Filed 5/9/18 Brady v. Walt Disney Pictures CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN BRADY, Plaintiff and Appellant, v. WALT DISNEY PICTURES et al., Defendants and Appellants.	B275515, B277111 (Los Angeles County Super. Ct. No. BC548206)

APPEALS from a judgment and a postjudgment order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Law Offices of Scott R. Ames and Scott R. Ames for Plaintiff and Appellant.

Davis Wright Tremaine, Emilio G. Gonzalez, Rochelle L. Wilcox and Evelyn F. Wang for Defendants and Respondents.

In this consolidated appeal, plaintiff Kevin Brady (Brady) challenges the trial court's grant of summary judgment to defendants Walt Disney Pictures (Disney), The Walt Disney Company and Disney Worldwide Services, Inc. (collectively Companies) on Brady's age discrimination claims. In Companies appeal, they claim that the trial court abused its discretion when it granted Brady's postjudgment motion to tax Disney's costs. We affirm both the judgment and the posttrial order.

BACKGROUND

I. Brady's age discrimination claim

Brady worked full-time for Disney for 25 years (1988-2013). During the last eight years of his employment (2005-2013), Brady served as the Director of the Story Department. In April 2013, Disney advised Brady that it was terminating his employment effective June 9, 2013. At the time of his termination, Brady was 48 years old.

In June 2014, after receiving a "right to sue" letter from the California Department of Fair Housing and Employment, Brady filed suit against Companies alleging two causes of action: (1) violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq. (FEHA)) based on age discrimination; and (2) wrongful termination in violation of public policy.[1] The complaint alleged that Companies discriminated against Brady by, inter alia, replacing him with a younger and "less qualified" woman and by refusing to consider him for a position that was

---

[1] During the proceedings below, the parties agreed that Brady's second cause of action was not a stand-alone claim but one dependent on the survival of his age discrimination claim. Consequently, the parties and the trial court focused on the evidence supporting Brady's first cause of action.

"nearly identical in duties and responsibilities" to his position as Director of the Story Department.

II. Companies' motion for summary judgment

A. COMPANIES' MOTION

In May 2015, Companies moved for summary judgment. In support of their motion, Companies made two principal arguments.

First, Companies argued that there was a legitimate, nondiscriminatory reason to eliminate Brady's position. Beginning in late 2011 to early 2012, approximately a year and a half before Brady's position was eliminated, Disney embarked on a plan to restructure the Story Department into a new Creative Affairs Department. At that time, the Story Department was comprised typically of 6 to 20 story analysts who reviewed, analyzed, and cataloged literary and other material whose "stories" could potentially be made into films. As manager of the Story Department, Brady's principal responsibility was to manage the department's workflow—distributing assignments to the analysts, collecting the analysts' finished work product, and distributing the finished work product to the creative executives. As envisioned by Disney, the new Creative Affairs Department would be more involved in the story development process and better able to support the creative executive team by providing more focused research on industry trends and genres and better competitive intelligence on the best stories, writers and directors, as well as more useful and relevant coverage of scripts and story ideas. As originally envisioned, the leader of this new department would be a senior-level executive or vice-president-

level employee who had displayed creative acumen.[2] Accordingly, the initial search for individuals to lead the new department focused on some candidates who were Brady's age or older.

Second, Companies maintained that there was no discriminatory animus or pretext underlying Disney's decision to terminate Brady's employment. Although Disney regarded Brady as a competent leader of the Story Department, it did not consider him to be a good candidate to lead the new Creative Affairs Department because the new department would be carrying out duties and responsibilities that the Story Department had not done in the past, duties and responsibilities for which Brady had seemingly shown little interest during his time leading the Story Department. For example, Disney noted that during his eight-year tenure as director of the Story Department, Brady had attended only one of the weekly creative executive meetings.

In contrast to Brady, the person Disney ultimately promoted to lead the new department had already been performing many of the creative tasks that the new department would carry out and had demonstrated an abiding interest in doing such work. Before becoming the inaugural head of the Creative Affairs Department, Jessica Virtue (Virtue), had been serving as the first assistant to Disney's president of motion picture production, Sean Bailey (Bailey). As first assistant, Virtue's duties included participating in weekly development and business production meetings, reading several scripts a week,

---

[2] Due to anticipated budget cuts, Disney ultimately made the decision in late 2012 "that the new Creative Affairs Department would be led by a 'manager' level employee rather than a senior-level executive."

looking for creative material for films, researching what other studios were working on and talent they were working with; managing a highly confidential development report for film projects, and analyzing the material creative executives were asked to read. In June 2013, when she assumed the leadership of the Creative Affairs Department, Virtue was 26 years old.

