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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROBERT OBERTO,

Plaintiff and Appellant,

v.

CALIFORNIA INSTITUTE OF
TECHNOLOGY,

Defendant and Respondent.

B228311

(Los Angeles County
Super. Ct. No. BC405007)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michelle R. Rosenblatt, Judge. Affirmed.

The Aarons Law Firm and Martin I. Aarons for Plaintiff and Appellant.

Paul Hastings, James A. Zapp, Paul W. Cane, Jr., Cameron W. Fox and
Melinda A. Gordon for Defendant and Respondent.

Plaintiff and appellant Robert Oberto (Oberto) appeals the judgment entered in favor of defendant and respondent California Institute of Technology (Caltech) following a jury trial of his wrongful termination action which ended in a defense verdict.

Oberto does not challenge the defense verdict. His sole contention on appeal pertains to a pretrial ruling by the trial court granting Caltech's motion for summary adjudication of Oberto's fourth cause of action for breach of employment contract.

In granting summary adjudication on the fourth cause of action, the trial court ruled that at the time Caltech decided to terminate Oberto's employment for workplace violence, it acted in good faith and following an appropriate investigation, it had reasonable grounds to believe Oberto had engaged in such misconduct.

(Cotran v. Rollins Hudig Hall Internat., Inc. (1998) 17 Cal.4th 93, 109 (Cotran).)

In view of the unusual procedural posture of this case, Oberto is incapable of demonstrating prejudicial error in the pretrial grant of summary adjudication on his cause of action for breach of employment contract. In opposing summary adjudication, Oberto contended the "real" reason he was discharged was in retaliation for whistleblowing. However, the jury rejected Oberto's claim he was the victim of a retaliatory discharge for whistleblowing; instead, it credited Caltech's position that Oberto was discharged for violating his employer's anti-violence policy. Therefore, Oberto is incapable of showing that if his cause of action for breach of employment contract had been submitted to the jury, there is any likelihood the jury would have found he was terminated without good cause.

The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

Oberto's operative first amended complaint pled causes of action against Caltech for wrongful termination in violation of public policy (first cause of action), defamation

(second cause of action),¹ retaliation (third cause of action), breach of employment contract (fourth cause of action), and violation of Labor Code section 2698 et seq. (Labor Code Private Attorneys General Act of 2004) (fifth cause of action).

The fourth cause of action, in issue here, alleged in pertinent part: Oberto and Caltech entered into an employment relationship; Caltech promised by words or conduct to discharge Oberto solely for good cause; Oberto substantially performed his duties; Caltech discharged Oberto without cause; Caltech's unlawful conduct caused Oberto to suffer a loss of earnings and other damages.

2. Motion for summary judgment/summary adjudication.

Caltech filed a motion for summary judgment on the complaint, or alternatively, for summary adjudication of discrete issues.

With respect to the fourth cause of action for breach of employment contract, Caltech contended it had good cause to terminate Oberto because he violated policy by behaving in a manner that reasonably caused colleagues to fear for their own safety or the safety of others. Moreover, Caltech conducted a thorough investigation before discharging Oberto, and its good faith reliance on the results of its investigation negated Oberto's claim.

In opposition, Oberto asserted the good faith of the employer's investigation was disputed, in that Oberto was not told of the charges against him and was not given an opportunity to respond. In addition, Caltech treated him differently, inconsistent with its usual practices. Further, there was an issue as to pretext – Oberto contended he was fired in retaliation for his internal and external complaints that senior management at Jet Propulsion Laboratory (JPL) provided “lowball” estimates to the National Aeronautics and Space Administration (NASA) in order to get jobs.

¹ Oberto voluntarily dismissed his defamation claim.

a. *Evidentiary showing on motion for summary adjudication, drawn from moving and opposing papers.*

(1) *Background.*

JPL is NASA's federally funded research and development center. Caltech manages JPL for NASA pursuant to a prime contract with NASA. In 1989, JPL hired Oberto as a systems engineer. From 1997 to 2005, Oberto worked as part of JPL's Advanced Projects Design Team, known as Team X.

