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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

XIAO PING ZHU,

Plaintiff and Appellant,

v.

TAWA SUPERMARKET, INC.,

Defendant and Respondent.

B240193

(Los Angeles County
Super. Ct. No. BC437645)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rex Heeseman, Judge. Affirmed.

Gleason & Favarote, Paul M. Gleason and Torey J. Favarote for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Michael M. Berger, Yi-Chin Ho and Andrew L. Satenberg for Defendant and Respondent.

Plaintiff Xiao Ping Zhu appeals from a judgment entered after the trial court granted summary judgment in favor of Tawa Supermarket, Inc. (Tawa) in this action for pregnancy discrimination, failure to provide reasonable accommodation, wrongful termination and other causes of action.

Zhu's causes of action fail as a matter of law because the evidence demonstrates, after giving birth and exhausting all leave to which she was entitled, Zhu was unable to return to work as a cashier after eight months of leave due to abdominal pain resulting from her child's birth by Cesarean section.

Zhu has presented evidence indicating, before she went on leave, her immediate supervisor refused her requests for accommodation due to her pregnancy and retaliated against her when she complained about the supervisor's treatment. Although we certainly do not condone the alleged conduct of the supervisor, as described by Zhu, the conduct is not actionable because it occurred more than one year before Zhu filed her administrative complaint with the Department of Fair Employment and Housing (DFEH) and it is not causally linked to her termination.

BACKGROUND¹

On or about August 24, 2006, Tawa hired Zhu to work as a cashier in one of its supermarkets. After working for Tawa for about five months, Zhu informed Tawa she was pregnant in or about January 2007.

In March 2007, Zhu asked her supervisor, Ling Ling Ong, if she could take a meal break in the middle of her shift because she became hungry often and needed to eat regularly due to her pregnancy. At that time, Zhu's shift was from 12:00 p.m. to 5:30 p.m. According to Zhu, Ong denied Zhu's request for a meal break.

¹ Unless otherwise specified below, the following facts are taken from (1) Zhu's declaration in support of her opposition to Tawa's motion for summary judgment and exhibits attached to her declaration, or (2) Zhu's deposition and exhibits thereto attached to the declaration of Justin C. Johnson (Tawa's counsel) in support of Tawa's motion for summary judgment.

Due to her pregnancy, Zhu needed to use the bathroom more frequently than before. She was required to obtain her supervisor's permission before leaving her cashier stand to use the bathroom. According to Zhu, Ong often denied Zhu's requests, or ignored Zhu's attempts to make requests, to use the bathroom, even after Zhu presented a note from her physician stating her pregnancy required her to use the bathroom frequently.

Zhu complained to the assistant store manager, Tai Sun, about Ong's denial of her requests for meal and bathroom breaks, but Ong continued to deny Zhu's requests. Then, Ong started treating Zhu differently from other cashiers. Ong assigned Zhu to a cashier station with a broken conveyor belt, requiring Zhu to push the items along the belt. Ong also required Zhu to push shopping carts and re-stock shelves with heavy items. Zhu told Ong her physician had advised that she not lift heavy items during her pregnancy, but Ong continued to assign Zhu to perform these tasks. Zhu complained to Sun about the additional duties Ong assigned (pushing carts and re-stocking shelves), but the assignments did not change.

Ong gave Zhu low scores on her performance evaluation. After reviewing the evaluation, Zhu wrote in the employee comments section that she believed Ong was treating her harshly because she was pregnant. According to Zhu, Ong reviewed Zhu's written comments and then ripped up the evaluation in front of Zhu.

On or about June 17, 2007, Zhu spoke to the store manager, Peter Tsai, and told him Ong was treating her unfairly and retaliating against her because of her pregnancy and because she had complained to Sun about Ong's conduct. Ong's treatment of Zhu did not change.

On or about June 24, 2007, Zhu received a new performance evaluation from Ong with lower scores than the previous evaluation (ratings of "marginal" or "unsatisfactory" in all categories). Ong wrote in the supervisor's comments section of the evaluation: "Too much complain due to pregnancy [sic]." Zhu wrote in the employee comments section of the evaluation that Ong was retaliating against her because she complained about Ong.

