Filed 7/17/18 Starna v. City of Hueneme CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ERIC E. STARNA,

Plaintiff and Appellant,

v.

CITY OF PORT HUENEME et al.,

Defendants and Respondents.

2d Civil No. B283772
(Super. Ct. No. 56-2016-00476757-CU-OE-VTA)
(Ventura County)

Eric E. Starna appeals a judgment (order sustaining demurrer without leave to amend), entered in favor of respondents City of Port Hueneme, Robert Albertson, and Peter Freiberg on appellant's Second Amended Complaint for marital status discrimination in violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12920 et seq).[1] The trial court ruled that 1. the FEHA causes of action were time-barred, and 2. no causes of action were stated. We affirm.

[1] Unless otherwise stated, all further statutory references are to the Government Code.

Facts and Procedural History

Appellant, a detective sergeant at the Port Hueneme Police Department (City), originally sought damages for adverse personnel actions dating back to 2010 when appellant dated and later married fellow detective Nora Guerrero. The Second Amended Complaint alleges a long history of adverse employment actions that are summarized as follows:

In July 2010, appellant informed his superior, Commander Jerry Beck that he intended to date Nora Guerrero, a subordinate detective in the department. City's anti-nepotism policy (Policy 1050) did not prohibit dating but did prohibit dating or married employees from being in a direct supervisor-subordinate relationship. Commander Beck said it would be fine for the two to date and work together because they could be trusted to be professional.

In August 2010, appellant complained about rumors concerning his favorable treatment of Guerrero. On August 13, 2010, Sergeant/Acting Commander Robert Gager told appellant that he had made himself "'unpromotable'" by having a relationship with Guerrero. Gager warned that other employees would stop appellant from trying to promote. On August 15, 2010, Commander Beck said that "'[w]e have to do something [because] the rumors are running rampant.'" Appellant and Guerrero were called into a meeting to discuss job position changes.

On September 30, 2010, appellant served the deputy city manager with a "Hostile Work Environment" personnel complaint. Appellant requested an investigation and asked that responsible employees be counseled to cease and desist.

In February 2011, Chief of Police Kathleen Sheehan removed appellant from his position as Detective Sergeant because Sergeant Robert Albertson had more experience. In May 2011, Chief Sheehan emailed appellant about positions in other police departments. As a result of the demotion, appellant lost 7.25% in detective premium pay. He believed his career had been "derailed."

In December 2012, Chief Sheehan resigned. Lieutenant Robert Gager became acting chief and promoted Det. Sgt. Robert Albertson to lieutenant to serve as second in command. Appellant believed he would have been a lieutenant had he not been demoted. After Gager was named chief of police, Gager said he would promote appellant to lieutenant but Nora Guerrero (now Nora Starna) would have to resign.

In March and April 2013, appellant complained about supervisor harassment and City's selection and promotion process. Appellant was promoted to detective sergeant (his previous position). He complained that three detectives had been assigned to patrol and that Nora Starna and a second officer were serving as court liaison officers without overtime pay. Appellant protested the working conditions and requested a meeting to discuss unpaid overtime and review the detective job descriptions. Appellant also requested that City make reasonable accommodations for him and Nora Starna.

In February 2014, appellant was treated for chest pains that were stress related and, in March 2014, he sustained a work-related injury. After appellant returned to light duty, he was falsely accused of showing signs of drug influence and asked to undergo a psychological examination. In June 2014, appellant was reprimanded for working on Friday while on light duty. In

August 2014, appellant was medically cleared to return to full duty but told to go home and not think about "'this place.'" In August 2014, a fellow officer falsely reported that appellant was abusing prescription medications and possibly abusing his wife.

