Filed 4/14/15 Leafblad v. City of Pasadena Fire Dept. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBIN LEAFBLAD, Plaintiff and Appellant, v. CITY OF PASADENA FIRE DEPARTMENT, Defendant and Respondent.	B251923 (Los Angeles County Super. Ct. No. GC047324)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed.

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

Michele Beal Bagneris, City Attorney, Javan N. Rad, Chief Assistant City Attorney, Burke, Williams & Sorensen and Richard R. Terzian for Defendant and Respondent.

Plaintiff and appellant Robin Leafblad was rejected on probation by the City of Pasadena Fire Department for not meeting probationary standards. Claiming that the employer's stated reason—her failure to pass a mandatory written examination—was not the true reason for her termination, Leafblad sued the City of Pasadena for what she claimed were the actual reasons: sexual orientation discrimination, gender discrimination, disability discrimination, and failure to prevent discrimination.[1] The trial court granted the City's motion for summary adjudication as to each cause of action except gender discrimination. That claim was tried to a jury, which found by special verdict that Leafblad's gender was not a substantial motivating factor in the employer's termination decision. The trial court entered judgment for the City based on the summary adjudication ruling and special verdict finding that disposed of all causes of action. In this appeal from the judgment, Leafblad challenges the summary adjudication ruling and exclusion of sexual orientation discrimination evidence at trial. For the reasons that follow, the judgment is affirmed.

BACKGROUND

Leafblad is one of two women who entered the City of Pasadena Recruit Fire Academy in March 2009. She is the only female who completed the Academy and began working as a probationary firefighter in July 2009.

The probationary program includes 6-month and 12-month examinations that contain manipulative (physical) and written tests. Leafblad passed the 6-month examination, but passed only the manipulative portion of the 12-month examination. Her 75 percent score on the 12-month written test fell short of the passing grade of 80 percent.

Her training captain, Captain Clyde King, informed the training chief, Battalion Chief Martin Johnson, that Leafblad failed the 12-month written test. At the request of

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[1] Two additional claims for retaliation and wrongful termination in violation of public policy are no longer at issue.

Deputy Fire Chief Calvin Wells, Johnson sought to learn whether there were any extenuating circumstances that could explain her low test score. After speaking with Captains Garrett Madrigal and Joshua Ward, Johnson informed Wells that he was not aware of any extenuating circumstances. Wells related this information to Fire Chief Dennis Downs, and recommended that Leafblad's probationary employment be terminated. Downs accepted the recommendation and terminated Leafblad's probationary employment.

Claiming that her failure to pass the 12-month written test was not the true reason for her termination, Leafblad filed an administrative claim and obtained a right to sue letter from the California Department of Fair Employment and Housing. She then filed the present action against the City for sexual orientation discrimination, gender discrimination, disability discrimination, and failure to prevent discrimination.

In her first amended complaint, the operative pleading, she alleged two principal theories. The first was disparate treatment in training and working conditions. Leafblad was the sole female in her probationary class; the Department had a nearly all-male workforce and male-oriented culture. Leafblad contends her male peers received more acceptance, assistance, support, and training from the experienced male firefighters than she did, and she had to endure less favorable work assignments and conditions that made it more difficult for her to train and study for the 12-month examination than her male peers.

The second theory was that in the absence of unlawful discrimination, the Department would have either accepted her test score of 75 as a passing grade, or allowed her to retake the examination. In support of this theory, she relies on statements made by King on the day of the 12-month written exam. King, who claims he misspoke, concedes that he said the minimum passing score was 70 percent. However, he denies making the other statement, "that retakes were allowed contingent on job evaluations and passing the manipulative section of the test." Based on these purported statements, the complaint alleged that Leafblad either passed the test with a score of 75, or was entitled to retake the test. Instead, she was terminated "based on her sexual orientation, her perceived

disability and her gender . . . without being given the opportunity to retake the exam as promised."

The City moved for summary judgment or, alternatively, summary adjudication of each cause of action in the complaint. In its motion, the City conceded that Leafblad was a member of a protected class and had suffered an adverse employment action, namely termination. But the City argued she was incapable of prevailing on her complaint in light of her failure to pass the written portion of the mandatory 12-month examination, which constituted a legitimate nondiscriminatory reason for her termination.

