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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

LINDA FISHER, Plaintiff and Appellant, v. 3M, et al., Defendants and Respondents.	2d Civ. No. B286849 (Super. Ct. No. BC614372) (Los Angeles County)

Appellant Linda Fisher left her job at respondent 3M after 37 years. Six months later, she filed suit under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] Fisher alleges that she was constructively terminated by 3M and her supervisor in the shipping department, Ajay Kaneria, who did not accommodate her reading disability. The trial court granted summary judgment for respondents, whose uncontroverted evidence showed that they took no adverse action

[1] Unlabeled statutory references are to the Government Code.

against Fisher; had legitimate, nondiscriminatory reasons to transfer her; agreed to accommodate her disability; and no one harassed her.

On de novo review, we conclude that Fisher did not raise a triable issue of harassment or disability discrimination. Federal law required Fisher to pass a written exam. Despite having help from a colleague, Fisher repeatedly failed the exam. To comply with federal law, 3M moved Fisher to a department where she did the same type of work for the same pay, but did not have to take the exam. FEHA does not require more. We affirm.

FACTS AND PROCEDURAL HISTORY

Fisher began at 3M in 1978. She worked on an assembly line, as a janitor, and ultimately became a shipping technician. Employment at 3M is at will.

Fisher has difficulty reading and writing, but was not diagnosed with dyslexia until June 2015, shortly before she announced her retirement. The diagnosis was made by a psychologist who evaluated her reading comprehension.

Fisher worked in a designated security area (DSA) of 3M's plant, where she ensured the safety of shipments. She entered information into a computer and had to read and write shipping labels. She stated that her job required "[a] lot of reading and writing" and it was "very important" to be accurate. She agrees that improper labeling of hazardous materials (e.g., nitroglycerin) could cause "potentially devastating consequences if you made a mistake."

Since 2010, Fisher had to pass two annual written exams provided by the federal government (Exam). Fisher knew that passing the Exam is a prerequisite for her job. Without it, she could not access the DSA unescorted or screen shipments.

The Exam was administered by Fisher's co-worker, Arnie Gallo. As a favor, he allowed her to remain after other employees taking the exam had left, then read the Exam to her. Fisher took the Exam 22 times between 2010 and 2015, and failed it 14 times. 3M management was unaware that Gallo helped Fisher with the Exam.

Respondent Kaneria became Fisher's supervisor in 2014. As 3M's security coordinator, he ensures compliance with federal regulations. He learned that Fisher was going to lose her access rights to the DSA because she failed the Exam in December 2014 and January 2015, despite Gallo's assistance in reading the questions to her. Kaneria knew (and Fisher was informed) that federal law requires her to be able to read and write. She admittedly could not pass the Exam without help.

After failing the January 2015 Exam, Fisher told Kaneria that she might be dyslexic. 3M's human resources department (HR) had no record of a reading disability; its employee manual requires medical documentation of a disability affecting an employee's ability to work. Kaneria advised Fisher to document her claim "so that we can look to see if there are accommodations that 3M can provide to you." Fisher testified that she understood that a doctor had to document her disability.

When Fisher's access rights lapsed in February 2015, she could not work in the DSA unless accompanied by a co-worker; she described this as an impediment to colleagues' ability to do their own jobs. A co-worker commented, "I wish you would pass the test so I don't have to keep doing this." 3M approved Fisher's move to a shipping area where passing the Exam is not required. The employee manual allows 3M to reassign employees. Fisher's job duties and pay were unchanged by the reassignment.

Fisher testified that the job transfer "helped a lot" because co-workers no longer had to leave their posts in the DSA to act as her escort. No one in the new assignment gave her a hard time. She felt her work there was important, and earned an award for shipping a hazardous product. She remained in that job until she retired. No one told her there was a time limit on how long she could work at the new assignment.

Fisher was assessed for a reading disability. Testing was not completed until June 2015 due to "billing issues between my doctor and the insurance," as Fisher explained in an email to Kaneria. She asked if Gallo could read her the Exam while she awaited her doctor's report.

Kaneria replied, "Unfortunately, Arnie cannot read the question[s] for you until we have the final information from your doctor, which we can use to determine a path forward." Fisher did not wait for the doctor's report. She took the Exam and failed it in April, May and early June 2015. She offered 3M her school records, which did not state that she had a disability or identify what accommodation she needed for her job.

Fisher felt a difference in her treatment at work. Kaneria voiced concern that she would have a hard time receiving things coming into the plant and asked her whether she received a note from her doctor. She feared job termination and experienced depression, anxiety, stress and high blood pressure.