JPL maintains a Violence-Free Workplace Policy which prohibits "any intentional conduct which is sufficiently severe, offensive or intimidating to cause an individual to reasonably fear for his or her personal safety or the safety of others" Examples of prohibited conduct include: "Physical violence or the threat of physical violence to harm persons or property," and "[a]ny verbal or physical conduct and/or harassing or intimidating behavior that causes an individual to reasonably fear for his or her personal safety." Violations of this policy can result in "disciplinary action up to and including the termination of employment."

(2) *The August 7, 2008 incident.*

In the summer of 2007, Oberto joined a project known as the DESDyn1 study. Tony Freeman was the program manager. In April 2008, Yuhshyen Shen became DESDyn1's study lead. Oberto reported to Shen, who in turn reported to Freeman and James Graf, deputy director of the Earth, Science and Technology Directorate (known as 8X) regarding the study. By June and July of 2008, Shen became concerned about Oberto's performance, and told Oberto he was giving him another chance, but would remove Oberto from the study team if problems persisted.

At a meeting on the afternoon of August 7, 2008, at which Graf, Freeman and Oberto were present, Oberto made statements to the effect that Freeman was undermining the team, taking credit for others' work, and making disparaging comments about Oberto to others. Freeman denied Oberto's allegations and reminded Oberto he had recommended him for the DESDyn1 systems engineer position. Graf did not believe Oberto was being constructive. Graf ended the meeting and told Oberto he would review

the entire team in six weeks and would decide “who stays and who goes” so it would be an effective working team.

Graf, who was Oberto’s supervisor, instructed Oberto not to speak to Freeman but instead, to direct any communications through him (Graf). In contravention of Graf’s instructions, Oberto turned to Freeman and said “I’ve got you. I know you now. I’ve got you. . . . I’m putting you on notice.” Twice more, Graf instructed Oberto not to speak to Freeman, and twice more Oberto spoke to Freeman.²

Graf was afraid Oberto was about to become violent, so Graf ordered Oberto to leave the office. After Oberto walked out the door, Graf stepped out into the hallway and told Oberto he was being removed from all 8X projects. Oberto either “threw” or “put” his laptop computer bag on the floor and returned to Graf’s office. According to Graf, he (Graf) pulled Freeman behind him as he saw Oberto coming down the hall. According to Graf, Oberto came back inside Graf’s office and stood within six inches of Graf’s face; according to Oberto, it was Graf who “got right into Oberto’s face.”

Maria Raygoza, a secretary who observed the incident, stated that Oberto’s fists were clenched and he appeared very upset. She was afraid Oberto would hit Freeman or Graf, and she told another nearby secretary, Cindy Bevans, to call security.

Jason Hyon, a scientist who was a bystander, observed Oberto charging off with clenched fists, causing Hyon to feel a little threatened. Oberto, on the other hand, denied his fists were clenched.

Oberto departed and security was not summoned.

Freeman and deputy section manager Crawford were concerned for their safety and requested security escorts to their vehicles that evening in case Oberto returned.

² Oberto did not dispute he made these statements to Freeman. Oberto simply denied he spoke in a menacing tone or angry manner.

(3) *The investigation and subsequent termination.*

Oberto was placed on paid administrative leave while Nancy Aguilera of Human Resources and Ed Ochotorena of JPL Security jointly investigated the incident. They interviewed everyone who witnessed the events, including Oberto, Graf, Freeman, Shen, Andrea Donnellan, three secretaries (including Raygoza), as well as Hyon, who was a bystander. They also interviewed anyone else at JPL whom Oberto said might have relevant information, and they also conducted follow-up interviews as necessary to ask additional questions. With the exception of Oberto's account of the August 7 incident (and his girlfriend Donnellan's account of an earlier meeting), Aguilera concluded the other witnesses' descriptions were consistent on the key events.