B. BRADY'S OPPOSITION

In mid-January 2016, Brady filed his opposition to Companies' motion. In his opposition, Brady did not dispute that Disney had a legitimate business reason to restructure/replace the Story Department or that Virtue was qualified to lead the new Creative Affairs Department. Instead, utilizing internal Disney documents and deposition testimony by Disney executives, Brady focused his opposition on Companies' contention that he was not qualified to lead the new department.

First, Brady contended that the duties and responsibilities of the leader of the Creative Affairs Department were not significantly different from those that he had carried out during his years managing the Story Department. Based on a February 2012 chart created by Disney's Human Resources Department (H.R. Department) comparing the responsibilities and duties of the head of the then-existing Story Department with the head of the to-be-created Creative Affairs Department and the subsequent deposition testimony of Bailey, Brady argued that as manager of the Story Department he performed 90 percent of the anticipated duties of the manager of the new department. In addition, Brady noted that in her first self-review after taking over the new department, Virtue stated that she had "assum[ed] leadership of the Story Department" after Brady's departure. Similarly, Brady observed that when Disney's H.R.

Department submitted a bonus request for Virtue six months after she had become manager of the Creative Affairs Department, it stated Virtue had taken "over the leadership of the Story Department." And in its job posting for the manager of the Creative Affairs Department, Disney listed, among other things, the following job responsibility: "Leads a team of Story Analysts and script coordinator in Story Department to ensure appropriate coverage & resources to the creative team that enables them to effectively seek out potential story profiles."

Second, Brady argued that, based on both his management skills and on his creative/professional ambitions, he was qualified to lead the new department. As he noted in his declaration, his entire 25-year tenure at Disney had been in the Story Department: one year as a clerk; four years as department secretary; 11 years as script coordinator/librarian; one year as acting head of the department; and eight years as director of the department. Moreover, in each of his last four performance reviews, covering the period from October 1, 2008 to September 30, 2012, he had received ratings that were all above average and in 2009, he had received the highest rating. As for his purported lack of initiative, Brady observed that in his 2010 review, Disney noted that he had "expressed interest in expanding his position" and that Disney "support[ed] his ambition to grow within the company." In addition, in September 2012, Brady had lobbied for a promotion based on his past accomplishments in making the Story Department more efficient and more cost-effective.

C. DISNEY'S REPLY AND REBUTTAL EVIDENCE

In late January 2016, Companies filed their supporting reply brief and their objections to certain evidence relied upon by

Brady in his opposition. At the same time, Companies also filed a "Compendium of Rebuttal Evidence," consisting of more than 100 pages of deposition excerpts.[3]

Utilizing their rebuttal evidence, Companies disputed the significance and meaning of the Disney documents upon which Brady relied in his opposition. For example, Disney maintained that the chart comparing and contrasting the duties of the Story and Creative Affairs Department heads was "stale"—that is, it was created during the earliest planning stages for the new department and, as a result, it was, according to the document's creator, "very much a straw man"—that is, it was merely a "conceptual description of duties and responsibilities." Not only was the document created long before an actual job description for the head of the new department had been finalized and

---

[3] Generally, a party moving for summary judgment may not rely on new evidence filed with its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312–316.) However, Companies served their reply brief and supporting rebuttal evidence on January 22, 2016. The trial court did not hold its hearing on the motion until March 4, 2016—almost six weeks after the reply brief and rebuttal evidence were served. In other words, Brady had both notice and "ample opportunity to ask the trial court for permission to submit responsive evidence or to file a sur-reply" (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 449), or to otherwise lodge an objection to Disney's rebuttal evidence. On the record before us, Brady did none of those things. "Absent any objection to the inclusion of new evidence in [the moving party's] reply brief, the court was entitled to consider the evidence as within the record before it." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426; *Plenger v. Alza Corp*. (1992) 11 Cal.App.4th 349, 362, fn. 8.)

posted, but the author of the document(a human resources executive) created it without any direct assistance from the officers who would be overseeing the new department. When Bailey, the moving force behind the creation of the new department, was asked about the chart at his deposition, he testified that the chart did not "wholly capture" his vision for the new Creative Affairs Department.