In his supporting declaration, Wells attested that a passing score for the written portion of the 12-month examination was 80 percent, as stated in the Department's Probationary Field Fighter Field Training and Evaluation Program (FTEP) Manual for 2007, 2008, and 2009. The FTEP Manual stated that the failure to pass the written test may result in termination, and no retakes would be allowed. To his knowledge, no other probationary firefighter had ever failed the 12-month written test. After receiving word from Johnson that there were no extenuating circumstances, Wells notified Downs that Leafblad did not meet probationary standards and should be terminated. Downs concurred with his recommendation and terminated her probationary employment.

In opposition to the summary judgment motion, Leafblad argued that her score on the 12-month written test was a pretext for unlawful discrimination based on sexual orientation, gender, and disability. She provided the following evidence in support of her contentions.

Sexual Orientation Discrimination. In her declaration, Leafblad stated that she became the subject of workplace rumors concerning her sexual orientation following a trip to Lake Havasu near the beginning of her 18-month probationary period: "On September 29, 2009 I went to Lake Havasu with a fellow female Pasadena firefighter Jodi Slicker, and another friend. While there, Pasadena Fire Prevention Chief Dennis Imler saw me and Slicker together and he engaged in casual conversation with us. Upon returning to work, I was subjected to continual rumors that I was romantically involved with Slicker, or was a homosexual. . . . As a result of these rumors, I was continually

questioned by superiors and other fire fighters regarding my sexual orientation, or if I was involved in a relationship with Slicker. I was questioned by [Captain Harry] Kurdoghlian, Captain Trisha Rodriguez and [Captain Josh] Ward regarding this matter."

"I was informed by Cpt. Kurdoghlian there was a rumor going around that I was in a sexual relationship with Slicker and if true would put me in a very vulnerable position. Although Kurdoghlian was a union representative, I did not speak to him in his capacity as such as I had no union protection as a probationary. . . . Cpt. Rodriguez also told me she heard rumors of me being in a relationship with Slicker and questioned me about it. . . . I was also informed by Cpt. Ward that he too had heard rumors that I was involved in a relationship with Slicker, and was concerned that we were to work in the same station, and on overtime assignments. . . . I advised Cpt. Kurdoghlian, Cpt. Rodriguez, and Cpt. Ward that I was not in a relationship with Slicker, yet I was continually questioned about it by others or subject to rumors about me at the various fire stations. . . . I was also asked about my sexual orientation by probationary Hester, probationary Timoney, and firefighter John Bonderchuck. In particular, Timoney informed me that he was involved in discussions whereby I was referred to by another firefighter as a 'carpet muncher.'"

"I was informed that Slicker was also pulled aside and questioned regarding her sexual orientation by Captain Contreras at the behest of EMS Chief Kevin Costa. Slicker was also questioned regarding her sexual orientation by firefighter Porraz at the behest of Slicker's indirect supervisor Captain Garrett Madrigal. . . . I was never permanently assigned to the same shift or the same station with Slicker at anytime while at the PFD. . . . I was never permanently assigned to the same apparatus (engine, truck, or ambulance) with Slicker at any time while at the PFD. . . . I was not in a relationship with Slicker while at the academy, or as a probationary firefighter with the PFD. . . . I never engaged in any activity or behavior that could lead anyone to believe that I was in a romantic relationship with Slicker. Despite this, I was constantly questioned regarding my sexual orientation, or if I was involved in a relationship with Slicker."

When Leafblad was in the Academy, her supervisors and peers joked that she was romantically involved with a male classmate, Sean Timoney. However, she "was never approached by management to discuss this alleged relationship with Timoney, or to discuss the City's alleged nepotism policy."

Gender Discrimination. Leafblad stated that while in the Academy, she was subjected to discriminatory treatment based on gender. King, her training captain, "would give male probationaries Sean Timoney, Frank Boykin and Justin Hester considerable feedback regarding their performance usually ranging from 30 to 45 minutes during meetings. I was never given such depth of feedback, and was usually limited to three to five minutes of feedback time with Cpt. King. . . . While in the Academy, I was excluded socially from my superiors, while my fellow male classmates were actively engaged by their superiors. While at the Academy, I worked and trained under Training Captain King. Cpt. King would always engage male classmates Timoney, Boykin, and Hester with regard to current sporting events, or the state of our local Los Angeles sports teams, but would exclude me from such interactions. Cpt. King would give 'high-fives' and joke and laugh with Timoney, Boykin, and Hester, but always excluded me from such conversations or banter. . . . Cpt. King never engaged me socially the way he engaged my fellow male classmates, or encouraged my success in any way." When Leafblad bested training officer Paul Porraz in a push-up contest, he complained to King about being teased for losing to a female. Porraz then initiated a contest among the recruits, which Leafblad won. However, Porraz ignored her after she won and did not give her the prize (a Tool Roll) that he had promised to give to the winner. Someone defaced Leafblad's photograph on a bulletin board.

