatory reasons existed for the adverse employment action. "'[L]egitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*. [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 358.)

Following such showing by the employer, the burden again shifts to the employee to demonstrate that the reasons for termination are a pretext and that the employer acted with a discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at pp. 354–356.) To do so, the employee must present "'substantial responsive evidence' that the employer's showing was untrue or pretextual. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735 (*Martin*).) An employee may raise a triable issue of fact regarding pretext by presenting evidence of

implausibilities, inconsistencies, or contradictions in an employer's proffered reason, or with direct evidence of a discriminatory motive. (*Guz*, *supra*, at pp. 356, 363.) To raise a triable issue of fact, however, the employee's evidence must do more than present a "weak suspicion" that discrimination was a likely basis for the termination. (*Id.* at pp. 369–370.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, fn. omitted.)

1. *Age Discrimination*

In the first cause of action of his complaint, Barrett alleges age discrimination. The elements of a cause of action for age discrimination are: (1) at the time of the adverse action the employee was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his job and (4) the employee was replaced by a significantly younger person. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003 (*Hersant*).)[4]

"When the employee has made this showing, the burden shifts to the employer to go forward with evidence that the adverse action was based on considerations other than age discrimination. When the employer offers evidence justifying the

---

[4] This fourth element is not always an element of the plaintiff's prima facie case. (*Hersant*, *supra*, 57 Cal.App.4th at p. 1003, fn. 3.) Depending on the circumstances of the case, the plaintiff needs to show that "some other circumstance suggests discriminatory motive." (*Guz, supra*, 24 Cal.4th at p. 355.)

adverse action on a basis other than age, the burden shifts back to the employee to meet his ultimate obligation of proving that the reason for the adverse action was age discrimination." (*Hersant*, *supra*, 57 Cal.App.4th at p. 1003.)

Here, Fox offered evidence that Barrett's employment was terminated for legitimate business reasons, namely his continued poor performance. As Barrett even admitted, he was unable to keep up with the demands of his work, and his performance did not improve after he was placed on a performance improvement plan, received written warnings, and met with his supervisor regularly to discuss his work performance.

In light of this evidence, the burden shifted to Barrett to establish that these reasons were pretext for intentional discrimination. He failed to do so. As for Robertson's comment, "It's a new day. It's not like the old days in film when you guys handled it," it is not evidence of bias against older employees. At best, it reflects the change from photochemical restoration to digital restoration.

Even if this comment were somehow construed to be ageist, a stray remark is not evidence of pretext of intentional discrimination (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 810; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705), particularly given the context here. Contrary to Barrett's contention, Robertson had consistently hired and promoted older employees, including Barrett's former subordinates, Crandall and MacKinnon, who were 56 years old and 59 years old, respectively, when Barrett was terminated. And, Stevenson was 52 years old when she was hired. Notably, the only person who Robertson hired at Fox, Gianna Babando, was 49 years old when Barrett's employment was terminated.

Robertson's hiring history undermines his age discrimination claim. (*Ripberger v. Corizon, Inc.* (7th Cir. 2014) 773 F.3d 871, 880–881.)

Moreover, Barrett cannot identify any "similarly situated" younger employees who were treated more favorably than he was. (See, e.g., *Patterson v. Avery Dennison Corp.* (7th Cir. 2002) 281 F.3d 676, 680.) While Barrett contends that he was not treated as fairly as certain employees in Fox's technical services department and one employee in digital vaults, Robertson did not manage those employees. Those employees were not similarly situated to Barrett.

Finally, we are puzzled by Barrett's contention that "[t]he circumstantial evidence of age discrimination includes the facts that Robertson, Caucasian and in her early thirties, was brought in without any experience in film preservation, and after being trained by Barrett and his staff of two hourly employees, she became the boss." Aside from the fact that Barrett offers no evidence of Robertson's age, we do not see this contention as evidence of age discrimination. How could Robertson, the only person who allegedly discriminated against Barrett, have discriminated against Barrett by getting promoted?

2. *Race Discrimination*

As set forth above, in order to establish a prima facie case for discrimination based on race, Barrett had to provide evidence showing that he (1) was a member of a protected class, (2) was qualified for the position sought, (3) suffered an adverse employment action, such as denial of an available job, and (4) some other circumstance suggesting a discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at p. 355.) Here, Barrett offers no evidence of discriminatory animus.

In urging reversal, Barrett points to two isolated comments that he claims Robertson made in 2009, four years before his employment was terminated. First, Barrett asserts that in 2009, Robertson told him that he should be commended as a black man for reaching the level of director without having a college degree. But, as Barrett testified, he believed that Robertson intended the comment as a "compliment," not to offend him, thus confirming that the comment does not suggest discriminatory animus. Moreover, the comment was made four years before Fox terminated Barrett's employment, further refuting any inference of discriminatory animus. (*Clark County School Dist. v. Breeden* (2001) 532 U.S. 268, 273–274 [temporal proximity must be very close to establish causality].)

Second, Barrett refers to comments made by Robertson to him after he returned from volunteering at a school. According to Barrett, Robertson said that the school teacher deserved "hazard pay," that she saw some "ignorant" parents and children at the school, and that they would probably never get out of the "ghetto." Again, these comments were made in 2009, four years before Barrett's employment was terminated. And, the comments include no reference to the race of the people to whom she was referring; rather, as Barrett testified, he "infer[red]" that her comments must have been related to Black or Latino persons.

In any event, as set forth above, Fox presented evidence of a legitimate, nondiscriminatory reason why Barrett's employment was terminated. The burden then shifted to Barrett to provide "'substantial responsive evidence'" that Fox's reason was a pretext and that the real reason for his termination was racial discrimination. (*Martin*, *supra*, 29 Cal.App.4th at p. 1735.)

For the same reasons discussed above, Barrett failed to meet this burden.

3. *Sexual Orientation Discrimination*

In the fourth cause of action of his complaint, Barrett asserted a claim for sexual orientation discrimination. In opposition to Fox's motion for summary judgment, Barrett conceded that he did not have evidence to raise a triable issue of fact on this claim, and the trial court summarily adjudicated Fox's motion on this basis. Barrett does not challenge the trial court's ruling on appeal. Thus, we see no basis to disturb the trial court's order.

B. Retaliation

To state a prima facie case of retaliation (Gov. Code, § 12940, subd. (h)), Barrett must show that he was engaged in a protected activity, that he was subjected to an adverse employment action, and that there is a causal link between the protected activity and the adverse employment action. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 217; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 (*Flait*).) "'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision."' [Citation.]" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615.)

Barrett's claim for retaliation fails because he never complained to anyone at Fox about discrimination. While he complained that his workload was too heavy and that other departments had more staffing, those are not protected activities.

Urging reversal, Barrett contends that he was not required to use "legal terms or buzzwords to complain about discrimination." While that may be true, we cannot take the conclusory leap that Barrett takes—"[t]he only reasonable inference from the context of his complaints is that he was referring to his protected status as the only African American Director."

In any event, even if Barrett could state a case of retaliation, his claim still fails as a matter of law because he has no evidence to rebut Fox's nonretaliatory reasons, set forth above, for the termination of his employment. (*Flait*, *supra*, 3 Cal.App.4th at pp. 475–476.)

C. Wrongful Termination in Violation of Public Policy

Barrett's fifth cause of action for wrongful termination in violation of public policy is based solely on the alleged FEHA violations. As set forth above, Barrett's FEHA claims do not survive summary judgment. It follows that this cause of action fails as well. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229.)

DISPOSITION

The judgment is affirmed. Fox is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J. *
GOODMAN

---

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