Filed 3/28/12 Cox v. San Luis Obispo County Sheriff's Dept. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

EDWARD COX, Plaintiff and Appellant, v. SAN LUIS OBISPO COUNTY SHERIFF'S DEPARTMENT, Defendant and Respondent.	2d Civil No. B231260 (Super. Ct. No. CV080643) (San Luis Obispo County)

Plaintiff Edward Cox appeals a summary judgment granted in favor of defendant San Luis Obispo County Sheriff's Department (Department). He claimed the Department terminated him from his position as a probationary correctional officer because of disability discrimination. (Gov. Code, § 12940 et seq.)[1] We conclude, among other things, that the trial court properly granted summary judgment because: 1) the Department presented evidence showing that Cox was terminated because of unsatisfactory job performance during his probationary period, and 2) Cox did not meet his burden to show a triable issue of fact. We affirm.

[1] All statutory references are to the Government Code.

FACTS

The Department hired Cox as a correctional officer. When he was hired, Cox was informed that he had a six-month probationary period and that if he did not adequately perform his job functions he could be terminated during that period. The Department evaluated Cox's performance and progress. It terminated him because he did not successfully complete his probationary training period while working at the jail.

Cox claimed that he suffered from cerebral palsy and the Department terminated him because of that disability. He filed an action against the Department alleging causes of action for disability discrimination, wrongful termination and intentional infliction of emotional distress.

The Department filed a motion for summary judgment claiming that it had a legitimate nondiscriminatory reason to terminate Cox's employment--his poor job performance. It attached declarations from several of Cox's supervisors who stated that his performance on a variety of job functions was unsatisfactory and that he fell below the acceptable standards for a correctional officer.

Cox filed an opposition which included, among other things, a series of evaluations of his work performance by additional training supervisors. In his declaration, Cox said his cerebral palsy limits his ability to walk, run and "perform any tasks that involve balance." Cox said that on September 17, 2007, his father, mother and aunt met with Deputy Chief Rob Roy Reid to notify him about his (Cox's) "belief that [he] was being treated differently because of [his] cerebral palsy." Reid reviewed Cox's training records and determined that the training Cox had received was "appropriate" and there was no need "to begin a new training regimen."

The trial court granted summary judgment against Cox on all three causes of action. It found "there is little to no evidence that [Cox] was capable of adequately performing the necessary job functions required for a correctional officer. Likewise, there is no evidence presented by [Cox] to suggest any adverse action was taken against [him] based upon his alleged disability. In fact, the alleged limitations due to [Cox's]

cerebral palsy appear not to have any relation to all of the categories in which [he] was found not to be acceptable."

The trial court ruled that his cause of action for intentional infliction of emotional distress arose "out of personnel management activity normally associated with the employment relationship. Any alleged insults or indignities do not rise to the level of outrageous conduct . . . ."

DISCUSSION

Summary Judgment on Disability Discrimination and Wrongful Termination

Where a defendant moves for summary judgment, it must "'make a prima facie showing that the plaintiff does not possess, and cannot reasonably obtain, sufficient evidence to establish at least one element of plaintiff's cause of action.'" (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 507.) "'On appeal, we review the record de novo to determine whether the moving party met its burden of proof.'" (*Ibid*.)

California "prohibits discrimination based on an employee's" physical or mental disabilities. (*Green v. State of California* (2007) 42 Cal.4th 254, 262; § 12940.) To establish a cause of action for employment disability discrimination, the plaintiff must prove that: 1) he or she has a disability that results in "a 'limitation' upon a major life activity" (§ 12926.1, subd. (c)); 2) he or she can perform the job with or without reasonable disability accommodations; and 3) the employer took an "adverse employment action" against the employee because of his or her disability. (*Green*, at p. 262.)