The discriminatory treatment continued during her probationary employment. Leafblad was subjected to comments regarding women (Kurdoghlian said that he liked 50-inch women; Ward discussed a semi-nude female), and attended a Christmas gift exchange at which one of the gifts, which she opened, contained "condoms and some sexual lubricant."

Leafblad claimed she "was subjected to conduct no other male probationaries were subjected to during [her] time with the PFD." "For example, while at Station 31, I was assigned to a four-person engine (a fire suppression unit), while another male probationary Ryan Watson, also at Station 31, was assigned to a truck. The engine at FS 31 was typically staffed with a captain (Cpt. Kurdoghlian), an engineer (Kimo Pisimio), a fire fighter (Leafblad), and a paramedic. On several occasions, when the paramedic on Engine 31 was not available, I would be forced by Battalion Chief Brett Gibson . . . from the engine, and would be re-assigned to take Watson's place on the truck. This was done despite the fact that I had significantly more experience than Watson as an EMT. I believe I was excluded from the job learning opportunities critical to my success as a probationary."

"Even in comparison to other stations, for example at FS 32, FS 33, or FS 36, when an engine was running three people, with a male probationary firefighter from my academy class being the lone firefighter on the engine, the male probationary would not be removed so another fire fighter could be on the engine to take the probationar[y's] place. I was constantly being removed from my assigned engines up until one year after I started as a probationary fire fighter. . . . I complained about this treatment to Cpt. Kurdoghlian, but was told by him I had to accept the decisions of BC Gibson."

"While at FS 31 under Cpt. Kurdoghlian, Captain Josh Ward . . . , who was not my direct supervisor, repeatedly assigned me to conduct clerical duties around the station, while probationary Ryan Watson who did work under Cpt. Ward was not. I was also charged with coordinating station visits by local schools by communicating with the school liaisons, while Watson was not. I was also charged with creating administrative spreadsheets, while Watson was not."

"Upon coming into FS 31, I was also repeatedly directed by probationary Watson to bring in groceries, and cook for the crew, when I was told that time should have been used to study, not to cook for everyone at the station. . . . On many occasions, when the truck, engine, and rescue ambulance were dispatched from FS 31, I was excluded from participating in responses to emergency calls, and told to stay behind and continue

cooking the meals, or make sure the food did not burn while others responded to the calls. I was also excluded from trips to the grocery store for shopping, and on one occasion was told to stay behind at the station in order to secure it because a bay door on the apparatus floor was broken. I was also directed to drive Cpt. Ward's personal vehicle to a local tire shop in order to get his tires changed while I was on duty. I believe I was excluded from on the job learning opportunities critical to my success as a probationary."

Leafblad denied that the true reason for her termination was her failure to pass the 12-month written test. She disputed the Department's contention that the FTEP Manual (which required a score of 80 percent on the 12-month written test on the first attempt) was still in effect. In addition to not receiving a copy of the FTEP Manual, she "was informed by Cpt. King that the FTEP was no longer in existence, and its contents were being revised by him, however the 'grading sheets' and 'Daily Observation Reports' from the FTEP would still be used. In addition, while on a light duty assignment I was tasked by Cpt. King to organize and fill each PFD [Pasadena Fire Department] station library with a list of documents, none of which included the FTEP manual as a document that needed to be in the station libraries. . . . Prior to taking my 12 month written examination, I was informed by Cpt. King that a passing score was a 70. In addition, Cpt. King said that if anyone failed to pass the 12 month written examination, retakes were allowed contingent on our performance evaluations from the prior year, and how we performed on the 12 month manipulative examination."

Leafblad claimed that unlike her male peers, she was not told the 12-month test had been expanded to include fill-in questions: "Prior to taking my 12 month written examination, I inquired of three or four different firefighters who had taken their 12 month written examination under Cpt. King six months earlier. I wanted to know if the written test would be a multiple choice format, or a fill-in type of examination, and was informed that the test only consisted of 100 multiple choice questions. . . . Prior to taking my 12 month written examination, I inquired as to the format of the 12 month written examination with probationary firefighter Delgado, who informed me that he spoke to Cpt. Madrigal who informed Delgado that the 12 month written test would be multiple

choice only. When I previously took the six month written examination as probationary firefighter, the test format consisted of 100 multiple choice questions only." "When I took the 12 month written examination, I came to find out the test consisted of not only 100 multiple choice questions, but also approximately 60 fill-in type questions."