Fisher e-mailed HR in June 2015, thanking a supervisor for her "understanding, support, and help" and "appreciat[ing] all my hard work." Fisher was told to "please come up and see [the HR manager] so that she can clarify where we are with your doctor's note, where we stand with the testing, what you need to do."

During her meeting with the HR manager, Fisher was told "not to worry because I was not going to lose my job," an assurance Fisher wrote down in a summary of the conversation. This was reinforced by a supervisor in 3M's corporate headquarters, who explained to Fisher that no one wanted to terminate her. Kaneria testified that Fisher would not be fired or demoted if unable to pass the Exam; she could remain, with the same pay, in a department that did not require the Exam or she could be escorted to work in the DSA.

After Fisher's doctor submitted a report and answered HR's questions in late June 2015, 3M agreed that the Exam could be read aloud. The doctor testified that HR's questions were reasonable and showed 3M's willingness to accommodate Fisher. The doctor told Fisher that 3M seemed willing to accommodate her. Soon after, Fisher took a one month leave from work, returning August 4, 2015.

Without notifying Kaneria or HR, Fisher took the Exam on August 6, 2015. She testified that she did not request an accommodation, and have Gallo read her the questions, because "I was mad, angry, and hurt." She failed the Exam.

After Fisher failed the August 2015 Exam, Kaneria learned that she did not ask for the questions to be read aloud. Fisher did not request a retest, with the questions being read, "[b]ecause I was mad and upset." Fisher told her therapist, on August 13, 2015, that she intended to take the Exam once more, because "they agreed to read to her the questions;" she wanted "to prove that she knows the answers and to prove [to] HR that she is not incompetent, [then] she intends to retire." Fisher did not ask anyone at 3M if she could remain in her current position, which did not require the Exam.

Fisher did not take the Exam again. She informed 3M of her plan to retire on October 1, 2015, exactly 37 years from her date of hire, when she was eligible for full retirement benefits. In her exit interview, she described her work as "awesome" and her supervisors as "great." At her request, a rare plant-wide retirement party was held for her.

Fisher testified that 3M did not terminate her. She left because "I felt I wasn't appreciated." She likes being retired and does not want to work. After Fisher's retirement, Kaneria told a supervisor he was glad he no longer had to deal with the Exam issue; he did not say he was glad 3M no longer had a dyslexic employee who might make mistakes.

In March 2016, Fisher sued respondents for violating FEHA and discriminating against her on the basis of disability, age, and for taking leave from work. Respondents moved for summary judgment. The court granted their motion and dismissed Fisher's lawsuit.

DISCUSSION

1. Summary Judgment Review

Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) It is "a mechanism to cut through the parties' pleadings" to determine whether "trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A moving defendant must show a complete defense or the plaintiff's inability to prove an element of his or her claims; the burden then shifts to the plaintiff to show a triable issue of material fact.

(Code Civ. Proc., § 437c, subd. (p)(2).) Review is de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)

2. Framework For FEHA Analysis

FEHA prohibits employers from taking an employment action against a person "because of" a protected characteristic such as a physical or mental disability. (§ 12940, subd. (a).) "[M]ere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225.) Discrimination based on a protected characteristic must be "a substantial factor motivating [an] adverse employment action." (*Ibid.*)

The elements of a FEHA claim are: (1) the employee belongs to a protected class; (2) performed competently at work; (3) "suffered an adverse employment action, such as termination, demotion, or denial of an available job;" and (4) circumstances suggest a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) An employer is entitled to summary judgment if it "conclusively negated" one of these elements or demonstrates that the employee has no evidence to support the elements. (*Id.* at p. 334.)

An employer seeking summary judgment must produce admissible evidence that its action was taken for "a legitimate, nondiscriminatory reason." (*Guz*, *supra*, 24 Cal.4th at pp. 357-358.) A legitimate reason is one "*facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination.*" (*Id.* at p. 358.) Once this showing is made, the employee must present a triable issue that the employer's decision was actually motivated by discrimination. (*Id.* at p. 360; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2.)

3. 3M Carried Its Burden on Summary Judgment

a. 3M Did Not Take Adverse Action Against Fisher

FEHA requires a showing that an employer discriminated against an employee "in compensation or in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) This means the employee was fired, not promoted, given an adverse job assignment, or suffered a "significant change in compensation or benefits, or official disciplinary action." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.)