In September 2014, appellant's peace officer duties were suspended for using opiate pain medication. After appellant had surgery, two officers visited and reported that appellant was "'disheveled'" and showed signs of opiate drug influence. It prompted an internal investigation to determine whether appellant was abusing prescription medication. Appellant complained that the investigation was "one-sided" and that Sergeant Freiberg had falsely accused him of committing workers' compensation fraud. In April 2015, someone in the City Human Resources Department told appellant's doctor that appellant was beating his wife and abusing prescription medication.

On July 9, 2015, Sergeant Freiberg (now Commander Freiberg) admonished appellant for "'bad mouthing'" the department about Albertson's and Freiberg's promotion. In August and September 2015, appellant received more written reprimands.

DFEH Administrative Complaint

On January 7, 2016, appellant filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) for marital status discrimination and employment retaliation. Appellant received a right to sue letter the same day and filed the instant action for damages.

Second Amended Complaint

After two rounds of demurrers, appellant filed a Second Amended Complaint (SAC) for whistleblower retaliation (Lab.

Code, § 1102.5; first cause of action), defamation (second cause of action), marital status discrimination (§ 12920 et seq; third cause of action), retaliation for opposition to martial status discrimination (§ 12920 et seq; fourth cause of action), and harassment for marital status and retaliation for opposition to marital status discrimination (§ 12920; fifth cause of action). After appellant dismissed the defamation cause of action, respondents demurred on the ground that the SAC was time-barred. Appellant opposed the demurrer on the theory that adverse employment conduct outside the one-year limitations period was actionable under the continuing violation doctrine.

The trial court sustained the demurrer without leave to amend. It ruled that the remaining causes of action were time-barred and concluded that the continuing violation doctrine did not apply. The trial court ruled that the FEHA violations were "permanent" and that the one-year statute of limitations commenced to run no later than the fall of 2014.[2] With respect to the first cause of action for whistleblower retaliation (Lab. Code, § 1102.5), the trial court ruled that the alleged whistleblowing activities were directed to internal administrative matters and not actionable. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384-1385; *Conn v. Western Placer Unified School Dist.* (2010) 186 Cal.App.4th 1163, 1181-1182.) With respect to the martial discrimination cause of action

[2] The Government Tort Claims Act (§ 810 et seq.) required that appellant present a written claim to City for damages no later than six months after the cause of action accrued. (See § 911.2; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 209.) The trial court ruled that the written claim was presented on October 26, 2015, a year after the FEHA action accrued.

(§ 12920; third cause of action), the trial court ruled that no facts were alleged that the discrimination was based on appellant's status as a married person. (See *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 944.) On the fourth and fifth causes of action for retaliation and harassment for opposition to marital status discrimination, the trial court ruled that the adverse employment actions took place from 2010 through 2014 and that the FEHA claims were time-barred.

De Novo Review

Because a demurrer tests the sufficiency of a pleading as a matter of law, we review the SAC de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) Appellant has abandoned the defamation and whistleblower causes of action for purposes of this appeal. (See, e.g., *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9, fn. 2.) What remains are the FEHA causes of action (third, fourth and fifth causes of actions).

FEHA One-Year Statute of Limitations

For purposes of demurrer, we focus on the adverse employment actions that occurred during the one-year period before the DFEH administrative complaint was filed on January 7, 2016. (§ 12960, subd. (d).) Discriminatory acts occurring after the administrative complaint was filed are barred by appellant's failure to exhaust his administrative remedies. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613 (*Okoli*) [failure to exhaust administrative remedy is a jurisdictional defect]; see, e.g., *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 898.) Although appellant can sue for adverse employment actions not included in the administrative

complaint, the incidents must be "'like or reasonably related'" to the administrative claim that was made. (*Okoli*, *supra*, at p. 1616.) Appellant, however, has not provided a copy of the administrative complaint and concedes there was no DFEH investigation. The SAC fails to allege that such an investigation would have uncovered adverse employment actions post-dating the administrative complaint. (Compare *Okoli*, *supra*, at pp. 1616-1617 [reasonable investigation would not have discovered retaliation after DFEH complaint filed], with *Baker v. Children's Hosp. Medical Ctr.* (1989) 209 Cal.App.3d 1057, 1065 [DFEH investigation took place; it was reasonable that an investigation of the allegations in the DFEH complaint would lead to investigation of subsequent discriminatory conduct].) Appellant has made no offer of proof what was in the DFEH complaint. Thus, he has forfeited the claim that a DFEH investigation, had one been conducted, would have uncovered more recent discriminatory conduct.