Unlike her male peers, Leafblad was subjected to adverse working conditions that made it more difficult to prepare for the exam: "Two weeks prior to taking the 12 month written examination I was the only probationary firefighter moved from one apparatus to another, and from one fire station to another. This forced me to get to know an entirely new crew, station, and city district, and as a result seriously disrupted my ability to properly prepare for the examination. No other male probationaries were moved to different stations or to a different apparatus immediately prior to the 12 month examinations."

Leafblad contended that Johnson failed to conduct a proper investigation of the reasons for her low test score. Johnson did not ask Leafblad whether there were any extenuating circumstances, nor did he speak with Leafblad's most recent supervisor. Instead, he spoke with two former supervisors, Madrigal and Ward, but neither had any knowledge about extenuating circumstances. Leafblad had worked under Madrigal only briefly in March 2010, and "he rarely spoke to [her]." At his deposition, Wells expressed surprise that Johnson did not ask Leafblad about her low test score. When asked whether Johnson should have spoken with Leafblad, Wells answered that '"it depends,' I mean he could have relied heavily on the direct supervisors who ultimately could know and should know her own situation, so perhaps he relied on that."

Disability Discrimination. On January 1, 2010, Leafblad suffered a "severe lower abdominal muscle strain" and was off work until March 30, 2010. In June 2010, she rolled her ankle and was off work until June 8, 2010. After each injury, Leafblad returned to work without limitations or restrictions, and did not need or request an accommodation. On the date of her termination, Leafblad was capable of performing all of the duties of a firefighter.

Leafblad argued that she was terminated because of a perceived disability. She contended the City had a financial incentive to terminate her because she filed workers' compensation claims for both injuries.

Summary Adjudication Ruling. The trial court granted the City's motion for summary adjudication of Leafblad's claims for sexual orientation discrimination, disability discrimination, and failure to prevent discrimination. However, the motion was denied as to Leafblad's claim for gender discrimination. The matter proceeded to trial on that cause of action.

Trial on Gender Discrimination. Leafblad filed a motion in limine to exclude evidence of her sexual orientation except as it related to her claim of gender discrimination. She sought to introduce the Lake Havasu incident and related rumors and questions about her relationship with Slicker, but to exclude all other sexual orientation evidence. In response to her request, the court pointed out that by introducing evidence of sexual orientation, she would be opening the door to cross-examination.

Leafblad withdrew her motion, but the City sought to exclude her proffered evidence. The City argued the Lake Havasu incident and related rumors and questions were not relevant to show disparate treatment based on gender.

After examining the pleadings and summary adjudication ruling, the trial court concluded that the proffered evidence would be relevant if Leafblad could establish a causal connection to the disparate treatment claim. For example, a discriminatory remark made by a manager or supervisor who "set her up for termination" would be relevant to the disparate treatment claim. But ordinary gossip by coworkers or those who had no role in Leafblad's termination would not be relevant to the disparate treatment claim. Based on this standard, the trial court excluded the Lake Havasu incident and related rumors and questions about Leafblad's relationship with Slicker.

At trial, the City presented evidence that Leafblad's termination was based on her failure to pass the 12-month written test, which was a legitimate business decision. Witnesses testified that Leafblad's work assignments were based on seniority, not gender. The male probationary firefighter (Watson) who allegedly received better assignments

was in a senior probationary class, and his assignments reflected his seniority over Leafblad.

In response to Leafblad's contention regarding discriminatory concealment of the test's revised format—the addition of 60 fill-in questions—the City pointed out that any surprise on her part was immaterial in light of her failure to pass the multiple choice portion of the test. Of the 100 multiple choice questions Leafblad had 74 correct answers, which constituted a score of 74 percent. Her overall score of 75 percent shows that the fill-in portion of the test actually increased her score. Accordingly, her contention that she was prejudiced by the withholding of information concerning the fill-in questions necessarily fails.[2]