On September 20, 2007, Zhu's physician signed a note stating Zhu was "require[d] to be off work" from September 21 to December 21, 2007. Zhu submitted a written request for a three-month pregnancy related disability leave (from September 21 to December 21, 2007), which Tawa approved. On September 21, 2007, Zhu began her leave of absence from Tawa due to health issues arising from her pregnancy. On October 1, 2007, Zhu's baby was delivered by Cesarean section.

On December 20, 2007, Zhu's physician signed a note stating Zhu would be "totally incapacitated" from December 20, 2007 to January 31, 2008, and could return to work on February 1, 2008. Tawa approved Zhu's written request for an extension of her pregnancy related disability leave until January 21, 2008. As stated in Tawa's Employee Handbook, "The maximum length of a pregnancy related disability leave is four months."²

On January 2, 2008, Zhu's physician signed a note stating abdominal pain resulting from the Cesarean section would prevent Zhu from returning to her regular or customary work until March 1, 2008. Zhu submitted a written request for "Family & Medical Leave" from January 21 to February 29, 2008, which Tawa approved.

On February 29, 2008, Zhu's physician signed a note stating abdominal pain resulting from the Cesarean section would prevent Zhu from returning to her regular or customary work until April 1, 2008. Tawa approved Zhu's written request for an extension of her family and medical leave until March 30, 2008.

On March 6, 2008, an attorney sent a letter to the California Labor & Workforce Development Agency on behalf of Zhu stating Tawa had been violating wage and hour laws by not paying employees the correct amount of overtime wages and not providing employees with adequate itemized wage statements.³

² Tawa's Employee Handbook is attached to the declaration of Peter Tsai in support of Tawa's motion for summary judgment.

³ This March 6, 2008 letter is attached to the declaration of George Gallegos (Zhu's counsel) in support of Zhu's opposition to Tawa's motion for summary judgment.

On March 31, 2008, Zhu's physician signed a note stating abdominal pain resulting from the Cesarean section would prevent Zhu from returning to her regular or customary work until May 1, 2008. Tawa approved Zhu's written request for an extension of her leave. Tawa extended Zhu's family and medical leave until April 13, 2008, and approved a personal leave of absence from April 14 to May 1, 2008. As stated in Tawa's Employee Handbook, "A personal non-paid leave of absence may be granted at [Tawa]'s discretion. Employees may request intermittent personal leave up to thirty (30) calendar days in a calendar year."

On May 2, 2008, Zhu's physician signed a note stating abdominal pain resulting from the Cesarean section would prevent Zhu from returning to her regular or customary work until June 10, 2008. Tawa approved Zhu's written request for an extension of her leave. Tawa extended Zhu's personal leave of absence until May 13, 2008, and approved a sick leave from May 14 to May 20, 2008.

On May 16, 2008, Zhu's physician signed a note stating abdominal pain resulting from the Cesarean section would prevent Zhu from returning to her regular or customary work until June 22, 2008. There is no evidence indicating Zhu submitted this May 16, 2008 doctor note to Tawa or submitted an additional request for an extended leave based on this doctor note.

On May 20, 2008, Tawa informed Zhu she could not return to work. According to Zhu, Tawa told Zhu her employment was terminated. According to Tawa, as set forth in the declaration of Peter Tsai in support of Tawa's motion for summary judgment, Tawa informed Zhu she could not return to work until she provided a certification from her physician stating she could return to work. As stated in Tawa's Employee Handbook, such a certification is required before an employee may return to work after a medical leave or pregnancy related disability leave. Zhu did not provide Tawa with a certification from her physician stating she could return to work.

On May 5, 2009, Zhu filed an administrative complaint with the DFEH, alleging: "I was retaliated against because of my pregnancy and related disability due to my pregnancy, which continued after my pregnancy when I tried to return to my job and the

company told me that they had filled my position and did not want me back.” In specifying Tawa’s conduct on the form complaint, Zhu checked the boxes for termination, harassment and retaliation.