Fisher testified that 3M did not terminate her employment; she retired because she felt unappreciated. Before retirement, she was moved to a shipping department that does not require the Exam. She received the same compensation for the same type of work; testified that the transfer "helped a lot;" and felt her work in the new position was important. These unrefuted facts show that 3M did not adversely change the terms, conditions or privileges of Fisher's employment. Respondents negated an essential element of Fisher's FEHA claim.

b. 3M Had a Legitimate Reason to Reassign Fisher

Fisher was unable to access the DSA and screen shipments after failing the Exam, an annual test imposed by the federal government. Fisher conceded that passing the Exam was part of her job. Respondents demonstrated that 3M risked violating federal law if Fisher continued to work in the DSA and screen shipments after her proof of qualifications lapsed. Moreover, people in Fisher's position must be able to read and write. (49 C.F.R. § 1549.103(d)(4) [screeners must have "the ability to read, write and understand English well enough to carry out written and oral instructions regarding the proper performance of screening duties or be under the direct supervision of someone

who has this ability, including reading labels and shipping papers, and writing log entries into security records in English."]

3M reassigned Fisher to comply with federal law, a reason facially unrelated to prohibited bias. (*Guz*, *supra*, 24 Cal.4th at p. 358.) 3M need not lower its safety standards or violate federal law to accommodate an employee. (§ 12940 ["security regulations established by the United States" are grounds to refuse an accommodation]; 2 Cal. Code Regs., § 11068(b) [employers need not lower quality or quantity standards to accommodate an employee with a disability].)

c. 3M Showed Fisher Had No Evidence of Harassment

FEHA requires a showing of severe or pervasive harassment that creates a hostile work environment; occasional, isolated, sporadic or trivial harassment is not actionable. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043.) Harassment includes epithets; derogatory comments, posters or cartoons; slurs; assault; impeding movement; or demanding sexual favors. (2 Cal. Code Regs., § 11019(b)(2).) It is conduct unrelated to job performance, engaged in for personal gratification, or from meanness or bigotry. Common management actions such as job reassignments or performance evaluations are necessary to operate a business and are not harassment. (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-647; *Roby v. McKesson Corp*., *supra*, 47 Cal.4th at p. 707.).)

By assigning Fisher to a different shipping department, asking her to medically document a disability, or giving her job evaluations, respondents engaged in managerial actions related to the running of 3M's business. Fisher had no evidence of epithets, derogatory comments or slurs arising from cruelty or

bigotry. Documentation that she made mistakes or needed improvement did not create a hostile work environment.

4. Fisher Did Not Show that 3M's Reasons Were Pretextual or Present Other Evidence of Intentional Discrimination

a. Fisher Presented No Direct Evidence of Discrimination

Fisher argues that 3M engaged in discrimination because someone said "we don't know where we're going to put you. We don't know what we're going to do with you," or pointed out that federal regulations require her to be able to read and write.

If a supervisor wondered aloud how 3M would resolve Fisher's inability to access the DSA and screen shipments after she failed the Exam (with Gallo reading her the questions), it is not direct evidence of discrimination. These stray remarks show that 3M was searching for a suitable position for Fisher while staying in compliance with federal regulations.

b. No Accommodation For Dyslexia Was Required Until Fisher's Disability Was Diagnosed in Late June 2015

FEHA prohibits discrimination against employees because of a mental disability. (§ 12940, subd. (a).) This includes "specific learning disabilities" that limit a major life activity such as work. (§ 12926, subd. (j)(1).) A reading disorder diagnosed by a medical professional may qualify as a mental disability under FEHA. (*Pensinger v. Bowsmith* (1998) 60 Cal.App.4th 709, 720-721, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.)

Fisher argues that respondents removed an accommodation when Kaneria instructed Gallo to stop reading the Exam aloud. There is no evidence that 3M ever authorized Gallo to help Fisher. In January 2015, Fisher informed Kaneria that she

might be dyslexic. Kaneria asked her to document her disability. She was diagnosed with dyslexia in June 2015.

Fisher was not entitled to a reading accommodation until respondents received medical documentation of a disability. (2 Cal. Code Regs., § 11069(d) [employer may request medical documentation to determine if accommodation is needed].) Vague statements that an employee might have a disability does not mean an employer knows a "'disability is the *only* reasonable interpretation of the known facts.'" (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1166-1167; 2 Cal. Code Regs., § 11068(a) [reasonable accommodation is required for known disabilities].)