King testified that he wrote the test and added the 60 fill-in questions. Of the 160 questions, he graded only the 100 multiple choice and the first 40 fill-in questions. He omitted the last 20 fill-in questions from the score. He could not recall why he did that, or what the male probationary firefighters would have scored on the last section. Although he could not say whether someone else would have failed, he denied throwing out the last 20 questions in order to save someone from failing.[3] He did not tell anyone in the Department about omitting the last 20 questions from the score.[4]

The City relied on the FTEP Manual to show that the passing grade for the 12-month written test is 80 percent and retakes are not allowed. Witnesses testified that

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[2] The probationary firefighter with the next lowest score was Delgado, who scored a total of 124 points on parts 1 (100 multiple choice questions) and 2 (40 fill-in questions). Assuming Delgado earned a perfect score on part 2, his lowest possible score on part 1 was 84 points. Leafblad, who scored 74 points on part 1, was the only probationary firefighter who scored less than 80 points on part 1 of the test.

[3] King was aware of a prior instance in which the entire probationary class failed the 12-month written test. That test was re-evaluated and discarded, and the entire class was re-tested.

[4] King was called as a witness by Leafblad. The City did not cross-examine King or call him as a witness.

King did not have the authority to reset the passing grade from 80 to 70 percent. Prior waivers of the 12-month test were based on different circumstances and nondiscriminatory reasons.[5]

During closing argument, the City argued that if Leafblad's final 20 fill-in questions had been graded, her score would have dropped from 75 percent to 68.88 percent, which was still below what she contends was a passing score of 70 percent. The City argued that because King's misstatement concerning a passing grade of 70 percent was made on the day of the exam, it was too late to mislead anyone about the amount of preparation needed for the test.

The jury received a special verdict form with five questions. In response to question 1, which asked whether Leafblad was discharged from her probationary employment, the jury answered yes. In response to question 2, which asked whether gender was a substantial motivating reason for the City's decision to terminate her probationary employment, the jury answered no. Because the jury did not find a prima facie case of discrimination, it returned the form without answering the remaining questions.[6]

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[5] In another prior instance, a female probationary firefighter was attending paramedic school when the 12-month examination was given, so she was unable to take the examination; upon her return, the 18-month probationary period had expired and because she was a permanent employee, she was not required to take the test.

[6] At trial under the first step of the *McDonnell Douglas* framework, the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802–804 (*McDonnell Douglas*).) Second, if the prima facie case is proven, the defendant must provide some legitimate nondiscriminatory reason for its employment decision. (*Id.* at pp. 802–803.) Third, if a nondiscriminatory reason is provided, the plaintiff must show by a preponderance of the evidence that the proffered reason was not the employer's true reason, but was a pretext for discrimination. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252–253; *McDonnell Douglas, supra*, at pp. 802–804; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1749–1750.)

The last three questions of the special verdict form stated:

"3. Did the City of Pasadena have a legitimate nondiscriminatory reason for terminating Robin Leafblad's probationary employment that standing alone would have

The trial court entered judgment for the City based on the summary adjudication ruling and special verdict findings. This timely appeal followed.

DISCUSSION

I

Leafblad challenges the summary adjudication of her claims for sexual orientation discrimination, disability discrimination, and failure to prevent discrimination. She contends that summary adjudication was improper due to the existence of triable issues of material fact.

We independently review an order granting summary adjudication, viewing the evidence in the light most favorable to the nonmoving party. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Ibid.*)

Under the modified *McDonnell Douglas* framework that applies in "pretext" cases where direct evidence of the employer's discriminatory intent is lacking, the employer as

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resulted in the same decision to terminate her in any event at the time the decision was made?

"___Yes ___No

"If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

"4. Was the City of Pasadena's decision to discharge Robin Leafblad from employment a substantial factor in causing her harm?

"___Yes ___No

"If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

"5. What are Robin Leafblad's damages? . . . ."

the moving party has the initial burden of showing that either one or more elements of the employee's prima facie case is lacking, or that the adverse employment decision was based upon a legitimate nondiscriminatory reason. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860–861 (*Serri*); *McDonnell Douglas, supra,* 411 U.S. 792.)

As the moving party, the City met its initial burden by presenting evidence that Leafblad's probationary employment was terminated for the legitimate nondiscriminatory reason that she did not pass the 12-month written test. (See *Serri, supra,* 226 Cal.App.4th at p. 861 [failure to meet performance standards constitutes a legitimate reason].) Where, as here, the employer meets its initial burden, the burden shifts to the employee to produce substantial evidence that the employer's stated reason is untrue or pretextual, or that the employer engaged in intentional discrimination. (*Ibid*.)