On May 12, 2010, Zhu filed her complaint in this action. She asserted nine causes of action against Tawa: (1) disability discrimination, (2) failure to provide reasonable accommodation of disability, (3) failure to engage in the interactive process, (4) unlawful retaliation, (5) pregnancy discrimination, (6) failure to provide reasonable accommodation of pregnancy, (7) wrongful termination in violation of public policy, (8) failure to prevent discrimination and (9) harassment.⁴

In August 2011, Tawa filed a motion for summary judgment or in the alternative motion for summary adjudication against Zhu, which Zhu opposed. The trial court granted the motion for summary judgment and entered judgment on March 1, 2012.

DISCUSSION

Standard of Review

To prevail on a motion for summary judgment in an action brought under the California Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA),⁵ a defendant employer initially has the burden to show “either that (1) plaintiff could not establish one of the elements of the FEHA claim, or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff’s employment. [Citations.]” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247.)

⁴ Tawa argues Zhu failed to exhaust her administrative remedies with respect to her causes of action for failure to provide reasonable accommodation of disability, failure to engage in the interactive process, failure to provide reasonable accommodation of pregnancy and failure to prevent discrimination because she did not check the appropriate boxes on the administrative complaint filed with the DFEH. We disagree with Tawa’s argument. These four causes of action are reasonably related to conduct alleged in Zhu’s administrative complaint. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 266-267.)

⁵ Further statutory references are to the Government Code.

The trial court must “decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff’s prima facie elements is lacking, or 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.* (1995) 41 Cal.App.4th 189, 203; see *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) A triable issue of material fact exists where “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

On appeal, we independently make the same determination. ““In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing her evidence while strictly scrutinizing defendant’s.”” (*Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1005 (*Scotch*).)

Discrimination

In her first cause of action for disability discrimination and fifth cause of action for pregnancy discrimination, Zhu alleges Tawa subjected her to an adverse employment action because of her disability/pregnancy. In opposition to Tawa’s motion for summary judgment, Zhu made clear the adverse employment action which forms the basis of her discrimination causes of action is her May 20, 2008 termination from Tawa.⁶

“The FEHA makes it an unlawful employment practice to discharge a person from employment or discriminate against the person in the terms, conditions, or privileges of employment, because of physical or mental disability or medical condition. (§ 12940,

⁶ As discussed above, Tawa does not characterize the May 20, 2008 employment action as a “termination,” but the distinction is not material to our analysis.

subd. (a).) The FEHA ‘does not prohibit an employer from . . . discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations’ (§ 12940, subd. (a)(1).)” (*Scotch, supra*, 173 Cal.App.4th at p. 1002.) The FEHA also prohibits discrimination based on sex, which includes “[p]regnancy or medical conditions related to pregnancy” and “[c]hildbirth or medical conditions related to childbirth.” (§§ 12926, subd. (q)(1)(A) & (B), 12940, subd. (a).)

In order to prove her discrimination causes of action, Zhu must establish “she was able to do the job, with or without reasonable accommodation” at the time Tawa told her she could not return to work. (*Green v. State of California* (2007) 42 Cal.4th 254, 262.) On summary judgment, Tawa demonstrated Zhu cannot establish this element of her discrimination causes of action.

At her deposition in this case Zhu testified that, at the time Tawa terminated her employment on May 20, 2008, her medical condition prevented her from returning to work. Her physician had signed notes confirming that Zhu’s abdominal pain prevented her from returning to her regular and customary work at that time.

Zhu argues, at the time Tawa terminated her employment, she could have performed the essential duties of a cashier with reasonable accommodation. Under the FEHA, an employer must “make reasonable accommodation for the known physical or mental disability of an applicant or employee.” (§ 12940, subd. (m).) Zhu states she requested a reasonable accommodation when she submitted a note from her physician stating she would not be able to perform her regular and customary work until June 10, 2008. The only accommodation Zhu requested, and the only accommodation Zhu proposes in opposition to Tawa’s motion for summary judgment and on appeal, is additional leave. She asserts she “was legally entitled to additional leave as a reasonable accommodation under the FEHA.” She does not dispute she had exhausted all leave to which she was entitled under statute and Tawa’s policies.