In his opposition to summary judgment, Cox claimed that he had established that his cerebral palsy met the standard of limiting his "major life activity of walking and running" under section 12926.1. In his attached declaration, he said his cerebral palsy limited his ability to balance, his hand and eye coordination, his reaction time, and his ability to walk and run. But in his prior deposition, Cox was asked, "Do you believe that your cerebral palsy restricts you from doing things?" Cox answered, "No." He was asked, "Do you believe that your cerebral palsy restricts you from doing

any things as a correctional officer?" Cox answered, "No." Cox also testified that he had never asked for "physical accommodation because of [his] cerebral palsy," and he did not feel that he was "due" an accommodation. Where a plaintiff's declaration is contradicted, as here, by his prior unequivocal admissions in his deposition, there is no substantial evidence to support the existence of a triable issue of fact. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Moreover, in his pre-employment medical evaluation, Cox described his medical history and said his health was "excellent." He did not mention that he had any physical disability limiting his ability to walk, run or balance.

Cox notes that his father, mother and aunt told Deputy Chief Reid that he had cerebral palsy. But "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." (*Kelly v. Drexel University* (3rd Cir. 1995) 94 F.3d 102, 109.) Consequently, the critical issue is not whether Reid knew Cox had a disability, it is whether the Department wrongfully discriminated or discharged him because of it.

The Department's Evidence about Cox's Job Performance

The Department claims Cox was discharged solely because of his poor job performance. "If the employer presents admissible evidence . . . that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1996) 41 Cal.App.4th 189, 203.)

Here the Department presented evidence showing it had a legitimate non-discriminatory reason for terminating Cox. It submitted the declaration of Michael Thompson, a correctional sergeant, who oversaw Cox's training and reviewed the Daily Observation Reports (DOR's) by Cox's supervisors. Thompson recommended that Cox not pass his probationary training for multiple reasons: 1) Cox "was unable to retain new

information" provided by senior correction officers; 2) he lacked an understanding of safety and security issues; 3) he "routinely demonstrated unsafe practices which could have resulted in . . . fellow Correctional Officers becoming injured"; 4) he "struggled to complete basic tasks"; and 5) he lacked the "ability or the desire to meet the minimum job requirements."

In his declaration, Correctional Sergeant Timothy J. Moore said Cox had deficient performance which included: 1) Cox's inability "to write an incident report"; 2) his reports omitted "necessary details" and contained "multiple spelling errors"; 3) Cox returned to work 20 minutes late from his lunch breaks; 4) he was unable to identify "protective custody cells" and did not keep written reports to track "inmate movements"; and 5) he "passed a lunch tray to a mental health inmate with his keys in the same hand," a security violation. Moore recommended that Cox not pass probation.

Senior Correctional Officer Michael Choate stated in his declaration that: 1) Cox had "an unacceptable level of knowledge of the layout of the main jail"; 2) he had "problems with judgment, oral communication, self confidence, report writing, supervision of inmates and emergency procedures"; 3) he "had trouble turning the locks" in the jail; and 4) Cox's "rating scores" for a majority of the areas of correctional officer competency "were not acceptable."

Training Officer Raymond Tietje said Cox "made repeated errors on routine forms." He said Cox "worked too slowly," failed to complete tasks, "frequently [forgot] instructions," exhibited "a lack of progress," was "significantly below minimum . . . levels of competency," and that Cox's "evaluations were dismal."

These declarations were strong evidence of unsatisfactory performance for a correctional officer. Cox was a probationary employee. As such, the Department could promptly terminate his employment during his probationary period for poor performance. (§ 19173; *Boutwell v. State Board of Equalization* (1949) 94 Cal.App.2d 945, 949.) "Broad discretion reposes in governmental agencies to determine which probationary employees will be retained." (*Phillips v. Civil Service Com.* (1987) 192 Cal.App.3d 996,

1000.) Cox understood this. In his deposition, Cox testified that he knew there was a six-month probationary period and he knew the consequences of poor performance. He said, "[I]f they found any reason that you could not perform the duties of the job, you could be terminated within the six-month period with no questions."