In addition, as part of their rebuttal evidence, Companies submitted the deposition testimony of Chris Salembier (Salembier), a story analyst who had worked under both Brady and Virtue and who was later promoted to manager of the Creative Affairs Department after Virtue moved on to a creative executive position. Salembier testified that when Virtue was in charge of the new department, she spent a majority of her time on research and development efforts tied to film projects and left the day-to-day management of the story analysts (Brady's primary duty as manager of the old Story Department) to the department's script coordinator/librarian. In addition, Salembier testified that as one of the current co-managers of the Creative Affairs Department he spends only a "small portion" of his time managing the work of the story analysts.

D. THE TRIAL COURT GRANTS DISNEY'S MOTION

On March 4, 2016, after ruling on Companies' evidentiary objections,[4] the trial court heard oral argument on the motion

---

[4] On appeal, Brady takes issue with one of the trial court's evidentiary rulings sustaining an objection to a portion of his declaration. Since Brady's argument is made in a footnote and without the benefit of any supporting legal authorities, we consider the argument waived. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

and then took the matter under submission. On April 1, 2016, the trial court issued a minute order granting Companies' motion, supported by a 19-page statement of decision explaining its finding that Brady had made an "insufficient showing that [Companies'] stated reason for terminating [him] was pretextual, or that [Companies] unlawfully discriminated against [him] because of age." The trial court entered judgment in Companies' favor on April 19, 2016 and an amended judgment on May 5, 2016. Brady timely appealed.

E. THE TRIAL COURT TAXES DISNEY'S COSTS

In mid-May 2016, Companies served Brady with a memorandum of costs seeking to recover various expenses (filing fees, deposition costs and service of process fees) totaling $14,797.20. On June 2, 2016, Brady moved to tax/strike Companies' costs memorandum on the ground that his age discrimination claims were not frivolous, groundless or unreasonable. Companies opposed the motion. On June 29, 2016, the trial court granted Brady's motion, finding that his claims were not objectively without foundation when he first filed his action and did not become objectively without foundation during the course of the litigation. Companies timely appealed.[5]

DISCUSSION

I. Summary judgment was proper

A. STANDARD OF REVIEW

We review an order granting summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made

---

[5] The parties stipulated to have their respective appeals consolidated for purposes of briefing, oral argument and decision. We granted the parties' stipulation.

and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768.) We accept as true both the facts shown by the losing party's evidence and reasonable inferences from that evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

B. SUMMARY JUDGMENT AND EMPLOYMENT DISCRIMINATION CLAIMS

In an employment discrimination case, an employer may move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz*, *supra*, 24 Cal.4th 317, 357.) A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. (*Id.* at p. 358.) The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action. (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098.)

By presenting such evidence, the employer shifts the burden to the plaintiff to present evidence that the employer's decision was motivated at least in part by prohibited

discrimination.[6] (*Guz*, *supra*, 24 Cal.4th at pp. 353, 357.) The plaintiff's evidence must be sufficient to support a reasonable inference that discrimination was a substantial motivating factor in the decision. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232; *Guz*, at p. 353.) The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive. (*Guz*, at p. 362 & fn. 25.)

Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it "remains subject to careful scrutiny." (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433.) The employee's "subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*Ibid*.) The employee's evidence "must relate to the motivation of the decision makers [and] prove,

---

[6] This burden-shifting test, known as the *McDonnell Douglas* test, is derived from the three-stage burden-shifting test established by the United States Supreme Court for use at trial in cases involving employment discrimination claims. (See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792; *Guz*, *supra*, 24 Cal.4th at pp. 354, 357.) A plaintiff has the initial burden at trial to establish a prima facie case of employment discrimination. (*Guz*, *supra*, 24 Cal.4th at p. 354.) On a summary judgment motion, in contrast, a moving defendant has the initial burden to show that a cause of action has no merit (Code Civ. Proc., § 437c, subd. (p)(2)) and therefore has the initial burden to present evidence that its decision was motivated solely by legitimate, nondiscriminatory reasons. (*Kelly v. Stamps.com Inc*., *supra*, 135 Cal.App.4th at pp. 1097–1098.)

by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*Id*. at pp. 433–434.)

To show that an employer's reason for termination is pretextual, an employee " 'cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.' " (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 (*Hersant*).) To meet his or her burden, 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," ' " and hence infer " 'that the employer did not act for [the asserted] non-discriminatory reasons.' " (*Ibid*.) "[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' 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*." (*Guz*, *supra*, 24 Cal.4th at p. 358.)