Continuing Violation Doctrine

Pursuant to FEHA, an administrative complaint must be filed no later than one year after the unlawful employment practice occurred. (§ 12960, subd. (d); *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 801-802 (*Richards*); *Trovato v. Beckman Coulter*, *Inc.* (2011) 192 Cal.App.4th 319, 327.) The continuing violation doctrine is an exception to the rule and tolls the statute of limitations. (*Richards*, *supra*, at p. 823; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 108, fn. 6 [continuing violation doctrine has its roots in principles of equitable tolling].) "Under this doctrine, a complaint arising under FEHA is timely if *any* of the discriminatory practices continues into the limitations period. [Citations.]" (*Accardi v.*

Superior Court (1993) 17 Cal.App.4th 341, 349.) "[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period . . . [providing the conduct is] sufficiently linked to unlawful conduct within the limitations period." (*Richards*, *supra*, at p. 812.)

To invoke the continuing violation doctrine, appellant must allege the FEHA violations were continuous and similar in kind, rather than a series of isolated occurrences. (*Richard*, *supra*, 26 Cal.4th at p. 823.) Appellant "must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." . . .' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 64.) The statute of limitations is tolled until the adverse employment conduct reaches some degree of permanence or finality. (*Yanowitz v. L'Oreal USA*, *Inc.* (2005) 36 Cal.4th 1028, 1059-1060 (*Yanowitz*) [continuing violation doctrine applies not only to FEHA harassment and discrimination claims but also retaliation claims].) That occurs when the employee is on notice that further efforts to end the discrimination, harassment, or retaliation would be in vain. (*Richards*, *supra*, at p. 823.)

The SAC alleges that the last adverse employment action concerning appellant's marriage was Lieutenant Albertson's removal of Nora Starna from the detective division on June 6, 2014. That occurred more than a year before the FEHA complaint was filed. And, it was an adverse employment action against Nora Starna (a non-party), not appellant.

The SAC also states that appellant was adversely treated while convalescing from a job-related injury. Appellant was

accused of abusing prescription drugs and reprimanded for working on Friday while on light duty. Those incidents do not involve discrimination, harassment, or retaliation based on marital status. The SAC states that appellant was falsely accused of "beating up his wife but no facts are alleged that the domestic violence investigation was connected to employment discrimination based on marital status. It is further alleged that appellant was subjected to wrongful employment actions by different supervisors but no facts are alleged that those actions are connected to marital status discrimination. Conclusory allegations to the contrary are disregarded on demurrer. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 650.)

Appellant contends that the continuous violation doctrine is an evidentiary issue that cannot be resolved on demurrer. Our courts have held to the contrary. (See *Acuna* v. *San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1406 (*Acuna*); *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 340; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 318-319; *Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at p. 345.) If the employee complains about an FEHA violation and the employer fails to take action to remedy the situation, the discrimination has reached permanence when the "employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (*Richards*, *supra*, 26 Cal.4th at p. 823.) That was the case in *Richards*, *Acuna*, *supra*, at pages 1414-1415, and *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1043.

In 2011, appellant was demoted and believed his career had been "derailed." Chief of Police Sheehan told him to consider

positions at other police departments. Appellant repeatedly complained from 2010 to 2014 but no action was taken thereon. The trial court found that "no reasonable person could have concluded that by the fall of 2014, 'further efforts at informal conciliation' would have been fruitful given everything that had occurred up to that time."

