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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOHN DAVIS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B256803 (Los Angeles County Super. Ct. No. BC484851)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven J. Kleifield, Judge. Affirmed.

Haney & Young, Steven H. Haney, J. Adrian Zamora for Plaintiff and Appellant.

Law Offices of David J. Weiss, David J. Weiss, Alyssa S. Gjedsted, Elizabeth A. Bright for Defendant and Respondent.

Plaintiff John Davis appeals from a judgment entered after the trial court granted summary judgment in favor of the County of Los Angeles (the County) in this employment action alleging discrimination and harassment based on physical disability, retaliation, and other causes of action. We affirm.

BACKGROUND

At all relevant times, John Davis was employed by the County as a Fire Captain with the Los Angeles County Fire Department (the Department).

In March 2009, Davis was diagnosed with a brain tumor (meningioma). The same month, he took a leave of absence from the Department, filed a workers' compensation claim, and underwent surgery to treat the brain tumor. On June 23, 2009, the qualified medical examiner (QME) on Davis's workers' compensation case issued a report finding the meningioma was work-related. After being cleared by the (QME) and his treating physicians, Davis was released back to work full duty without restrictions on October 12, 2009. The Department denied his workers' compensation claim later that month on October 21, 2009. Davis returned to work at the fire station on October 26, 2009. In November 2009, he appealed the denial of his workers' compensation claim.

In November or December 2010, the Department's Division Chief for Risk Management, Michael Kranther, learned Davis was taking anti-seizure medication. Kranther was at a regularly scheduled meeting with the County's third party workers' compensation administrator, Intercare, when he learned this information. The purpose of the meeting was to review and discuss pending workers' compensation claims against the County, including Davis's claim.

After learning about Davis's use of anti-seizure medicine, Kranther discussed the matter with the Department's medical director, Dr. Frank Pratt. Dr. Pratt recommended the Department refer Davis's case to the County's Occupational Health Programs (OHP) for review. On January 28, 2011, Kranther sent a memorandum to the Department's human resources division, explaining that Davis was released to full duty without restrictions in October 2009, but continued to be treated with anti-seizure medication.

Kranther's memorandum requested the human resources division evaluate Davis's case and decide whether the matter should be referred to OHP.

The Department's human resources manager, Kiran Sahni, contacted OHP to determine whether the Department should refer Davis's case to OHP for an evaluation of Davis's fitness to perform his work assignment in light of his use of anti-seizure medication. On February 3, 2011, Dr. Kenichi Carrigan from OHP sent an email to Sahni, stating, "Based on the dept's concern regarding Mr. Davis' use of anti-epileptic medication, please send a request for reeval to our office. We are concerned about it as well. Please include the letter of request as well as Mr. Davis' signed consent form to us so that we can initiate the process."

On February 6, 2011, Davis's supervisor, Battalion Chief Art Ellis, presented Davis with a form entitled, "Consent for Medical/Psychological Re-Evaluation" (Consent Form) and asked Davis to sign it. The form states, in pertinent part, "I . . . consent to be medically/psychologically re-evaluated by Occupational Health Programs in order to determine my ability to perform the essential duties of my position." Davis refused to sign the Consent Form. After their meeting, Davis sent Battalion Chief Ellis an email stating, "I enjoyed our conversation today. Thanks for your valuable time and expression of support. I found this document ["Psychological Reevaluations: Policies and Guidelines" booklet prepared by OHP] and it seems to apply to what you delivered to me. I'm not a lawyer but it appears the Department must prove some cause or need, based on behavior or failure to perform my job, in order to request a re-evaluation. Please let the chief know that I will not comply until I am forced to do so, or advised to, by my legal counsel." According to Davis, Battalion Chief Ellis did not explain to him why the Department wanted him to sign the Consent Form or what testing he would undergo if he signed the Consent Form.

On March 3, 2011, the Department (Sahni) informed OHP (Dr. Carrigan) that Davis did not sign the Consent Form. The same day, Dr. Carrigan sent Sahni an email, stating:

"Thanks for the update. If he [Davis] is not cooperating with the re-eval process, we advise the dept to administratively restrict him due to safety concerns. The following work restrictions will be appropriate:

- No driving on County time.
- No working at heights.
- No tasks where sudden loss of consciousness would cause injury to others or interfere with the provision of emergency services.

Please let me know when the employee and department [are] ready to go forward with the medical re-evaluation process. In the meantime, the above work restrictions should be enforced immediately."