“[A] finite leave can be a reasonable accommodation under [the] FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties.” (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.) “‘Reasonable accommodation does not require the employer to wait indefinitely for an employee’s medical condition to be corrected. . . .’” (*Id.* at pp. 226-227.)

Zhu argues Tawa was required to grant her request for a finite leave of absence until June 10, 2008 as a reasonable accommodation. Zhu cannot establish it was likely she would have been able to perform her duties on June 10, 2008 (or on any date certain thereafter). In fact, on May 16, 2008, four days before Tawa told Zhu she could not return to work, Zhu’s physician signed a note stating that Zhu would be unable to perform her regular and customary work until June 22, 2008 due to her continued abdominal pain.

As set forth above, prior to the birth of her child Zhu requested, and Tawa granted her, a three-month pregnancy related disability leave from September 21 to December 21, 2007. After her baby was delivered by Cesarean section on October 1, 2007, Zhu experienced lingering abdominal pain. Zhu requested and Tawa granted her five extensions of her leave from December 21, 2007 to May 20, 2008. Zhu was on leave for a total of eight months.

At her deposition Zhu testified that as of June 22, 2008, one month after her termination, she continued to suffer from the same abdominal pain which prevented her from returning to work on May 20, 2008. There is no evidence in the record indicating when, if ever, Zhu’s condition improved such that she could have returned to work or would have improved sufficiently to permit her to resume her duties as a cashier. Nor is there evidence in the record indicating Zhu’s physician ever cleared her to return to work.

In its motion for summary judgment, Tawa demonstrated Zhu cannot establish an element of her discrimination causes of action (first and fifth causes of action) because she cannot prove she could have performed the essential duties of her job, with or without reasonable accommodation, at the time Tawa told her she could not return to work. Zhu has not raised a triable issue of material fact.

Zhu concedes that if she cannot prove a discrimination cause of action against Tawa, her eighth cause of action for failure to prevent discrimination under section 12940, subdivision (k), fails as well.

Failure to Engage in the Interactive Process/Provide Reasonable Accommodation

In her third cause of action for failure to engage in the interactive process, Zhu alleges Tawa violated the FEHA in that “it failed to respond to Plaintiff’s request for an accommodation and engage in a timely, good faith interactive process with Plaintiff or her medical provider so as to determine whether there existed a reasonable accommodation of her disability.”

“The FEHA makes it unlawful for an employer ‘to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.’ (§ 12940, subd. (n).)” (*Scotch, supra*, 173 Cal.App.4th at p. 1003.)

“To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because “[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . .” [Citation.] However, . . . once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: ‘Section 12940[, subdivision] (n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.’” (*Scotch, supra*, 173 Cal.App.4th at pp. 1018-1019.)

On summary judgment Tawa demonstrated Zhu cannot prove a cause of action for failure to engage in the interactive process because she cannot identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. Zhu has not identified a reasonable accommodation that would have enabled her to return to work. She asked Tawa to allow her to remain on leave until June 10, 2008. As discussed above, Zhu cannot establish her request for additional leave was a reasonable accommodation because she cannot show it was likely she would have been able to perform her duties on June 10, 2008 (or on any date certain thereafter). The evidence demonstrates Zhu was still unable to return to work as of June 22, 2008, and there is no evidence in the record indicating when, if ever, Zhu's condition improved such that she could have returned to work. Zhu has not raised a triable issue of material fact.

Because Zhu cannot establish Tawa failed to make reasonable accommodation for her disability/pregnancy, her second cause of action for failure to provide reasonable accommodation for her disability and her sixth cause of action for failure to provide reasonable accommodation for her pregnancy also fail.