Appellant argues that the "reasonable person standard" is based on what appellant perceived, but our courts have stated that it is an objective standard. (See *Acuna*, *supra*, 217 Cal.App.4th at p. 1414 [applying objective test]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 905 [same; sexual harassment resulting in constructive discharge]; *Karahadian Ranches v. Agric. Labor Relations Bd.* (1985) 38 Cal.3d 1, 10 ["reasonable employee" for unfair labor practice claim is objective test].) An employer who is confronted with an employee seeking accommodation or relief from harassment or discrimination "may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards*, *supra*, 26 Cal.4th at p. 823.) In *Yanowitz*, *supra*, 36 Cal.4th at pp. 1059-1060, the plaintiff did not complain about the employer's discriminatory treatment until less than a year before the DFEH administrative complaint. Here, appellant repeatedly complained to no avail, more than a year before the DFEH administrative complaint was filed.

Appellant argues that he remained hopeful that a change in administration would result in the cessation of discrimination and harassment. Had that been alleged, it would not correct the pleading defect. Appellant should have known that further

efforts to resolve the situation would be futile. (See, e.g., *Cucuzza v. City of Santa Clara*, *supra*, 104 CalApp.4th at p. 1043.)

Anti-Nepotism Rules Do Not Constitute Marital Status Discrimination

The demurrer was sustained on the alternate ground that the martial status discrimination claim was based on who appellant was married to (i.e., a fellow detective), not the fact that he was married. (*Chen*, *supra*, 96 Cal.App.4th at p. 944.) Appellant cites *Hope Internat. University v. Superior Court* (2004) 119 Cal.App.4th 719, 724 for the rule that "marriage between two coworkers is not ipso facto a reason to get rid of one of them." Section 12940, subdivision (a)(3)(A) however, provides that employers have the right "to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission." The Fair Employment and Housing Commission has promulgated administrative rules which provide that employers "[f]or business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons." (Cal. Code Regs., tit. 2, § 11057, subd. (a)(2).) The rules further provide: "For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse." (*Id.*, subd. (a)(1).) City's anti-nepotism policy is consistent with those rules and the FEHA. No facts are alleged that City applied or enforced Policy 1050 in an unlawful manner.

In *Chen*, *supra*, 96 Cal.App.4th 926, the Court of Appeal explained that marital status discrimination refers to differential treatment because of the employee's marital status. (*Id.* at p. 939-940.) If the adverse employment action is based on who plaintiff is married to, it is not actionable under the FEHA. (*Id.* at p. 944.) In *Chen,* a deputy district attorney received unfavorable work assignments when she dated and married an upper management attorney in the same office who was "not in the good graces" of the county district attorney. (*Id.* at p. 930.) Plaintiff claimed the adverse work assignments were based on the district attorney's lack of approval of her relationship with and marriage to the office manager. (*Ibid*.) The *Chen* court cited *Boaden v. Department of Law Enforcement* (Ill. 1996) 664 N.E.2d 61 (*Boaden*) for the principle that employment discrimination based on marital status is not concerned with the identity of one's spouse. (*Chen*, *supra*, at pp. 941-942.)

In *Boaden*, plaintiff and his wife were police officers and worked at the same police department. They were prohibited from working the same shift, in the same patrol area. Plaintiff sued for unlawful discrimination based on marital status pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq. (West 1992)) which is similar to California's FEHA.[3]

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[3] The Illinois Human Rights Act provided: "'It is a civil rights violation: [¶] (A) . . . For any employer to refuse, to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, . . . discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.' 775 ILCS 5/2-102(A) (West 1992)." (*Boaden*, *supra*, at p. 65.) The statute defined unlawful discrimination as follows: "'"Unlawful discrimination" means discrimination against a person because of

(*Boaden*, *supra*, at p. 65.) The Illinois Supreme Court held there was no marital status discrimination because a policy prohibiting spouses from working together presents an entirely different kind of harm than discrimination based on an individual's marital status. (*Ibid.*) "[T]he statutory definition of marital status discrimination does not encompass policies based on the identity of one's spouse." (*Ibid*.)