Once the burden shifts, the employee must "produce 'substantial responsive evidence' demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer. [Citations.]" (*Serri, supra,* 226 Cal.App.4th at p. 862.) "It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive. [Citations.]" (*Ibid.*)

A. Sexual Orientation Discrimination

Under the burden-shifting framework, Leafblad was required to show that the City used her test score as a pretext to fire her because of her sexual orientation. To satisfy this burden, Leafblad relied on the Lake Havasu incident and the rumors and questions that followed. She argued that the questions about her relationship with Slicker were discriminatory, because they would not have been asked of a male firefighter in the same situation.

The City contended the supervisors were simply complying with the nepotism policy. Under that policy, an employee who is in a relationship with another employee must notify the department head of their relationship. Ward testified that he raised the issue with Leafblad because she was scheduled to work with Slicker "at the station and

[would] have to sleep in the same dorm." He said he believed Leafblad when she denied being in a relationship with Slicker.

Leafblad argued the City was misusing the nepotism policy as a pretext for discrimination based on sexual orientation. According to her separate statement of disputed facts, the policy "only applies to those PFD employees who are related to one another, or in relationships." She "never engaged in any activity or behavior that could lead anyone to believe that she was in a romantic relationship with Slicker." "While at the Academy, Leafblad was subjected to jokes by her fellow academy members and supervisors who informed her that they believed Leafblad was involved in a romantic relationship with another male academy member Sean Timoney." "Despite being subjected to these jokes and representations, Leafblad was never approached by management to discuss this alleged relationship with Timoney, or to discuss the City's alleged nepotism policy."

Based on the Department's failure to react to the jokes about her supposed romance with Timoney, Leafblad contends the nepotism policy does not apply to her supposed relationship with Slicker. However, the two situations are not identical. The decision regarding the nepotism policy's application in a given situation must be made by the employer, not the employee, and the employer may have any number of reasons to conclude the policy applies under one set of facts but not another. In order to make that determination, an employer is entitled to conduct an investigation. Based on only two instances—the Department's reactions to jokes about her relationship with Timoney and rumors about her relationship with Slicker—Leafblad would have us infer the Department's enforcement of the nepotism policy is discriminatory. We refuse to draw an inference that is based on speculation. "A genuine issue of material fact exists if, and only if, the evidence would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1371.)" (*Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 183.) "An issue of fact can only be created by a conflict of evidence. It is not created by 'speculation, conjecture, imagination or guess work.'

[Citation.] Further, an issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions' [citation], or mere possibilities [citation]." (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196–197.)

Leafblad argues the inadequacy of Johnson's investigation is indicative of a discriminatory motive. In her opening brief, she states that "Johnson testified that he was directed to only speak to Leafblad's captains, and not Leafblad, concerning any extenuating circumstances." If by this statement she intended to convey that Johnson was directed not to speak to her, the record does not support that assertion. According to his deposition, Johnson was instructed to contact Leafblad's "captains to see if there was anything that might have caused her to fail." He was then asked: " Q Chief Wells did not tell you to also contact Ms. Leafblad to see if there was something happening in her life that may have caused her to fail, correct? He never said that to you? [¶] A I don't believe so. [¶] Q And you didn't think it was your place to do that on your own, correct? [¶] A Correct." There is no indication in the record that Johnson was instructed not to speak to Leafblad.

Leafblad contends that Johnson's investigation was inadequate because the persons he contacted—Ward and Madrigral—were no longer supervising her on the date of the test. However, Johnson was told to contact Ward, who was Leafblad's supervisor during the months preceding the test. Johnson learned from Ward that, in his opinion, Leafblad was qualified to be a firefighter. Assuming that Johnson should have spoken to Leafblad's most recent supervisor, she was transferred to her new station and given a new supervisor shortly before the test, and Leafblad does not contend her new supervisor would have been able to provide any additional information. (See *Arteaga v. Brink's, Inc*. (2008) 163 Cal.App.4th 327, 344 [employer may fire an employee for good, bad, erroneous, or no reason at all, so long as firing is not for discriminatory reason].)

Based on her theory that Johnson harbored an improper bias, Leafblad cites several employment discrimination cases in which the investigator was biased.[7] Because there is no basis to infer that Johnson harbored a discriminatory motive, those cases are distinguishable.