On March 7, 2011, the Department again asked Davis to sign the Consent Form and again Davis refused. The same day, Chief Ellis sent Davis a memorandum informing him the Department was placing him in "a light duty assignment," "based on worked restrictions placed on you by OHP."

About three weeks into his light duty assignment, on March 29, 2011, Davis sent a written inquiry to the human resources chief and other chiefs in the Department, asking what information the Department had acquired, and where it had acquired the information from, which caused the Department to place him in a light duty assignment. Davis also asked whether there were "policies or procedural requirements to be met in order to suddenly change my work status." On April 6, 2011, Davis sent a similar inquiry through his chain of command to Fire Chief Daryl Osby. On April 8, 2011, the president of the union to which Davis belonged sent a four-page letter to Fire Chief Osby, demanding the Department reinstate Davis to full duty with no restrictions.

On April 22, 2011, Dr. Carrigan from OHP prepared a letter to Davis, explaining, "As you are aware we have received a request for medical re-evaluation from your department. This request was prompted by departmental concerns that a medical condition may impact your safety and safety of others while at work. You have a history of brain tumor and we were informed that you currently take anti-seizure medication. A medical re-evaluation must be conducted in order to determine your risk of seizures and

fitness to continue your duties as a Fire Captain." In the letter, Dr. Carrigan requested Davis provide to OHP by June 27, 2011, (1) copies of his medical records from March 2009 to the present relating to evaluation and treatment for the brain tumor, (2) pharmacy records listing medications dispensed from 2009 to 2011 relating to his brain tumor and prevention of seizures, (3) the September 14, 2010 QME report in his workers' compensation case, and (4) results of a current electroencephalogram, if any.

On April 25, 2011, the Department (Sahni) sent Davis a letter, informing him he was released to return to full duty, effective immediately, but was still required to submit the medical records to OHP as requested in Dr. Carrigan's April 22, 2011 letter (which was attached to the Department's correspondence). The Department's April 25 letter also informed Davis, if he did not comply with OHP's request for medical records, OHP would conclude its assessments and the Department would re-impose work restrictions on Davis. Davis returned to his full duty position without restrictions.

Davis did not provide the requested medical records to OHP by June 27, 2011. On June 30, 2011, the Department sent Davis a letter, informing him the Department planned to re-impose certain work restrictions ("No driving on County time" and "No tasks where sudden loss of consciousness could cause injury to others or interfere with the provision of emergency services"), as set forth in an attached June 29, 2011 letter from Dr. Carrigan to Davis. Dr. Carrigan's June 29 letter also advised Davis that OHP would reconsider the work restrictions "at any time" if Davis submitted the requested medical records. In the June 30 letter, the Department notified Davis that it had scheduled an interactive process meeting for July 5, 2011, prior to any re-imposition of work restrictions.

Also on June 30, 2011, Fire Chief Osby sent Davis a letter, explaining, "Legal counsel has advised the Department not to reply to the questions posed by you in your letter dated April 6, 2001[] due to your pending petition before the Civil Service Commission and your Workers' Compensation claim." Osby invited Davis to have his representative contact County Counsel regarding the questions posed in Davis's April 6 letter.

Davis attended the interactive process meeting on July 5, 2011. At the meeting, Davis submitted and read aloud a four-page written statement, objecting to the work restrictions and requesting the Department place him on paid administrative leave instead. In the written statement, Davis stated his reassignment to light duty had "subjected [him] to a loss of pay and other financial damages."[1] He argued the work restrictions were unwarranted because (1) the Department of Motor Vehicles was aware of his medical history but had placed no current restrictions on his driver's license, and (2) he had never suffered a sudden loss of consciousness, and his medical history and use of anti-seizure medication did not increase his risk for losing consciousness. Davis claimed the actual reason the Department referred his case to OHP and was unlawfully requesting his private and protected medical information was in "an attempt to intimidate, harass and retaliate against" him for appealing the Department's denial of his workers' compensation claim. Davis also complained about the lack of information from the Department regarding the bases for the work restrictions, despite his repeated requests for such information. He further made reference to the denial of his rights under the Fair Employment and Housing Act, but did not elaborate.

On July 7, 2011, the Department issued a memorandum, which Davis received on July 11, 2011, confirming Davis's work restrictions, as set forth in the Department's June 30, 2011 letter to Davis (and listed above). Davis reported for his light duty assignment, but continued to object to the work restrictions and the manner in which they were imposed. He filed multiple grievances and made inquiries regarding the propriety of the Department's request for his private medical records and request for a medical reevaluation while his workers' compensation appeal was pending. Davis claims the Department wrongfully ignored his grievances and requests for information.

