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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALFREDO MUNIZ-ORTEGA et al., Plaintiffs and Appellants, v. TATUNG COMPANY OF AMERICA, INC. Defendant and Respondent.	B263930 (Los Angeles County Super. Ct. No. BC537988)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf Michael Treu, Judge. Affirmed.

Rastegar Law Group, Farzad Rastegar, and Joshua N. Lange for Plaintiffs and Appellants.

Kaufman Borgeest and Ryan, Jeffrey S. Whittington, and Vanessa K. Manolatou for Defendant and Respondent.

Plaintiffs Alfredo Muniz-Ortega, Gloria Diaz, and Juana Navarro sued their former employer, defendant Tatung Company of America, Inc. (Tatung), alleging that Tatung terminated their employment because of their age in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12940 et seq.) Tatung moved for summary judgment claiming that plaintiffs were laid off as part of a reduction in force following the loss of a large client, and that plaintiffs' ages were not a factor. The court granted the motion and entered judgment in Tatung's favor. Plaintiffs appealed. We affirm the judgment because plaintiffs failed to establish a triable issue of material fact as to Tatung's motivation for terminating their employment.

FACTUAL SUMMARY

A. *Background*

Tatung serves customers that make computers and other electronic equipment. It has four departments: Commercial, Refurbish, Import/Export, and Hub and Logistics. The Hub and Logistics department receives, stores, and ships products for its customers. Before 2011, that department had two subdivisions: "Hub" and "Traffic." The Traffic subdivision provides support for Tatung's refurbishing department. Plaintiffs worked primarily in the Hub subdivision, which has three departments: shipping, receiving, and office administration.

Tatung hired Muniz-Ortega in September 1979 when he was 19 years old. During his 33 years with Tatung, he held a variety of positions in the Hub subdivision, including forklift driver, receiving supervisor, and, most recently, shipping supervisor. When he was laid off in March 2012, Muniz-Ortega was 51 years old.

Diaz began working for Tatung in October 1999. In 2001, she became a receiving clerk and, in 2005, a receiving supervisor in the Hub subdivision. Diaz had also received training in shipping duties. She was laid off in October 2012 at the age of 51.

Navarro was hired in August 1997. She initially worked in the Traffic subdivision. After 2001, Navarro worked as a receiving and inventory clerk in the Hub subdivision. She was laid off in August 2012 at the age of 48.

B. *The Loss Of Hewlett Packard's Business And Its Aftermath*

Until 2011, one customer, Hewlett Packard (HP), provided 90 percent to 95 percent of the business for the Hub subdivision. The remaining work involved Tatung's products. During 2011, HP informed Tatung that it would be moving its business elsewhere. Tatung thereafter reduced its shipping and receiving of HP products, and its inventory of HP products fell from more than 1,000,000 units to about 1,000 units. The Hub subdivision continued to handle Tatung's products.

In mid 2011, in an effort to develop new business, Tatung created a third subdivision within the Hub and Logistics department, the Container Freight Station (CFS) subdivision. The CFS subdivision transloads products from shipping containers to trailers for delivery to customers. In August 2011, Tatung hired 39-year-old Moises Andrade to oversee CFS. Tatung created two shipping clerk positions for the new subdivision, which it filled with two people who had been working as temporary employees: Julie Meau, age 35, and Daisy Zuniga, age 24. Muniz-Ortega, Diaz, and Navarro also "helped out" at times in the CFS subdivision.

Tatung also acquired a "small contract" with a manufacturer named "Blue Bath." Cindy Mendoza, who was hired in January 2010 when she was 23 years old, handled receiving for Blue Bath, as well as receiving for HP and Tatung products. She had also been trained to work in the Traffic subdivision and eventually worked there full time.

Despite the creation of the CFS subdivision and the acquisition of the Blue Bath contract, the loss of HP's business led Tatung to downsize the Hub and Logistics department by subletting space in its warehouse and conducting "rolling lay-offs" that began in late 2011. These layoffs were in addition to a substantial reduction in Tatung's personnel throughout the firm since 2009 due to the slowdown affecting the economy generally.