To create a triable issue of material fact, a plaintiff must demonstrate that the employer's reasons were untrue or that the employer engaged in intentional discrimination because of her perceived sexual orientation. A "plaintiff must do more than raise the inference that the employer's asserted reason is false. '[A] reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.' (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 515.) If plaintiff produces *no* evidence from which a reasonable factfinder could infer that the employer's true reason was discriminatory, the employer is entitled to summary judgment. (*Caldwell v. Paramount Unified School Dist.* [(1995)] 41 Cal.App.4th [189,] 203.)" (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) Because the evidence viewed in favor of Leafblad would not allow a reasonable

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[7] In *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 120–121, a store employee filed suit for retaliatory discharge, claiming he had been terminated for reporting a store manager's sexual harassment of other employees. The employer's motion for summary judgment was granted, but reversed on appeal. The court found there were triable issues of material fact concerning the adequacy of an internal investigation of the sexual harassment complaint. The evidence suggested the investigation could have been tainted because the investigator might have felt obligated to exonerate the store manager.

In *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, the plaintiff, a mechanic supervisor, sued his employer, United Airlines, for harassment, discrimination, and retaliation. The plaintiff was terminated after a complaint of sexual harassment was made against him. He contended the employer's investigation was conducted by a biased individual. Finding triable issues of fact, the appellate court reversed a summary judgment for the airline.

In *Greene v. Coach, Inc.* (S.D.N.Y. 2002) 218 F.Supp.2d 404, an employer's regional loss prevention investigator conducted an investigation of employee theft at a store. The employee contended the investigation was tainted by racial bias. Finding triable issues of fact, the appellate court reversed a summary judgment for the employer.

In *Probst v. Reno* (N.D. Ill. 1995) 917 F.Supp. 554, a plaintiff recovered damages for employment discrimination and retaliation after a bench trial.

juror to find that her test score was used as a pretext for sexual orientation discrimination, summary adjudication was properly granted.

B. Disability Discrimination

In order to state a prima facie case for discrimination based on a physical disability, Leafblad was required to show that she suffered from a disability; she was otherwise qualified to do the job; and she was subjected to an adverse employment action because of her disability. (*Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at pp. 344–345.) The trial court granted the City's motion based on Leafblad's failure to establish a prima facie case.

"Under the FEHA, 'physical disability' includes having a physiological disease, disorder, or condition that, by affecting the neurological or musculoskeletal body systems, special sense organs or skin, 'limits' a 'major life activity.' ([Gov. Code,] § 12926, subd. [(m)](1)(A), (B).) 'Limits' is synonymous with making the achievement of a major life activity 'difficult.' (*Id*., subd. [(m)](1)(B)(ii).) 'Major life activity' is construed broadly and includes physical, mental, and social activities, and working. (*Id*., subd. [(m)](1)(B)(iii).) '"[W]orking" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.' (§ 12926.1, subd. (c).)" (*Arteaga v. Brink's, Inc*., *supra*, 163 Cal.App.4th at p. 345.) "An actual or existing disability is not necessary. The FEHA defines 'disability' to include: (1) '[h]aving a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment [that constitutes a physical disability], which is known to the employer'; (2) '[b]eing regarded or treated by the employer . . . as having, or having had, any physical condition that makes achievement of a major life activity difficult'; or (3) '[b]eing regarded or treated by the employer . . . as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability.' (§ 12926, subd. [(m)](3)-(5).)" (*Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at p. 345.)

As previously mentioned, Leafblad suffered an abdominal injury and was off work from January through March 2010. She returned to work without limitations or restrictions. In June 2010, she rolled her ankle and missed several days of work. She returned to work without limitations or restrictions, and did not need or request an accommodation due to injury. There is no evidence that Leafblad informed her employer that she was disabled. (See *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443 [employee must inform employer of disability].) It is undisputed that she was able to perform all of her duties on the date of her termination. We therefore conclude there is no evidence that she was suffering from an actual disability when she was terminated from her probationary employment.

The evidence also fails to support a theory of perceived disability. There is no evidence that Leafblad was treated as if she had "a physical condition, past or present, that made achievement of a major life activity difficult." (*Arteaga v. Brink's, Inc., supra*, 163 Cal.App.4th at p. 350; see Gov. Code, § 12926, subd. (m)(4).) Ward told Johnson that Leafblad was qualified to be a firefighter, which indicates he did not think of her as disabled. There is no evidence that she was treated as if she had a disability.