Cox's Evidence on Performance Evaluations

In opposition to summary judgment, Cox submitted a separate statement of facts and claimed there were evaluations by superiors that showed that he performed in a satisfactory manner during his probationary period. He referred the trial court to evaluations by Correctional Officers Haynes and Pino. Haynes's DOR of September 6, 2007, reflects that Cox had acceptable performance levels in a variety of areas. But consistent with the evaluations by Thompson, Moore, Tietje and Choate, Haynes determined Cox's performance to be unacceptable in the areas of oral communication, appropriate use of radio codes, articulation of transmissions by radio, supervision of inmates, Department policies and procedures, scheduled daily activities, professionalism, demeanor, emergency procedures and report writing. Knowledge of emergency procedures and report writing are important components of a law enforcement officer's job. (*Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1330; *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 588; *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, 481-482; see also *Ratliff v. City of Milwaukee* (E.D. Wis. 1985) 608 F.Supp. 1109, 1126.)

Cox referred the trial court to a DOR dated September 7, 2007, by Officer Pino, which rated Cox's performance as acceptable in a variety of areas. But Pino also found unacceptable performance in the areas of oral communication, "scheduled daily activities," and emergency procedures.

Cox claimed there was favorable evidence in DOR's of other officers, such as Officer Tietje. Tietje rated Cox's performance acceptable in a few areas. But for the most part these evaluations found Cox's performance to be unsatisfactory. Moreover, in a "remedial training assignment worksheet," Tietje noted a serious problem that Cox was "falsifying" a "special observation log."

Cox also attached a July 17, 2007 DOR from Supervisor Price. But that report reflected that Cox's performance was unsatisfactory in 21 of the 31 performance categories. In four subsequent DOR's, Price consistently found that Cox's performance in the area of emergency procedures was "not acceptable." Cox attached a July 3, 2007 DOR from Officer Golding. But that report indicated that Cox's performance was "not acceptable" in 20 of the 31 performance categories. Golding noted that Cox made a serious mistake, which resulted in a female inmate being placed in a cell with male inmates, and that his performance in emergency procedures was "not acceptable." Cox attached a June, 26, 2007 DOR from Officer Froehner. But this report indicated that Cox's performance involving emergency procedures was "not acceptable" and that his performance in 20 other categories was unsatisfactory.

The reports cited by Cox, combined with the evaluations found in the declarations in support of summary judgment, show a consistent pattern of Cox's unsatisfactory performance in areas essential for law enforcement officers, such as knowledge of emergency procedures. Probationary correctional officers must perform well in this area to advance. "'Unquestionably, a broad discretion reposes in governmental agencies to determine which [such] employees they will retain.'" (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 783.) California's Fair Employment and Housing Act (FEHA) "does not take away an employer's right to interpret its rules as it chooses." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344; *Davis v. City of Dallas* (5th Cir. 1985) 777 F.2d 205, 217 ["where [the] job involves responsibility for the safety of others, the 'public interest is paramount and justifies high employment standards'"].) Because of the dangers inherent in law enforcement, Cox has not shown why the Department could not reasonably decide that only the most highly qualified should be retained. Cox did not show from his performance evaluations that he fell within that category or that his performance was acceptable.

Other Evidence Cox Submitted to Show His Ability to Perform the Job

Cox attached the deposition of Andrew Rasmussen. The Department objected to its admission and the trial court sustained the objection. Cox has made no showing of trial court error in sustaining the objection.

But even considering this evidence on the merits, the result does not change. Rasmussen testified that he was Cox's supervisor when Cox was an explorer scout. He said Cox performed well as a scout. Cox followed orders, made phone calls to other explorers, and prepared for upcoming scouting events. But as the trial court correctly noted in its tentative decision, this evidence was irrelevant because it had "no bearing on Plaintiff's job performance as a correctional officer." Scouts are not in charge of inmates in jails. Cox failed to meet his burden to show satisfactory job performance at the Department.

Cox's Evidence that His Poor Performance Evaluations Were Pretexts

Cox claims the unfavorable reports by his supervisors were a pretext motivated by an unlawful intent to terminate him because of his physical disabilities.

