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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MICHAEL MARCIANO, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B287477, B288907 (Los Angeles County Super. Ct. No. BC618835)

APPEAL from the judgment and order of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

McNicholas & McNicholas, Matthew S. McNicholas, Douglas D. Winter, Abel P. Nair; Esner, Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Shaun Dabby Jacobs, Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Michael Marciano attempted to sue the City of Los Angeles (City) under California's whistleblower statute after he reported his belief that he, as a police officer, was subjected to an unlawful ticket quota. Marciano's deposition testimony revealed that several statements in his complaint were not true. Additionally, information emerged in Marciano's deposition that directly contradicted the factual basis for some of his claims. Yet, Marciano persisted in bringing this lawsuit against the City.

The trial court granted summary judgment in favor of the City, concluding Marciano failed to allege any adverse action by the City and failed to establish causation between his protected activity and the actions by the City of which he complained. Because Marciano failed to address the court's causation finding on appeal, he has forfeited his challenge to the judgment.

The court also awarded attorney fees to the City, finding Marciano brought his action against the City without good faith or reasonable cause. Our review of the record reveals substantial evidence supporting the court's determination Marciano did not act in good faith over the course of the proceedings.

We affirm the judgment and the order awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Marciano joined the Los Angeles Police Department (LAPD) in 2008. In 2014 and 2015, he was a patrol officer in the North Hollywood Division. One of Marciano's regular patrol partners was Andrew Cota.

According to Marciano, he began having problems at work with Lieutenant Toledo in October 2014. On October 31, 2014, Toledo denied Marciano and Cota's request to leave work an hour early, yet he allowed other officers to leave early. According to Marciano, this was when Toledo's "vendetta" against him began.

Marciano asked for time off during the December 2014 holiday but his request was not granted. According to Marciano, Toledo was "abusing his authority" by denying him days off during Christmas. Yet, Marciano admitted he was on vacation leave the entire month of November 2014.

On December 24, 2014, Toledo criticized Marciano because his boots were not shiny enough. Toledo exhorted him to do a better job in the future. Marciano replied sarcastically, " '[w]hy what will happen? Not get my red days, work weekends and all the holidays? Oh wait I already do.' " The next day, Toledo assigned Marciano to work the kit room, where police equipment is stored, and assigned Cota to work the front desk.

Marciano and Cota occasionally carpooled to work. On December 31, 2014, Cota asked Toledo if he and Marciano could work together since they carpooled that morning. Toledo denied Cota's request. Shortly thereafter, Marciano asked Toledo if he could leave early; Toledo refused the request and asked, " 'besides, how will you get home?' " Marciano replied that he and Cota drove separately. When Toledo said, " '[o]h so you lied to me?' " Marciano replied, " 'I didn't say anything, but let's face the facts, you wouldn't put us together anyways regardless if we carpooled or didn't carpool. And it worked, you still won't change the lineup regardless. We haven't carpooled since you have been on our backs because you're unpredictable with us and only us.' "

On January 10, 2015, Toledo told Marciano he stopped assigning him and Cota as partners because they lied to him about carpooling and because their productivity was low. With respect to productivity, Marciano raised his voice and replied, " '[o]f course it is, we didn't get any days off as requested, no red days, no holidays off, so why write our average of 2-4 tickets each when you guys shaft us like that? Hell a female with less time on got the whole week off!' " Toledo then said, " '[w]ell I need more out of you guys,' " to which Marciano replied, " '[w]hat will it take to be left alone?' " Toledo told Marciano one ticket each would suffice, and agreed to put Marciano and Cota together as partners.

Marciano refused Toledo's request that he write one ticket a day, characterizing it as an "unlawful ticket quota." On January 23, 2015, Marciano contacted an LAPD supervisor, Detective Lou Turriaga, to report the alleged quota.

On February 12, 2015, Toledo told Cota and Marciano that their productivity was the lowest in their shift, and that the captain wanted Toledo to tell them that low producing officers would be split up. When Marciano insisted they were not low producing, Toledo offered to put them on a foot-beat unit. Marciano and Cota refused. Toledo then told them that he checked the "FI's" and they were okay, but could do better. Marciano asked, " 'Sir what is it going to take to be left alone?' " Toledo replied, " 'I can't say a number because of a 'Quota' but two cites a day will work.' " Marciano said, "okay."

On February 20, 2015, Toledo told Marciano and Cota that their boots look good and they could partner together that day. After returning from the field late that morning, Marciano told Toledo he would not be able to issue any citations due to the

morning call and a hospital detail to which he was ordered that afternoon. Toledo questioned why it took so long for Marciano and Cota to return from the morning call and Marciano became agitated, raised his voice, and said, " 'Sir if this is about citation, please put me on the desk, I'm tired and sick of this.' " Shortly thereafter a sergeant told Marciano that Toledo was furious with Marciano and would be splitting them up permanently because of the way Marciano talked to him.

On February 26, 2015, Marciano learned police officers had received a large settlement after claiming they were subjected to a ticket quota. The following day, Marciano consulted an attorney and went to the LAPD psychologist. On February 28, 2015, Marciano asked his personal doctor to place him off work due to stress. Marciano filed a worker's compensation complaint for stress at some point, which was denied. Marciano admitted he did not know why the City denied his claim and had no evidence it was in retaliation for complaining about a quota.

On March 18, 2015, Marciano returned to work from his stress leave. Shortly after, Captain Lee, the patrol captain, asked Marciano to transfer to another division because he was a "problem child." Marciano told Lee he did not want to leave. Lee then said she would put Marciano at the top of the list for the division of his choosing and dropped the matter. Marciano admitted Lee never forced or caused him to transfer.