Retaliation

In her fourth cause of action for unlawful retaliation, Zhu alleges Tawa retaliated against her with "significant adverse employment actions" because she "engaged in the protected activities of exercising and asserting her FEHA right to take pregnancy leave and her FEHA rights as a 'disabled' individual."

"The FEHA makes it unlawful for an employer 'to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.' (§ 12940, subd. (h).)" (*Scotch, supra*, 173 Cal.App.4th at p. 1003.) "To establish a prima facie case of retaliation under the FEHA, a plaintiff must show '(1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.' [Citation.]" (*Id.* at p. 1020.)

As Tawa argued in its summary judgment motion, Zhu may not base her retaliation cause of action on adverse employment actions which occurred more than one year before she filed her administrative complaint with the DFEH because causes of action based on such conduct are time barred. (§ 12960, subd. (d) [“No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred”]; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 [exhaustion of administrative remedies under the FEHA requires that an administrative complaint be filed with the DFEH specifying the alleged unlawful acts].) Zhu filed her complaint with DFEH on May 5, 2009. Thus, the only adverse employment action which falls within the applicable limitations period is the termination of her employment on May 20, 2008.

As discussed above, Tawa presented evidence on summary judgment demonstrating Tawa told Zhu she could not return to work after she had exhausted all leave to which she was entitled under statute/Tawa’s policies, and her medical condition had not improved to the point where she could return to work.

Zhu argues Tawa terminated her employment in retaliation for (1) her complaints about Ling Ling Ong’s harassment, (2) her requests for accommodation of her pregnancy (proper meal and bathroom breaks and relief from additional duties imposed by Ong, such as lifting and re-stocking heavy items), (3) her exercise of her right to take leave after the birth of her child, and (4) her March 6, 2008 letter to the California Labor & Workforce Development Agency asserting Tawa was violating wage and hour laws.

Zhu has not presented evidence raising a triable issue of fact that she was terminated because she engaged in protected activity. After an eight-month leave, Zhu was unable to return to work due to a medical condition. She was not entitled to additional leave. Tawa told Zhu she could not return to work. Even a month later, Zhu’s medical condition still had not improved. There is no evidence indicating when, if ever, Zhu’s condition improved such that she could have returned to work. Nor is there evidence indicating Zhu’s physician ever cleared her to return to work. As discussed above, “The FEHA ‘does not prohibit an employer from . . . discharging an employee

with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations’ (§ 12940, subd. (a)(1).)” (*Scotch, supra*, 173 Cal.App.4th at p. 1002.) Zhu cannot prove her cause of action for retaliation.

Harassment

As discussed above, conduct which occurred before May 2008 may not form the basis of Zhu’s ninth cause of action for harassment because it occurred more than one year before Zhu filed her administrative complaint with the DFEH. Thus, Ling Ling Ong’s treatment of Zhu during the time Zhu was working as a cashier is outside the limitations period because it occurred no later than September 2007.

Zhu argues Ong’s treatment is actionable under “the ‘continuing violation doctrine.’” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802.) Under this doctrine harassment “should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of ‘permanence’ so that employees are on notice that further efforts at informal conciliation with the employer to . . . end harassment would be futile.” (*Ibid.*) Ong’s treatment of Zhu, after Zhu became pregnant but while Zhu was still working as a cashier, ceased in September 2007 when Zhu went on leave. It did not continue over the eight months Zhu was on leave during which Tawa granted Zhu five extensions on her original request for a three-month pregnancy related disability leave.

As discussed above, Zhu cannot prove Tawa’s refusal to grant her additional leave and refusal to allow her to return to work were wrongful. Accordingly, Zhu cannot prove Tawa harassed her because of her pregnancy/disability as alleged in her ninth cause of action.

Wrongful Termination in Violation of Public Policy

Zhu concedes her seventh cause of action for wrongful termination in violation of public policy fails if her statutory FEHA claims fail.

For all of the foregoing reasons, the trial court did not err in granting Tawa’s motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover costs on appeal.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.