Where the employer has presented legitimate reasons for the termination, the employee may present evidence that those reasons """were not its true reasons, but were a pretext for discrimination.""" (*Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at p. 343.) But the employee may not rely on speculation to support a claim that the employer's actions were motivated by unlawful discrimination. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 73.) He or she must produce specific evidence showing a "causal link" between the adverse employment action and the unlawful motive. (*Ibid.*) """The [employee] cannot simply show the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer . . . ." (*Arteaga*, at p. 343.) The trial court correctly ruled that Cox did not meet his burden.

In his declaration in support of the motion, Correctional Sergeant Thompson said he was not aware Cox had a disability and his recommendations that Cox

"not pass probation were not based on any disability or perceived disability of the Plaintiff." He met with Cox on October 15, 2007, and prepared a "memorandum," which Cox signed. That memorandum reflects that Thompson told Cox that he was not performing well and he asked Cox "if there was anything [he] could do to help [Cox] improve." Cox replied that he was "having problems retaining information and admitted that it is a problem that is [his] responsibility only." There is nothing in that memorandum to indicate that Cox ever advised Thompson that his problems were related to a disability or that he needed assistance because of any physical limitations. Moore declared that his negative recommendations about Cox's ability to complete his probationary period "had nothing to do with any actual or perceived physical disability." Choate and Tietje also said that they did not take "physical disability" into consideration when making their negative recommendations about Cox.

In his opposition declaration, Cox did not contest these statements by Thompson, Moore, Choate and Tietje, and he never claimed that they ever mentioned his disability at any time during his training. Cox did not state that Pino, Haynes, Price, or Golding ever knew about his disability or mentioned it during training. In his declaration, he did not state that the Department gave him assignments to unfairly test the limits of his physical abilities.

In his complaint, Cox alleged that he had received different training than other trainees because of his disability. To establish discrimination from diverse treatment, Cox had to show that "the individuals with whom [he] seeks to compare [his] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." (*Mitchell v. Toledo Hospital* (6th Cir. 1992) 964 F.2d 577, 583.)

But during his deposition, Cox admitted that he had no personal knowledge that Officers Choate and Tietje had trained him differently than other trainees. Cox claimed the training he received about the use of keys was different. But when asked,

"Do you know of Price training other new-hires with respect to keys differently than you?" Cox responded, "No." Cox claimed Moore unfairly criticized him for making an incorrect time entry on a log. But he answered "no" to the question, "Did you ever see Sergeant Moore deal with the same incident in a different way?" Cox also conceded that others also had been "disciplined for writing incorrect time." When asked why he believed any alleged difference in training was due to disability discrimination, Cox said, "I can't answer the question." These admissions showed his inability to testify about facts necessary to support his claims. (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 21.) His speculation or belief there was discrimination does not suffice. (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 73; *Mitchell v. Toledo Hospital*, *supra*, 964 F.2d at p. 583.)

Moreover, in his declaration, Thompson indicated that the training Cox received was essentially standardized; it was from a training manual. Cox received the same training as the other "new officers." In addition, DOR's are standardized evaluation forms that are used to rate all trainees on the same 31 categories of performance. As the trial court correctly noted, Cox's negative evaluations were almost exclusively in areas that did not involve physical activities. The 31 DOR categories primarily involve knowledge of the facility, emergency procedures, Department policies, attitude, professionalism, demeanor, the ability to write, fill out forms, investigative skills, oral communication, the use of the radio, self-confidence, judgment, following instructions, interviewing, interrogation, appearance, etc.

Cox suggests the Department refused to give him remedial training assistance. But the Thompson memorandum, which Cox signed, refutes that claim. Deputy Chief Reid reviewed the claim that Cox was being treated unfairly. But Reid determined that Cox had received appropriate training. In addition, in his declaration in opposition to summary judgment, Cox made no statement that he had the ability to competently perform the job, with or without disability accommodations or remedial

training. That is a fatal omission. (*Green v. State of California*, *supra*, 42 Cal.4th at pp. 261-263.)