[1] Although Davis continued to be classified and paid as a Fire Captain, his hours were reduced from 56 to 40 hours per week, and his light duty assignment prohibited him from working overtime and collecting overtime pay.

On November 2, 2011, Davis submitted a request to participate in night live fire training. On November 9, 2011, the Department sent Davis a memorandum denying his request based on his work restrictions "to protect you and the personnel around you."

Davis continued to work in a light duty assignment until March 2012. In December 2011, and again in January 2012, he was reassigned from one light duty assignment to another, which he claims was unnecessary and unwarranted.

On March 20, 2012, the Workers' Compensation Appeals Board entered a stipulated award, finding Davis's brain tumor was work-related. On March 22, 2012, Dr. Carrigan from OHP sent Davis a letter explaining, due to the finding that Davis's tumor was work-related, civil service rules required OHP to "base [its] determination of [Davis's] work fitness solely on [his] workers' compensation medical records."[2] On March 26, 2012, the Department held a second interactive process meeting and informed Davis the Department was returning him to full duty. In a March 27, 2012 memorandum to the County's Risk Management Branch, Fire Chief Osby explained that the medical evidence on which the Workers' Compensation Appeals Board based its stipulated award (the QME's September 14, 2010 report) stated that Davis was cleared to return to work full duty without restrictions. Accordingly, the Department decided to return Davis to full duty. Davis accepted his full duty assignment.

In May 2012, Davis filed this employment action against the County. In a first amended complaint, filed against the County on August 1, 2012, Davis asserted five causes of action alleging violations of the California Fair Employment and Housing Act (FEHA)[3] (discrimination based upon physical disability, harassment based upon physical disability, retaliation, failure to prevent discrimination, harassment and/or retaliation, and

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[2] Los Angeles County Civil Service Rules, rule 9.07(b) states, in pertinent part: "If the employee's condition is the result of a work-incurred injury which falls within the jurisdiction of the workers' compensation appeals board, the determination by the director of personnel of the employee's medical capacities shall be based solely upon the medical evidence used by the appeals board in its disposition of the case."

[3] Government Code section 12900 et seq.

failure to engage in the interactive process). He also asserted a cause of action alleging violation of the California Labor Code's whistleblower statute (Lab. Code, § 1102.5), and a cause of action alleging violation of the California Firefighters Procedural Bill of Rights Act (§§ 3250-3262).

In June 2013, the County filed a motion for summary or in the alternative motion for summary adjudication against Davis, which Davis opposed. The trial court granted the motion for summary judgment and entered judgment on May 6, 2014.

DISCUSSION

Standard of Review

To prevail on a motion for summary judgment in an action brought under the FEHA, 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." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247.) 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

"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, subd. (a).)" (*Scotch*, *supra*, 173 Cal.App.4th at p. 1002.) Under FEHA, "the definitions of physical disability and mental disability [are] construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." (§ 12926.1, subd. (b).)

Davis met his burden of establishing a prima facie case of unlawful discrimination. Because of a perceived physical disability or medical condition, the Department/County placed Davis in a light duty assignment with work restrictions. The County reduced his weekly hours, prohibited him from working overtime, and denied him certain training.

The County presented admissible evidence demonstrating it placed Davis in a light duty assignment with work restrictions based on a legitimate, nondiscriminatory factor—public safety. At a regularly scheduled meeting with the County's third party workers' compensation administrator, the Department learned Davis was taking anti-seizure medication as prescribed by a physician. The Department's medical director recommended the Department refer Davis's case to OHP for a review of Davis's fitness to perform his work assignment. Dr. Carrigan at OHP shared the Department's concern about public safety in light of Davis's use of anti-seizure medication. OHP recommended Davis be medically reevaluated. The Department and OHP wanted to determine if there was a risk Davis would lose consciousness on the job and compromise his safety and that of others.

The burden shifted back to Davis to show the County's reason for the adverse employment actions "was in fact pretext" and the County's motive for its actions was

discriminatory. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804; *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 361.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at p. 361.) "'The [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.) A showing of "general unfairness" by the employer will not defeat the employer's summary judgment motion. (*Ibid*.) The employee must show discrimination.