C. Failure to Prevent Discrimination

Leafblad contends that because the court denied summary adjudication of the gender discrimination claim, the court should have denied summary adjudication of the related claim of failure to prevent discrimination. She argues that common issues of material fact exist as to both claims.

Regardless of the merits of her argument, Leafblad is incapable of demonstrating prejudice. The City, having prevailed on the gender, sexual orientation, and disability discrimination claims, is entitled to judgment as a matter of law on the failure to prevent discrimination claim.

II

Leafblad contends the trial court abused its discretion by excluding her proffered evidence of sexual orientation discrimination—the Lake Havasu incident and the rumors

and questions about her relationship with Slicker. She argues the evidence was relevant to show that her low test score was used as a pretext for gender discrimination.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "Except as otherwise provided by statute, all relevant evidence is admissible." (*Id.*, § 351.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.)

In evaluating challenges to evidentiary rulings, we must look at all the evidence, both supporting and contradicting the judgment, to determine whether, had additional evidence been presented, or some admitted evidence been excluded, the jury might have drawn different factual conclusions. Thus, we must examine all the evidence to determine whether "'it is reasonably probable that a different result would have been reached absent the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)' [Citation.] If so, reversal is required. [Citation.]" (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 769.)

As previously mentioned, Leafblad initially sought to exclude evidence of her sexual orientation except as it related to her claim of gender discrimination. After she withdrew her motion, the City sought to exclude the proffered evidence. The trial court, based on its analysis of the pleadings and summary adjudication ruling, excluded the proffered evidence for lack of a causal relationship to the termination decision. We find no abuse of discretion.

Pantoja v. Anton (2011) 198 Cal.App.4th 87 (*Pantoja*), which is cited in the reply brief, is distinguishable. The plaintiff, Lorraine Pantoja, sued her former employer, Thomas J. Anton, an attorney, for gender discrimination and sexual harassment in the form of a hostile work environment. (*Id.* at p. 93.) Anton prevailed at trial. On appeal, Pantoja contended the trial court had erroneously excluded "me-too evidence" of sexual harassment by Anton of other employees that did not occur in Pantoja's presence or otherwise affect her working environment. (*Id.* at p. 109.) The appellate court reversed.

In finding the exclusion of the "me-too evidence" erroneous, the appellate court stated: "The court's in limine ruling erroneously disregarded the possibility that this me-too evidence could be relevant to prove Anton's intent when he used profanity and touched employees. Further, by the time the defense had presented its case, it had become clear that Anton's intent was an issue in dispute, contrary to the court's belief. Anton's case was premised on the claim that his frequent use of profanity at a loud volume was always directed at situations, not people; it happened in the presence of men as well as women; and Anton never would have tolerated harassing behavior by anyone in his office, let alone perpetrated it himself. To the contrary, evidence that Anton harassed other women outside Pantoja's presence could have assisted the jury not by showing that Anton had a propensity to harass women sexually, but by showing that he harbored a discriminatory intent or bias based on gender. It would have enabled the jury to evaluate the credibility of his and his other witnesses' assertions that, although he yelled profanities in the office, he did not use the words Pantoja claimed; he did not direct profanities at Pantoja; and he did not have a discriminatory intent. We conclude the evidence was admissible to show intent under Evidence Code section 1101, subdivision (b), to impeach Anton's credibility as a witness, and to rebut factual claims made by defense witnesses." (*Pantoja*, *supra*, 198 Cal.App.4th at pp. 109–110.)

Based on *Pantoja*, Leafblad argues the exclusion of the Lake Havasu incident and related remarks and questions was erroneous. She states that "no other male PFD employees would have been subjected to such adverse employment actions for engaging in a social interaction while off duty. That is no PFD male employees would have been verbally reprimanded and accused of being in a homosexual relationship simply for socializing while off duty. The trial court improperly excluded evidence of this highly relevant incident that went to proving an element of Leafblad's gender discrimination claim."

The difficulty with her argument is that this is not a hostile work environment or harassment case. In *Pantoja*, evidence of Anton's profanity laced outbursts toward other employees was directly relevant to determining the credibility of the witnesses and

Anton's state of mind toward the plaintiff. In contrast, the proffered evidence of the Lake Havasu incident and related remarks was not relevant to the disparate treatment claim. As previously discussed, the Lake Havasu incident was not causally linked to discriminatory treatment that allegedly contributed to Leafblad's low test score. We therefore conclude the proffered evidence was not relevant to the disparate treatment claim and the trial court did not abuse its discretion by excluding it.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.