Cox attached the declaration of Helena Vandhalen, his aunt, who works as a "correctional technician" at the Department. Vandhalen said that on September 21, 2007, she, Cox's father and Cox's mother met with Reid and advised him that Cox had cerebral palsy. In her declaration, she said they told Reid that "[they] believed [Cox] was being treated differently because of his cerebral palsy." But such conclusory assertions of belief or speculation that there is discrimination are not sufficient to establish a triable issue of fact. (*Bushling v. Fremont Medical Center*, *supra*, 117 Cal.App.4th at p. 510; *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 73.) It cannot be used as a substitute for specific evidentiary facts to establish the "causal link" between the employment termination and the alleged discrimination. (*Morgan*, at p. 73.)

At her deposition, Vandhalen mentioned two incidents involving Cox. She said before Cox was hired, Senior Officer Luther told her that if Cox was hired he (Luther) was "not going easy on him." In a second incident, she said Cox was drinking a Frappucino and Officer Froehner got angry and berated him for not bringing him coffee. But she admitted that neither Froehner nor Luther made any reference to Cox's disability. These two incidents alone are not sufficient to bridge the causational link or to establish a triable issue of fact showing that the Department engaged in disability discrimination. (*Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at pp. 343-344; *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 80 ["We have never held that workplace harassment . . . is automatically discrimination"]; *Nix v. WLCY Radio/Rahall Communications* (11th Cir. 1984) 738 F.2d 1181, 1187 [proof of unfair workplace conduct is not the equivalent of meeting the required standard of proving intentional discrimination].)

Cox said Froehner told him that "'[he is] the new guy. [He needs] to bring [them] doughnuts.'" But Cox made no factual connection between this request and disability discrimination. Being subjected to a supervisor's rude behavior does not, by

itself, support a finding of employer discrimination. (*Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at p. 344 [FEHA "addresses discrimination"; it is "not a shield against harsh treatment at the workplace"]; *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 73; see also *Payton v. City University of New York* (S.D.N.Y. 2006) 453 F.Supp.2d 775, 785 [probationary police officer's proof of "isolated incidents," "stray remarks," and his subjective belief about discrimination was not sufficient to "constitute a viable claim"]; *Porras v. Montefiore Medical Center* (S.D.N.Y. 1990) 742 F.Supp. 120, 127 ["Unfair, overbearing, or annoying treatment of an employee, standing alone" is not sufficient].)

Moreover, Cox was in probationary law enforcement training. No trier of fact could ignore the difference between this chain of command training, which requires following orders and testing the trainees' abilities to handle pressure in volatile situations, compared to the different environment of typical private sector jobs. (*Oncale v. Sundownder Offshore Services, Inc.*, *supra*, 523 U.S. at p. 81-82; *Davis v. City of Dallas*, *supra*, 777 F.2d at pp. 216-217.) The ability to handle verbal abuse is part of the job of correctional officers. (*Davis*, at pp. 216-217.) Vandhalen testified that it is not unusual that "a fair amount of hazing goes on by the training officers to the probationary trainees during the probationary period."

Intentional Infliction of Emotional Distress

In his opening brief, Cox does not raise the issue that the trial court erred by granting summary judgment on his cause of action for intentional infliction of emotional distress. Failure to raise an issue in the opening brief normally constitutes a waiver on appeal.

But even so, an employee has no cause of action for intentional infliction of emotional distress against the employer caused by a supervisor's conduct at the workplace that involves discipline or harsh criticism. That is a matter covered by workers' compensation. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 25.) "Even if such

conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Ibid.*)

Moreover, "[l]iability for intentional infliction of emotion distress "'does not extend to mere insults, indignities, threats, annoyances, [or] petty oppressions . . . .'"" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) In his declaration in opposition to summary judgment, Cox stated no facts to show that he suffered emotional distress from the conduct of his supervisors. Nor did he show that their conduct was so """"extreme as to exceed all bounds of that usually tolerated in a civilized community."""" (*Ibid.*) There was no error.

We have reviewed Cox's remaining contentions and conclude he has not shown error.

The judgment is affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Dodie A. Harman, Judge

Superior Court County of San Luis Obispo

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