The same analysis applies here.[4] If the adverse employment action is based on the employee's ""status of being married to a *particular* person,"" it is not marital status discrimination under the FEHA. (*Chen*, *supra*, 96 Cal.App.4th at p. 944; see *Nakai v. Friendship House Assn. of Am. Indians*, *Inc.* (2017) 15 Cal.App.5th 32, 40.) A series or sequence of adverse employment actions "is not enough." (*Chen*, *supra*, at p. 931.) The SAC alleges a long series of discriminatory and harassing acts, but alleges no facts that appellant was discriminated against, harassed or retaliated against based on his marital status.

Leave to Amend

Appellant, in his reply brief, concedes that "it is clear from other portions of the record that [appellant] never proffered the

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his or her race, color, religion, national original, ancestry, age, sex, *marital status*, handicap . . . .' 775 ILCS 5/1-103(Q) (West 1992)." (*Ibid*.)

[4] California Code of Regulation, title 2, section 11053, subdivision (a) defines "'Marital Status,'" as used in the FEHA, as: "An individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state."

amendments he now proposes in his AOB, and the trial court never exercised any discretion regarding such proposed amendments." Appellant requests that this court "determine in the first instance, without deference to the trial court, that [appellant] should be granted leave to amend."

Stated another way, no offer of proof was made to the trial court that the complaint could be amended to state a viable cause of action. There is authority that the issue of leave to amend is always open on appeal. (See Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.) "'While such a showing can be made for the first time to the reviewing court [citation], *it must be made*.'" (*Medina v. Safe-Guard Products*, *Internat.*, *Inc.* (2008) 164 Cal.App.4th 105, 112–113, fn. 8.)

Appellant's opening brief does not change the legal effect of his pleading. Citing California Code of Regulations, title 2, section 11057, subdivision (b), appellant argues that an employer must provide reasonable accommodations for married co-employees. Appellant cites no authority that the same duty applies to co-employees who date and create morale or supervision problems governed by the employer's anti-nepotism policy.[5]

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[5] City's anti-nepotism policy, which is modeled on section 12940, subdivision (a), provides: "Employees are prohibited from directly supervising, occupying a position in the line of supervision, or being directly supervised by any other employee who is a relative or with whom they are involved in a personal or business relationship." (Port Hueneme Police Department Policy Manual, Policy 1050: Nepotism and Conflicting Relationships, section 1050.2(a).)

The second amended complaint alleges that the marital discrimination commenced in 2010, *before* appellant married Nora. It alleges there were morale problems and rumors circulating through the department, and that Chief Sheehan removed appellant from the position of Detective Sergeant in early February 2011.

Appellant argues that he married Nora on February 23, 2011 and that Chief Sheehan knew about the planned marriage, which creates the inference Sheehan wanted appellant to resign and "did not want Starna and Nora serving in the same department, let alone with one one working for the other." Based on appellant's construction of the law, appellant's engagement and marriage trumped City's anti-nepotism rules and tolled the FEHA one-year statute of limitations for the next five years. There is no authority for that. Reasonable accommodations were made but appellant claimed that City did not go far enough. He complained about it for the next four years. The last adverse employment action concerning appellant's marriage purportedly occurred in 2014, more than a year before the FEHA complaint was filed.

Three pleading attempts are enough. A plaintiff does not have the right to file amended complaints ad infinitum. "'Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citation.]' [Citation.]" (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 458.)

Disposition

The judgment (order sustaining demurrer without leave to amend) is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

Law Offices of Samuel F. Galici and Samuel F. Galici; Law Office of Greg May and Greg May, for Plaintiff and Appellant.

Kessel & Associates and Elizabeth M. Kessel, Victoria N. Jalili; Pollak, Vida & Barer and Daniel P. Barer for Defendants and Respondents.