In short, where the case has been decided on summary judgment, " ' "[i]f 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." ' " (*Arteaga v. Brink's, Inc.* (2008)163 Cal.App.4th 327, 344, italics omitted.)

C. COMPANIES MET THEIR EVIDENTIARY BURDEN

Companies submitted evidence that Brady's termination was based on a nondiscriminatory reason, namely the transformation of the Story Department into a conceptually bigger business unit, the Creative Affairs Department. So unassailable was this evidence that Brady expressly did not dispute it. In addition, Companies put forward evidence that Virtue, regardless of her age, was qualified to lead the new department.

D. BRADY DID NOT MEET HIS EVIDENTIARY BURDEN

An age discrimination plaintiff, such as Brady, may show that a defendant's proffered reason is pretextual through direct or circumstantial evidence. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69.) With direct evidence of pretext, " ' "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.] The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' " (*Id.* at p. 69.) In contrast, "[c]ircumstantial evidence of ' "pretense" must be "*specific*" and "*substantial*" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis." (*Ibid.*, italics added.)

Here, Brady did not offer any direct evidence of pretext. He did not, for example, point to any age-related remarks or statements by any of Companies' employees. In fact, at his deposition, he testified that none of his superiors at Disney ever made any comments about his age in connection with his

termination and that prior to learning that his position was being eliminated, he did not have any reason to believe that he was being discriminated against because of his age.

As a result, in order to survive Companies' motion, Brady needed to produce specific and substantial circumstantial evidence of discrimination. Brady's burden was even higher due to Companies' strong (undisputed) showing of a legitimate, nondiscriminatory reason to terminate Brady and promote Virtue. (*Guz*, *supra*, 24 Cal.4th at p. 362 & fn. 25.) While Brady was able to rely on specific circumstantial evidence, he failed to produce evidence sufficient to support a reasonable inference that discrimination was a substantial motivating factor in his termination.

1. Job posting, Virtue's bonus and self-review

In opposing the Companies' motion, Brady relied on the following documents: the job posting for the manager of the Creative Affairs Department; Virtue's 2013 self-review; and the 2013 bonus request for Virtue. While each of those documents contains language indicating that the manager of the new department was responsible for managing the story analysts, the documents also indicate that the job entailed additional duties and responsibilities.

For example, among the responsibilities listed in the job posting, the first two were not among Brady's duties as manager of the Story Department: "Participates with the creative development executives to assist in the identification of the best story with the best writers within established service levels[; and [¶]] Stays abreast of industry trends, compiles research on writers, genres, and competitive projects, etc." The job posting also listed the following as the number one job qualification:

"3+ years experience in creative development on a senior executive or agency desk"—experience that Brady did not possess.

Although Virtue's self-review stated that her job "includ[ed] the Story Department," it also plainly stated that oversight of the Story Department was only one of several other responsibilities she performed Similarly, the bonus request stated that, while Virtue "took over the leadership role of Story Department," she did so "in coordination with the Creative Affairs work." Moreover, the bonus request went on to state further that Virtue "excelled" at her dual role and that "[p]rior to Jess' arrival, some of the executives did not even utilize the work of the department."

2. Brady's performance reviews

Brady's performance reviews do not support a reasonable inference of discriminatory animus given the uncontroverted testimony of Salembier regarding the substantial differences in duties between Brady's former position as manager of the Story Department and the manager of the Creative Affairs Department. Indeed, Salembier testified that the current workload is so heavy that he shares the position with a co-manager.[7] (See *Horn v. Cushman & Wakefield Western, Inc.*

---

[7] In light of the substantial differences in job responsibilities, Brady's performance reviews do not support a reasonable inference that he was qualified to lead the new department. His ratings in those reviews, while consistently favorable, declined steadily over time. In 2009, Brady received the highest rating out of five possible, "Leading the Way." In 2010, Brady received the second highest rating, "Moving Ahead." In 2011, Brady's rating dropped again, this time to the third level, "Right on Track." In 2012, although Brady's rating did not

(1999) 72 Cal.App.4th 798, 812–814 (*Horn*) [affirming summary judgment for employer, in part, because "actual duties" of new/restructured department "differed substantially" from old department].)