Aguilera documented her interviews in a written report to Pete Theisinger, director for the Earth and Science Directorate, the senior manager for Oberto's line organization. Theisinger decided to terminate Oberto, based on his review of Aguilera's detailed investigative report, as well as input from his deputy director concerning Oberto's continuing anger about his removal from the Team X management position, and information about Oberto's past outbursts and interpersonal problems, including written counseling for insubordination. Theisinger read the Violence-Free Workplace Policy and concluded actual physical contact was not required for a violation thereof. Theisinger determined Oberto had violated the policy and that he could not risk a future, possibly more threatening or violent outburst by Oberto.

On September 3, 2008, Oberto was notified he was being terminated for violating JPL's Violence-Free Workplace Policy.

On September 12, 2008, Oberto filed a grievance challenging his discharge, asserting the "real" reason for his termination was information about Team X cost estimates for the Mars Science Laboratory (MSL) that he provided to JPL's John Casani in April 2008. On October 7, 2008, JPL notified Oberto his grievance was denied.

Oberto admitted Graf had always treated him fairly, prior to the morning of August 7, 2008. In addition, Oberto had always gotten along with Hyon, and had no reason to believe Hyon would be biased against him. Oberto did not know Maria Raygoza and had no dealings with her as of August 7, 2008. He also had no prior dealings with Aguilera or Ochotorena.

b. *Trial court's grant of motion for summary adjudication as to fourth cause of action.*

The trial court solely granted summary adjudication on Oberto's fourth cause of action for breach of employment contract; it denied summary adjudication of the remaining causes of action. With respect to Oberto's cause of action for breach of employment contract, the trial court ruled as follows:

"Robert Oberto does not have a valid claim for breach of contract. It is undisputed that Robert Oberto could not be fired without cause. The stated reason for terminating Mr. Oberto's employment was violence in the workplace. The issue is not whether Robert Oberto in fact exercised violence in the workplace, but whether at the time the decision to terminate his employment was made, [Caltech], acting in good faith, and following appropriate investigation, had reasonable grounds for believing [Oberto] had committed the violence in the workplace. The moving party here has provided evidence of a thorough investigation, an opportunity for Robert Oberto to be heard and to present evidence and witnesses, and a decision based in pertinent part upon disinterested witnesses. [Oberto] does not present evidence that creates a genuine issue of material fact. See *Cotran*[, *supra*, 17 Cal.4th at p.] 109, noting that a good-faith reliance on the investigation and a belief that the employee engaged in the culpable misconduct is a defense for suit based on a breach of the employment contract. Therefore summary adjudication of the fourth cause of action for breach of contract is granted."

3. Trial and verdict.

Oberto's remaining claims were tried to a jury, which returned a defense verdict.

With respect to Oberto's cause of action for wrongful termination in violation of public policy, the jury found Oberto's "internal report to [Caltech] in April 2008 or his report to NASA in August 2008" were not a motivating reason for Caltech's decision to discharge Oberto.

As for Oberto's claim of retaliation, the jury determined Oberto did disclose information to NASA in August 2008, but that disclosure by Oberto was not a contributing factor in Caltech's decision to discharge him.

Following the denial of Oberto's motion for new trial, he filed a timely notice of appeal from the judgment.

CONTENTIONS

Oberto contends: the trial court erred in granting summary adjudication on the cause of action for breach of contract because there were numerous disputes on issues of material fact including disputes as to the adequacy of the investigation, examples of inconsistent practices and evidence of pretext, raising genuine issues of fact to be determined by the jury; the trial court applied the wrong standard in granting summary adjudication; the trial court erred in granting summary adjudication because all the elements of the governing standard are triable to the jury; Caltech's material facts for the fourth cause of action were based entirely on the material facts for the first and second causes of action, which the trial court found were in dispute, and therefore the trial court should have denied summary adjudication as to the fourth cause of action; and the trial court improperly denied the motion for new trial and should have granted a new trial on the fourth cause of action.

DISCUSSION

1. Standard of appellate review.

Summary judgment "motions are to expedite litigation and eliminate needless trials. [Citation.] They are 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.’ [Citations.]” (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.) “Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party. [Citations.]” (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 17; accord, *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 19.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc, §437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Aguilar*, at p. 849; Code Civ. Proc., §437c, subd. (p)(2).)