Tatung's Vice President of Administration, Ray Fekrinia, initiated the layoffs in the Hub and Logistics department. He asked David Frasco, Tatung's Director of the Hub and Logistics department, to recommend employees for layoff. Fekrinia stated in his deposition that under Tatung's "general guidelines" they would normally consider the

following factors in deciding which employees were to be laid off: employee seniority, quality of work, versatility, potential, and cross-training. He testified that he "probably" discussed these guidelines with Frasco in connection with the layoffs. According to Frasco, he based his recommendations on "employee skill set as well as attendance records"; he did not consider—or even know—the ages of employees he selected for layoffs, and did not base his selection on how old an employee appeared. Fekrinia ultimately approved of Frasco's recommendations.

Plaintiffs had excellent performance reviews and no disciplinary problems. For that reason, Frasco explained, they were "among the latter employees to be laid off." Muniz-Ortega was laid off in March 2012, Navarro in August 2012, and Diaz in October 2012. At the time they were discharged, each was told that they were being laid off because of the slowdown in work.

When Frasco was asked at his deposition whether he considered moving plaintiffs to the CFS subdivision instead of discharging them, Frasco testified that Muniz-Ortega was not transferred because the skilled CFS positions required frequent customer interaction via email and Muniz-Ortega was not comfortable with using computers or email. Frasco did not consider making Muniz-Ortega a forklift driver in the CFS subdivision because he believed that would be a demotion and not "the right thing to do." Frasco did not transfer Diaz to CFS because her grammar and spelling in emails were unsatisfactory. Regarding the possibility of moving Navarro, Frasco explained that Tatung, "had two people in that area that were doing a good job in CFS from the start, and . . . it takes . . . months to train to understand the business and understand the whole process of the clerical part. It's not just e-mail. It's . . . very complicated." Furthermore, Navarro was not fully trained in any aspect of CFS operations other than quality control, which is merely "watching and documenting the [quality control] so we had the right amount of pallets in the trailer."

According to Tatung's Human Resource Manager, Sonya Gonzalez, at the beginning of 2012, there were 44 employees in the Hub and Logistics department, comprised of 16 persons in the Hub subdivision, 10 in CFS, and 18 in Traffic.

Thirteen of the 16 Hub subdivision employees, including the plaintiffs, were over 40 years old. Over the next two years, Tatung laid off seven employees in the Hub subdivision, six of whom were over 40, and six employees in the Traffic subdivision. Five other employees in those subdivisions either "voluntarily resigned" or were "terminated." Although Tatung did not lay off any CFS subdivision employees during that time, four CFS employees left Tatung for other reasons. At the time of Frasco's deposition in October 2014, there were seven employees in the CFS subdivision: the supervisor (Andrade), the two shipping clerks (Meau and Zuniga), a "yard goat driver," and three forklift drivers.

C. *Statements Evidencing Discriminatory Animus*

Plaintiffs identify the following statements as evidence of Tatung's age-based discriminatory animus. At some point during the year preceding Diaz's layoff, Frasco told Diaz that older people have a greater propensity for accidents. The comment was made in connection with a "safety meeting." Diaz did not speak to anyone about the comment.

Navarro testified that during a 2011 safety meeting, Saturnino Vasquez, a Tatung employee in the Human Resources department, said, "[be] careful with the people that are older because it's easier for them to get hurt, they produce less. So just [be] careful when they're working." Navarro also heard Frasco comment at a safety meeting in May or June 2012, about the need to "be careful because there's a lot of older people, and they can get hurt" or "hurt easier.'"

D. *Procedural Background*

Plaintiffs filed their complaint in the Superior Court in February 2014 alleging the following causes of action: (1) Age discrimination in violation of the Fair Employment and Housing Act (FEHA); (2) Failure to prevent and correct age discrimination in violation of FEHA; (3) Retaliation for complaining of age discrimination; and (4) Wrongful termination in violation of public policy. They alleged that they were "qualified employees at the time of their termination of their employment, they were more than 40 years old, and they were replaced by employees younger than 40, raising an

inference of discrimination." They further alleged that "their age was a motivating factor in [Tatung's] termination of their employment."