Davis has not presented sufficient evidence of pretext to raise a triable issue of material fact precluding summary judgment. The Department/County's internal correspondence consistently cites public safety as the reason—the only reason—for seeking a medical reevaluation and placing Davis in a light duty position with restrictions pending the reevaluation. Davis asserts public safety was not an issue given he had been cleared to return to full duty in October 2009, had worked his full duty assignment for 17 months without a loss of consciousness before the Department learned about his use of anti-seizure medication, and had no current restrictions on his driver's license. Whether or not Davis's use of anti-seizure medication *should have* raised a red flag in the Department about public safety, the evidence shows it *did, in fact,* raise a concern in the Department and the County about public safety. Davis has presented insufficient evidence to show the Department/County's consistently stated concern about public safety was pretextual.[4]

[4] Davis argues the County did not ask other employees with serious medical issues to sign a consent form for reevaluation or place them in light duty assignments. Davis has not cited a case that was medically similar to his own and we need not address this issue further.

Davis also asserts the County ignored and/or mishandled his inquiries about the work restrictions as well as his multiple grievances, made unlawful requests for his private and protected medical information, and was prohibited from seeking a medical reevaluation while his workers' compensation appeal was pending. To the extent these assertions are true, these facts are insufficient to show a discriminatory animus. The County's competence in handling complaints and grievances and its knowledge of privacy laws and workers' compensation rules are not being tested on summary judgment. The issue is whether Davis has presented sufficient evidence demonstrating the County was motivated by a discriminatory animus and was lying when it repeatedly stated it was imposing the work restrictions and seeking the medical reevaluation because it was concerned Davis's treatment with anti-seizure medication indicated there was a risk he might lose consciousness and pose a public safety risk. Davis has not presented sufficient evidence to raise a triable issue of material fact on his discrimination claim.

Harassment

Davis contends the County subjected him to actionable harassment because of a perceived physical disability.

Under FEHA, it is unlawful for an employer to harass an employee because of a physical disability. (§ 12940, subd. (j)(1).) "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.) "'[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.'" (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646.)

"'[C]ommonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of

supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management." (*Reno v. Baird, supra,* 18 Cal.4th at pp. 646-647.)

The County's actions that Davis complains about are personnel management actions—the manner in which the County sought the medical reevaluation, the County's requests for Davis's medical records, the County's assignment of Davis to light duty, the County's imposition of work restrictions, the County's handling of Davis's grievances and complaints. Davis cannot prove a cause of action for harassment as a matter of law.

Retaliation

Davis contends the County engaged in retaliation after Davis "complained often and repeatedly concerning his mistreatment" and "protested incessantly that he was being subjected to discrimination, was harassed and was retaliated against for challenging the methods employed by the County in violating his rights" under various statutes and rules.

"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.'" (*Id.* at p. 1020.)

Davis has not presented evidence establishing a causal link between his complaints and any adverse employment action. As discussed above, the evidence demonstrates the County took all adverse employment actions for one reason and one

reason only—a perceived public safety risk as indicated by Davis's use of anti-seizure medication. Accordingly, Davis cannot prove a retaliation cause of action as a matter of law.

Failure to Prevent Discrimination, Harassment and Retaliation

Because Davis cannot prove the underlying causes of action for discrimination, harassment and retaliation, as explained above, his cause of action for failure to prevent such conduct under section 12940, subdivision (k), cannot lie. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, fn. 4 ["courts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)"]; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 ["Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented"].)

Failure to Engage in the Interactive Process

"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.)

Because Davis did not request any accommodation from the County, the County had no duty to engage in the interactive process with him, and this cause of action fails as a matter of law. Moreover, Davis did not have a "known" physical disability. The County was seeking a medical reevaluation to determine if Davis had a disability or medical condition which would prevent him from doing his job safely.

Whistleblower Statute

"Labor Code section 1102.5, subdivision (b), prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a statutory or regulatory violation. The purpose of this statute is to

‘“encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.”’” (*Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537, 1545-1546.) “To establish a prima facie case for whistleblower liability, a plaintiff must show that he or she was subjected to adverse employment action after engaging in protected activity and that there was a causal connection between the two.” (*Id*. at p. 1546.)

As already discussed, there is no causal connection between Davis’s complaints to his superiors and any adverse employment action. Accordingly, Davis cannot prove this cause of action as a matter of law.

Firefighters Procedural Bill of Rights Act

Under the Firefighters Procedural Bill of Rights Act, “When any firefighter is under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, that could lead to punitive action, the interrogation shall be conducted under [certain enumerated] conditions.” (§ 3253.)

Davis was not under investigation or subjected to interrogation by his commanding officer. This statutory provision is inapplicable to the facts of this case. Accordingly, Davis’s cause of action under this provision fails as a matter of law.

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

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. LUI, J.