We review the trial court’s ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.)

2. *General principles regarding a cause of action for breach of employment contract not to terminate without good cause; good cause in this context means a reasoned conclusion by the employer that the employee committed the misconduct.*

Cotran, supra, 17 Cal.4th 93, clarified the nature of the inquiry when an employee who was hired under an implied agreement not to be discharged except for good cause is terminated for misconduct and challenges the termination in court. (*Id.* at p. 95.) If an implied contract exists, an employer who fires an employee for misconduct is not required to prove that the alleged misconduct actually occurred. Rather, the employer must show that it reasonably believed that the alleged misconduct took place and otherwise acted fairly. (*Id.* at pp. 107-109.)

There, employee Cotran sued his former employer, Rollins, after he was fired for sexual harassment of two female employees. The termination followed a lengthy investigation by Susan Held, Rollins's manager for equal employment opportunity (EEO) compliance, who interviewed 21 people, including 5 individuals specified by Cotran. "On the basis of her investigation, her assessment of [the two complainants'] credibility, and the fact that no one she interviewed had said it was 'impossible' to believe plaintiff had committed the alleged sexual harassment, [she] concluded it was more likely than not the harassment had occurred." (*Cotran, supra*, 17 Cal.4th at p. 97.) Based on Held's investigative report, Rollins terminated Cotran.

At trial, Cotran testified that his sexual relationships with the two women were consensual and his accusers had ulterior motives. He did not disclose these liaisons when his employer initially confronted him with them because he was upset, frightened and felt ambushed. (*Cotran, supra*, 17 Cal.4th at pp. 97-98.)

Rollins's defense at trial was that its decision to fire Cotran had been reached honestly and in good faith, and that Rollins was not required to prove the acts of sexual harassment occurred. (*Cotran, supra*, 17 Cal.4th at p. 99.)

The trial court rejected Rollins's defense theory and ruled Rollins had to prove Cotran committed the acts that led to his dismissal. The trial court so instructed the jury, which returned a substantial verdict for Cotran. (*Cotran, supra*, 17 Cal.4th at p. 99.)

The Supreme Court held that it was not the jury's function to decide whether the acts that led to the decision to terminate actually occurred. Rather, the jury's role was to assess the *objective reasonableness* of the employer's factual determination of misconduct. (*Cotran, supra*, 17 Cal.4th at pp. 102-103.) To this end, the jury had to determine whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or pretextual. (*Cotran, supra*, 17 Cal.4th at p. 107.) The Supreme Court reasoned that a standard "permitting juries to reexamine the factual basis for the decision to terminate for misconduct – typically gathered under the exigencies of the workaday world and without benefit of the slow-moving machinery of a contested

trial – dampens an employer’s willingness to act, intruding on the ‘wide latitude’ [necessary] for the efficient conduct of business.” (*Id.* at pp. 105-106.)

Cotran concluded that on retrial, the jury should be instructed: “[T]he question critical to defendants’ liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.” (*Cotran, supra*, 17 Cal.4th at p. 109.)

Thus, under *Cotran*, the following factual determinations “are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct. (*Cotran, supra*, 17 Cal.4th at p. 109.)” (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 264 (*Silva*).)

All of “the elements of the *Cotran* standard are triable to the jury. (*Cotran, supra*, 17 Cal.4th at p. 108.) However, if the facts are undisputed or admit of only one conclusion, then summary judgment may be entered on issues that otherwise would have been submitted to the jury. [Citation.]” (*Silva, supra*, 65 Cal.App.4th at p. 264; accord, *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 440 (*King*).)

3. *In view of the unusual procedural posture of this case, Oberto is incapable of demonstrating prejudicial error in the pretrial grant of summary adjudication on his cause of action for breach of employment contract.*

Pursuant to *Cotran*, the trial court granted summary adjudication in favor of Caltech on Oberto’s cause of action for breach of employment contract. On appeal, Oberto seeks reversal of that ruling on the ground he presented “numerous material facts which illustrate the termination did not satisfy the *Cotran* standard.” However, in view of the defense verdict on the issues which were tried to the jury, it is unnecessary to reach Oberto’s arguments relating to *Cotran*.