Tatung moved for summary judgment in December 2014. Plaintiffs opposed the motion and filed written objections to portions of declarations by Frasco and Gonzalez. After a hearing in March 2015, the court overruled plaintiffs' objections and granted the motion.

DISCUSSION

I. *FEHA and Summary Judgment*

FEHA prohibits discrimination against persons "in terms, conditions, or privileges of employment" based upon age or other specified classifications. (Gov. Code, § 12940, subd. (a).) "Age," for purposes of FEHA, refers to persons 40 years of age or older. (Gov. Code, § 12926, subd. (b).)

Because direct evidence of an unlawful discrimination is seldom available, courts use a system of shifting burdens to aid in the presentation and resolution of such claims. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).) At trial, the plaintiff is required to establish a prima facie case of unlawful discrimination, the elements of which may vary depending upon the particular facts. (*Guz, supra,* 24 Cal.4th at p. 355.) In a discriminatory discharge case, the prima facie case requires evidence that the plaintiff is over the age of 40, was performing competently in his or her position, was discharged, and "some other circumstance suggests a discriminatory motive." (See *ibid.*) If the plaintiff establishes such a prima facie case, a presumption of discrimination arises. (*Ibid*.) The employer may rebut this presumption by producing admissible evidence that it discharged the employee for a legitimate nondiscriminatory reason. (*Id.* at pp. 355-356.) The plaintiff then has "the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.)

The respective burdens are altered in a summary judgment motion. When a defendant employer moves for summary judgment on a FEHA cause of action, the employer has the initial burden of "presenting evidence that *either* negates an element of the employee's prima facie case, or establishes a legitimate nondiscriminatory reason for taking the adverse employment action against the employee." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 966 (*Swanson*).) A " 'legitimate' " reason is one that is "*facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*." (*Guz, supra*, 24 Cal.4th at p. 358.) Making this showing is " 'not an onerous burden [citation], and is generally met by presenting admissible evidence showing the defendant's reason for its employment decision [citation].' [Citation.]" (*Swanson, supra*, 232 Cal.App.4th at p. 965.)

When the employer satisfies its initial burden with evidence of a legitimate nondiscriminatory reason, the burden of avoiding summary judgment shifts to the employee, who must offer substantial evidence that the employer's stated reasons were " 'untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.]" (*Swanson, supra*, 232 Cal.App.4th at p. 966.) To satisfy this burden, the employee may not "simply deny the credibility of the employer's witnesses or . . . speculate as to discriminatory motive." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862). Nor is it enough to show that the employer's reasons were unsound, wrong, or mistaken; "[w]hat the employee has brought is not an action for general unfairness but for age discrimination." (*Hersant, supra*, 57 Cal.App.4th at p. 1005.) Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]' [Citations.]" (*Ibid.*) 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," the employer is entitled to summary judgment. (*Guz, supra,* 24 Cal.4th at p. 361, fn. omitted.)

In reviewing summary judgment, "[w]e review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

II. *Evidentiary Objections*

In support of the motion for summary judgment, Tatung submitted Gonzalez's declaration setting forth data concerning the number and ages of employees in the Hub and Logistics department and subdivisions, as well as firm-wide, and showing how those numbers changed since 2011. Plaintiffs objected to virtually all of the substantive statements on grounds that they were irrelevant, based on insufficient foundation, and constitute improper opinions of a lay witness. The trial court overruled the objections. Plaintiffs challenge the rulings on appeal. The standard for review of rulings on evidentiary objections in a summary judgment has not been decided by our Supreme Court. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) The weight and trend of authority, however, supports the view that the standard is abuse of discretion. (See, e.g., *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 82-83; *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