3. Job comparison chart

The piece of evidence upon which Brady relied most heavily—the chart comparing the two departments—does not support a reasonable inference that he was qualified to lead the new department. The document was created in early 2012, just weeks after Disney began taking steps to create a new department and more than a year before Brady was notified that he was being laid off. Moreover, Companies submitted uncontroverted evidence that the chart was not meant to be a finalized job description, but only a preliminary conceptualization of the new position. In addition, Companies submitted undisputed deposition testimony showing that Bailey, the executive who pushed for the creation of the new department, regarded the chart as an incomplete listing of the duties of the head of the Creative Affairs Department. (See *Horn*, *supra*, 72 Cal.App.4th at p. 811 ["it is the focus of the actual job duties required, rather than the position description which is relevant"].)

In short, Brady failed to demonstrate that the reasons proffered by Companies for his termination were " ' "unworthy of credence." ' " (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005.) Under California law, a trial court may grant summary judgment where, as here, " 'the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was

---

slide any further, it did not rise either; instead, it remained at the third level of five, "Right on Track."

abundant and uncontroverted independent evidence that no discrimination had occurred.' " (*Guz*, *supra*, 24 Cal.4th at p. 362.) Accordingly, we hold that Companies were entitled to judgment as a matter of law on Brady's age discrimination claims.

II. The order taxing Disney's costs was proper

A. STANDARD OF REVIEW AND GUIDING PRINCIPLES

Government Code section 12965, subdivision (b), permits a court, in its discretion, to award to the prevailing party in a FEHA action reasonable attorney fees and costs.

In determining whether an award of attorney fees to a FEHA defendant is appropriate, California courts apply the standard applied in discrimination cases under Title VII of the Civil Rights Act of 1964, set forth in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422 (*Christiansburg*). (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 103 (*Williams*).) Under the *Christiansburg* standard, a plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claims were frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (*Christiansburg*, at p. 422.) The *Christiansburg* court reasoned that the purpose of the fee provision was to " 'make it easier for a plaintiff of limited means to bring a meritorious suit.' " (*Id.* at p. 420.) "To award fees to a defendant simply because the plaintiff was ultimately unsuccessful 'would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.' " (*Williams*, *supra*, at p. 101.) Thus, a defendant should be awarded his or her attorney fees " 'not routinely, not simply

because he succeeds, but only where the action brought is found to be unreasonable.' " (Christiansburg, at p. 421.)

The *Christiansburg* court warned against "*post hoc*" reasoning. (*Christiansburg*, *supra*, 434 U.S. at p. 421.) Thus, a trial court must not conclude that, simply because the plaintiff did not prevail, "his action must have been unreasonable or without foundation." (*Id.* at p. 422.) The high court reasoned that "[n]o matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." (*Ibid.*) Thus, the term "meritless" means "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." (*Id.* at p. 421.)

In *Williams*, *supra,* 61 Cal.4th 97, our Supreme Court held that the "*Christiansburg* standard applies to discretionary awards of both attorney fees and costs to prevailing FEHA parties under Government Code section 12965(b). . . . A prevailing defendant . . . should not be awarded fees and costs unless the court finds the action was *objectively without foundation* when brought, or the plaintiff continued to litigate after it clearly became so." (*Id.* at p. 115, second italics added.)

A trial court's award of attorney fees and costs under Government Code section 12965, subdivision (b), is subject to abuse of discretion review. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1200.) Under this standard, we will not disturb a trial court's discretionary decision in the absence of a manifest abuse of the trial court's discretion. (*Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1151.)

B. NO ABUSE OF DISCRETION

Although Brady's age discrimination claim did not prove to be particularly strong, there is no evidence that it was objectively without any foundation in fact. Disney terminated Brady after 25 years in the same department and hired a person more than 20 years his junior to lead the successor to Brady's old department. Courts have recognized that replacement by a substantially younger person can be an indicator of age discrimination. (See *France v. Johnson* (9th Cir. 2015) 795 F.3d 1170, 1174 [holding that "an average age difference of ten years or more between the plaintiff and the replacements will be presumptively substantial, whereas an age difference of less than ten years will be presumptively insubstantial"]; *O'Connor v. Consolidated Coin Caterers Corp*. (1996) 517 U.S. 308, 313 ["substantial younger" replacement may be "reliable indicator of age discrimination"].) Accordingly, we hold that the trial court did not abuse its considerable discretion in finding that Brady's claim was not meritless.

DISPOSITION

Summary judgment in favor of Walt Disney Pictures, The Walt Disney Company and Disney Worldwide Services, Inc., is affirmed. The order striking Walt Disney Pictures, The Walt Disney Company and Disney Worldwide Services, Inc.'s costs is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J. BENDIX, J.