This case is a rarity, in that after the grant of summary adjudication in favor of Caltech on Oberto's cause of action for breach of employment contract, the remaining causes of action were tried to the jury, which returned a defense verdict. Therefore, we have the benefit of hindsight, in that we know how the jury would have resolved Oberto's cause of action for breach of employment contract if that claim had gone to the jury.

In opposing summary judgment, Oberto asserted the "real" reason for his termination was information about Team X cost estimates for MSL that he provided to JPL's John Casani in April 2008. Oberto also maintained he "engaged in protected activity" by sending an email to NASA on August 11, 2008 (four days after the altercation) regarding the information Oberto previously provided to Casani.

In resisting the defense motion for summary judgment, Oberto contended that he was fired in retaliation for (1) disclosing internally and (2) disclosing to NASA, that JPL senior management "was knowingly providing low ball estimates to NASA in order to get jobs."

However, the jury ultimately rejected these claims by Oberto. To reiterate, with respect to Oberto's cause of action for wrongful termination in violation of public policy, the jury expressly found Oberto's "internal report to [Caltech] in April 2008 or his report to NASA in August 2008" were *not* a motivating reason for Caltech's decision to discharge Oberto. Likewise, with respect to Oberto's claim of retaliation, the jury found Oberto *did* disclose information to NASA in August 2008, but said disclosure by Oberto was *not* a contributing factor in Caltech's decision to discharge him. On appeal, Oberto does not challenge the verdict. Therefore, these findings by the jury are final and binding.

Oberto fails to address the impact of the jury's findings; his appeal focuses on the pretrial grant of summary adjudication on his cause of action for breach of employment contract. Oberto asserts he "presented evidence at summary judgment that JPL's reason for firing [him] was pretextual and was for retaliation – in other words that the decision to terminate him was not done in good faith. *Thus this is an issue for the jury to decide.*" (Italics added.)

Oberto overlooks the fact that notwithstanding the grant of summary adjudication on his contract claim, the jury did decide that Oberto's termination was *not* pretextual or retaliatory, in its resolution of Oberto's causes of action for wrongful termination in violation of public policy and for retaliatory discharge. The jury expressly rejected Oberto's claims that he was fired for his internal report in April 2008 or his external report to NASA in August 2008. Instead, in returning a defense verdict, the jury credited the defense position that Oberto's "employment was terminated because he caused others to reasonably fear for their own safety and for the safety of others in violation of [Caltech's] Violence-Free Workplace Policy."

Because Oberto cannot relitigate the jury's rejection of his claim that his discharge was pretextual or retaliatory, Oberto's attack on the summary adjudication ruling is unavailing. Oberto argues, *inter alia*: this was Aguilera's first violence in the workplace investigation; he was not informed of the eyewitness accounts of the incident and was denied the opportunity to respond thereto; and that he was treated more harshly than other employees charged with similar misconduct.

Although Oberto claims the "real" reason he was discharged was in retaliation for whistleblowing, the jury rejected Oberto's claim that he was the victim of a retaliatory discharge for whistleblowing. Instead, the jury credited Caltech's proffered reason that Oberto was discharged for violating his employer's anti-violence policy. Oberto is not entitled to another bite of the proverbial apple; his ongoing contention that his termination "was a pretext for retaliation" was rejected by the trier of fact.

In sum, the employer's stated reason for discharging Oberto was that he violated its anti-violence policy; Oberto claimed the employer's motivation was retaliatory. The defense verdict amounted to a rejection of Oberto's claim that his termination for violating the anti-violence policy was actually a pretext for retaliation for whistleblowing. On this record, Oberto is incapable of showing that if his cause of action for breach of employment contract had been submitted to the jury, there is any likelihood the jury would have found he was terminated without good cause.

DISPOSITION

The judgment is affirmed. Caltech shall recover its costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.