We agree with plaintiffs that the data in Gonzalez's declaration is inadmissible. The firm-wide, age-based employment data is irrelevant because the plaintiffs are challenging the employment decisions concerning the Hub and Logistics department only. Those decisions were, as a practical matter, made by Frasco, the Director of the Hub and Logistics department. There is no evidence that Frasco was involved in any way in decisions made in other departments of Tatung. The data regarding the Hub and Logistics department (44 employees) and the Hub subdivision (16 employees) is inadmissible for a different reason: The sizes of the employee pools are too small to be statistically relevant. (See, e.g., *Fallis v. Kerr-McGee Corp.* (10th Cir. 1991) 944 F.2d

743, 746 [age-based data regarding group of 51 employees was "too small to provide reliable statistical results"]; *Sengupta v. Morrison-Knudsen Co., Inc.* (9th Cir. 1986) 804 F.2d 1072, 1076 [pool of 28 employees "is too small" to be reliable]; *Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1172 [evidence regarding a pool of 16 employees was too small to constitute "substantial and specific" evidence of pretext].) The court, we conclude, abused its discretion when it overruled plaintiffs' objections to Gonzalez's declaration. This error, however, was not prejudicial to plaintiffs because, to the extent it had any validity, it favored plaintiffs.

Plaintiffs also objected to the following statements by Frasco: (1) "Consequently, as of late 2011/early 2012, Tatung was no longer shipping and receiving HP products"; (2) "As an example of the impact to Tatung, its warehouse stored over a million units of HP Products in 2011, but only about 1,000 as of this year"; and (3) "Due to the loss of the HP contract, which formed the large majority (90-95%) of Hub and Logistics business, Tatung was forced to reduce its operational expenses, which consisted of staff and space." Plaintiffs objected to each statement on grounds of inadequate foundation, relevance, and improper lay opinion.

Under any standard, there was no error. Frasco stated that he is and has been since 2006 the Director of the Hub and Logistics department, and responsible for managing that department. This is a sufficient foundation for his statements regarding the changes that occurred in the Hub and Logistics department during and after 2011. The statements are relevant because they support Tatung's reasons for the plaintiffs' layoffs. Finally, the statements are not improper opinions.

III. *Age Discrimination*

In its motion for summary judgment, Tatung did not attempt to negate plaintiffs' prima facie case of age discrimination; rather, it asserted that it had legitimate nondiscriminatory reasons for its decisions.[1] In particular, Tatung proffered the general reason that the layoffs occurred because Tatung was "forced to reduce its operational expenses" due to the loss of HP's business, and that plaintiffs' ages were not considered. The reason is "facially unrelated to prohibited bias," and, if true, would "preclude a finding of discrimination." (*Guz, supra*, 24 Cal.4th at p. 358, italics omitted.) Tatung supported this reason with admissible evidence through Frasco's and Gonzalez's declarations and Fekrinia's deposition testimony. The showing is sufficient to shift the burden to plaintiffs to present substantial evidence that the stated reason "was untrue or pretextual," or that it "acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005.)

Plaintiffs contend that they were "passed over" when Andrade, Zuniga, and Meau were selected as the supervisor and shipping clerks for the new CFS subdivision. They offer no evidence, however, that any of them ever requested to work in the CFS subdivision or indicated any interest in the new CFS positions, or that they complained to anyone when Andrade, Zuniga, and Meau were selected for those positions in 2011. Indeed, the only adverse employment action alleged in the complaint is Tatung's "termination" of their employments the following year. Plaintiffs cannot avoid summary judgment on their cause of action for discriminatory *discharge* based on unsupported arguments of discriminatory *failure to transfer or promote*. (See *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541 [party cannot successfully resist summary judgment on a theory not pleaded].) Moreover, plaintiffs alleged that Tatung's age discrimination can be

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[1] In its moving papers before the trial court, Tatung stated: "In ruling on Tatung's [m]otion, the trial court will be called upon to decide if Plaintiffs have met their burden of establishing a *prima facie* case of unlawful discrimination." It proceeded, however, to focus on the argument that it had legitimate nondiscriminatory reasons for the layoffs.

inferred from the fact that they were "replaced" by younger persons. Andrade, Zuniga, and Meau were the first supervisor and shipping clerks in the CFS subdivision; they replaced no one.