Fisher contends that her reading difficulties were known to co-workers at 3M, who frequently helped her with reading tasks. The opinions of Fisher's co-workers are not sufficient. Awareness of reading problems is not equivalent to a diagnosis of dyslexia, which requires professional testing and analysis. (*Pensinger v. Bowsmith*, *supra*, 60 Cal.App.4th at pp. 723-725 [employee's "trouble" with reading or writing is not an obvious manifestation of a learning disability].) Absent a diagnosis, respondents would not know if Fisher's "inability to read was a result of an organic dysfunction rather than a lack of education." (*Morisky v. Broward County* (11th Cir. 1996) 80 F.3d 445, 448-449; *Pensinger* at pp. 724-725; *Illingworth v. Nestle U.S.A., Inc.* (D.N.J. 1996) 926 F.Supp. 482, 489 [employee's difficulty in mastering a computer program did not place his employer on notice of his underlying dyslexia].)

c. Fisher Was Accommodated With a Reassignment While Awaiting Testing For a Reading Disability

After Fisher disclosed possible dyslexia, 3M assigned her to an area in which the Exam is not a prerequisite and Kaneria asked her to document her disability "so we can look to see if there are accommodations that 3M can provide to you." This evidence shows respondents engaged in the informal interactive process with Fisher when she identified a possible disability. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379.) Fisher acquiesced in the reassignment, remained a shipping technician, had no pay loss, and never objected to the work.

"FEHA does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee . . . seeks." (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222; 2 Cal. Code Regs., § 11068(a) [law requires "reasonable" accommodation].) FEHA lists "reassignment" as an appropriate accommodation. (§ 12926, subd. (p)(2).) Fisher did not raise a triable issue because 3M met its "'*duty* to reassign a disabled employee [to] an already funded, vacant position *at the same level* . . . .' [Citation]." (*Raine* at p. 1223.)

d. No Evidence Shows Extraordinary, Egregious and Intolerable Conditions Requiring Fisher To Resign

Fisher did not show a triable issue whether respondents "intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (*Turner*).) "[A]n employee cannot simply

'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." (*Id.* at p. 1246.) In *Turner*, the Supreme Court found no triable issue of conditions justifying resignation where the employee reported illegal acts of other employees; was reassigned; and received a low performance rating. (*Id.* at pp. 1254-1255.)

Fisher identified nothing intolerable, extraordinary or egregious about her working conditions. When she transferred within 3M, she had same type of job at the same pay, in a different building. She liked the new assignment, felt the work was important and no one gave her a hard time. There is no evidence she complained about the job to 3M management. The transfer was "well within an employer's prerogative for running its business" and there is no showing of "a pattern of continuous mistreatment." (*Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1270-1271 (*Simers*) [newspaper columnist demoted to reporter, at the same pay, could not claim constructive discharge].) "It is the working conditions themselves — not the plaintiff's subjective reaction to them — that are the sine qua non of a constructive discharge." (*Id.* at p. 1274.)

The cases Fisher cites demonstrate egregious behavior that is not present here. (See, e.g., *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1057 [continuous pattern of discrimination included discriminatory promotional exams, having to meet a higher standard of performance than non-Hispanics, and denial of assignments that could lead to advancement]; *Thompson v. Tracor Flight Systems, Inc.* (2001)

86 Cal.App.4th 1156, 1168-1169 [employee resigned because a manager repeatedly screamed at her; used a derogatory racial term to her; and threatened to transfer her to Texas].)

e. Fisher Was Given a Reading Accommodation But Chose Not to Use It

Fisher had a leave of absence then took the Exam two days after she returned, without notifying supervisors of her intent to do so. She did not ask for the Exam questions to be read because she was mad, angry, and hurt. After failing, she did not request a one-on-one retest using the reading accommodation because she was "mad and upset." Fisher's "'[b]ruised ego[] and hurt feelings'" do not give rise to a claim for constructive termination. (*Simers*, *supra*, 18 Cal.App.5th at p. 1270.) ""An employee may not be unreasonably sensitive"" to the work environment and is not guaranteed a job ""free of stress."" (*Turner*, *supra*, 7 Cal.4th at p. 1247.)

Kaneria urged Fisher to avail herself of the reading accommodation. Fisher told her therapist that she intended to retake the Exam because "they agreed to read to her the questions," then retire after proving her competence. Fisher was aware of the accommodation offered to her, but elected to retire. Her refusal to retest using the accommodation, out of anger and hurt, cannot form the basis of a FEHA claim against 3M. Respondents could not force Fisher to use the accommodation she requested and 3M approved.

Fisher argues that she felt degraded and humiliated because she had to enter the DSA with an escort after she failed the Exam (despite Gallo reading her the questions) and her access rights lapsed. However, she cites a federal regulation stating that an employee who did not pass the Exam must "be

under direct supervision" of someone who passed the Exam. While 3M's compliance with federal law requiring direct supervision may have caused appellant discomfort, it was not actionable.[2]

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

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[2] Fisher has abandoned claims made in her complaint that were not raised in her opening brief, such as age discrimination and denial of medical leave. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9, fn. 2.) Had these claims been raised, they would be subject to the same analysis as her disability claim, i.e., she suffered no adverse employment action because she was transferred to a similar position at the same pay.

Gail Ruderman Feuer, Judge

Superior Court County of Los Angeles

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