Although they now describe their claims in terms of being "passed over," plaintiffs' primary argument is, in essence, that Tatung should have discharged Andrade, Zuniga, and Meau and allowed the plaintiffs to take their places in the CFS subdivision. They offer no legal support for this theory. Indeed, there is law to the contrary: "When an employer modifies its workforce for business reasons, it has no obligation to transfer an employee to another position within the company." (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 800; see also *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1422 [" 'When an employer reduces its work force for economic reasons, it incurs no duty to transfer the employee to another position within the company.' "].) Here, Andrade, Zuniga, and Meau were the core, skilled personnel in the seven-person CFS subdivision and had held those positions since that subdivision was created. Tatung had no obligation to discharge them and replace them with plaintiffs the following year.

Moreover, Frasco explained that plaintiffs were not considered for transfer to the CFS subdivision because Muniz-Ortega was uncomfortable with computers and email, Diaz had problems with grammar and spelling in emails, and Navarro was insufficiently trained to justify replacing the existing CFS clerks. Plaintiffs offered no substantial evidence to suggest that these reasons are untrue or a pretext for discrimination.

Diaz points to her testimony that after her discharge, Andrade, in addition to supervising the CFS subdivision, also performed Diaz's former duties overseeing receiving in the Hub subdivision. She also refers to Andrade's 2012 employee performance review, which states that Andrade "oversees CFS and receiving departments," and provides that his objectives for the following year include: "Train and understand HP and Tatung process for inbound and outbound shipments." This evidence is consistent with Tatung's explanation that Diaz's responsibilities as Hub receiving supervisor had diminished to such an extent that the position no longer required a full time employee and that any ongoing receiving work could be absorbed by other

employees.[2] It does not, however, suggest a discriminatory motive for terminating her employment.

Navarro contends that Mendoza, a younger employee with less seniority, continued to work as a receiving clerk in the Hub subdivision after Navarro was laid off. She refers to Mendoza's employee performance reviews, which indicate that Mendoza has been working in the "receiving department as well as backing up [the] Service department," and that Mendoza will help train another employee "in receiving for Tatung/HP business." Even if Mendoza performed the same duties as Navarro and was similarly or less qualified, evidence that Mendoza remained after Navarro was laid off merely supports Navarro's prima facie case of discrimination—a point Tatung does not meaningfully contest. That fact does not, however, constitute evidence that Tatung's stated reason for discharging Navarro "was untrue or pretextual" or that it "acted with a discriminatory animus." (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005.) Moreover, Tatung points out that Mendoza, but not Navarro, had experience in receiving Blue Bath products.

Finally, plaintiffs point to evidence that Frasco told Diaz that older people have a greater propensity for accidents, and that Frasco and Vasquez, a human resources representative, advised Diaz and Navarro to be careful with older people because they are more easily hurt. These statements, which plaintiffs describe as "icing on the cake," allegedly occurred during or in connection with meetings about employee safety. Even if the statements are not true, the most reasonable inference to be drawn from them is that Tatung was advising its employees to be careful around, or more protective of, older employees. The statements thus construed reflect *concern* for older employees, not *animus* toward them. Arguably, however, a trier of fact could infer that an employer who believes that older persons are more accident-prone and more easily injured might be motivated to discharge older employees. Given the nature of the statements and the

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[2] Tatung contends that Diaz's remaining duties were absorbed by Peter Lee, the Hub subdivision supervisor. Any dispute as to whether Diaz's remaining duties were performed by Adrade or Lee is immaterial.

context in which they were made, however, we conclude that such evidence, whether viewed in isolation or together with the other evidence, is " 'too weak to raise a rational inference that discrimination occurred.' [Citation.]" (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th 512, 541.)

Based on our independent review of the record, the evidence as a whole is insufficient to permit a rational inference that Tatung's motives in discharging plaintiffs were discriminatory. Plaintiffs' first cause of action for age discrimination therefore fails. (See *Guz*, *supra*, 24 Cal.4th at p. 361.) Because the second, third, and fourth causes of action depend upon the validity of their discrimination claim, those causes of action fail as well. (See, e.g, *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 355.)

DISPOSITION

The judgment is affirmed. Tatung is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.