In April or May of 2015, Marciano started to manipulate his schedule because he felt he was not getting enough of his requested weekend days off. When he would submit his requested schedule, Marciano would request days off that he wanted to work, and ask to work days he actually wanted off. According to Marciano, this strategy worked 50 or 60 percent of

the time, resulting in him working on days he did not want to work 40 or 50 percent of the time. Marciano admitted there were weekends in 2015 that he did not want to work, but had put on paper that he did want to work.

In November 2015 Marciano went on vacation. On November 29, 2015, after he returned, Lieutenant Humphries told Marciano that he and Cota could no longer work together because they were a " 'risk management issue.' "

In May 2016, Marciano and Cota filed a complaint against the City in the Los Angeles Superior Court pursuant to Labor Code section 1102.5, alleging the City subjected them to negative counseling sessions, threats of transfer, negative documentation about their refusal to comply with the unlawful quota, negative performance evaluations, denial of preferred days off, damage to their reputations, interference with their ability to do their jobs, denial of promotions and/or assignments, improper withholding of benefits to which they were entitled, separating them as partners, and labeling them both as risk management issues. They alleged they suffered and were continuing to suffer losses in earnings and other benefits and in their ability to promote or be selected for other units. They also alleged the losses and retaliatory acts they suffered would adversely affect their income and pension.

Between November 2014 and September 2016, Marciano and Cota were not regular partners and Marciano was frequently assigned to desk and kit room duty.

In September 2016, Marciano and Cota transferred to the Pacific Division. Marciano admitted he transferred of his own will and he chose to transfer to Pacific Division because one of his goals as a police officer had always been to work divisions like

Venice Beach that have historic value. At Pacific, Marciano and Cota worked together as partners. Marciano testified his supervisors at Pacific were "overly nice" to him, did not deny him opportunities, and issued several positive writeups about him.

In June 2017 Marciano and Cota were deposed. Marciano admitted he never received negative counseling sessions, contrary to the allegations in his complaint. He also admitted he never received negative performance evaluations and that nothing negative about him was ever put in writing over the course of his career; specifically, he admitted nothing bad was written about him in retaliation for his opposition to Toledo's alleged ticket quota. Marciano testified he received a positive comment card for his performance in 2015 at North Hollywood and received several positive writeups at Pacific.

Despite alleging in his complaint that he was denied promotions, Marciano admitted in deposition that he never applied for any promotions.

Marciano admitted he repeatedly raised his voice at Toledo and was dishonest by failing to correct Cota's lie about carpooling. Marciano also admitted if two officers are low performing, it would be appropriate for a captain to split them up.

When asked to explain why he believed his reputation was damaged after he reported the ticket quota, Marciano testified that, in addition to Humphries saying he was a risk management issue, Marciano could tell by people's body language when they read his name tag that they were not pleased to see him. They would give him a blank stare and did not greet him with "open arms." He also stated he believed his supervisors were "overly nice" to him at Pacific Division because they felt they needed to

make him extremely comfortable so that "nothing else happens." Marciano testified that one of his training officers asked, " '[w]hat happened to you? You're a bad seed now,' " and said, " 'I trained you better than that.' " Finally, Marciano testified he believed his reputation was damaged because he overheard a detective in the bathroom say his lawsuit was a "joke."

Despite alleging in his complaint that he suffered and would continue to suffer losses in earnings, Marciano admitted he made more money at Pacific than he did at North Hollywood.

Within one month of the June 2017 deposition, Cota dismissed himself from the lawsuit.

On August 11, 2017, the City filed a motion for summary judgment.

On September 11, 2017, counsel met and conferred. The City informed Marciano it would seek to recover attorney fees under Code of Civil Procedure section 1038 should Marciano continue to prosecute his claim. Marciano did not respond, and on October 18, 2017, filed an opposition to the motion for summary judgment.

On November 13, 2017, after oral argument, the court granted the City's motion on two grounds: (1) as a matter of law, none of the City's acts constituted adverse job actions; and (2) Marciano failed to show any nexus between his reporting of the ticket quotas and any of the job actions of which he complained.

On December 13, 2017, the City filed a motion seeking $46,800 in attorney fees pursuant to Code of Civil Procedure section 1038. On January 5, 2018, Marciano opposed the motion. The court granted the City's motion for attorney fees, finding

Marciano's lawsuit was not brought in good faith, and that there was no objective reasonable cause for filing the lawsuit.

Marciano timely appealed both the trial court's grant of summary judgment, and the court's award of attorney fees to the City. We consolidated the appeals and address both below.

DISCUSSION

I. Marciano Has Forfeited His Challenge to the Trial Court's Grant of Summary Judgment

Labor Code section 1102.5, subdivision (b) provides: "[a]n employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency . . . [where the] employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation."

To establish a prima facie case for whistleblower retaliation under Labor Code section 1102.5, the plaintiff must show: "(1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.) As stated above, the trial court granted summary judgment on the second and third elements, finding Marciano did not suffer any adverse actions and did not show that his engaging in protected activity led to negative actions by the City.

On appeal, Marciano addresses the second element only. He argues the court erred in granting summary judgment because there is evidence sufficient to raise a triable issue of fact that Marciano's transfer to desk duty materially affected his job performance and opportunities for advancement in his career,

and that his work schedule was altered to his detriment when he was denied weekend days off.

Marciano claims the trial court did not grant summary judgment on the ground he failed to establish causation. Yet, the record could not be clearer that the court did find a lack of causation. In its order, the trial court listed several acts Marciano alleged were adverse job actions before declaring:

> "The court finds that as a matter of law, these acts on which he relies, whether in totality or individually, do not constitute adverse job actions. Moreover, viewing all facts most favorably to the plaintiff, even on the facts and circumstances on which he relies, as opposed to his opinions and arguments based thereon, *plaintiff has failed to show any nexus between the complaint or complaints about the ticket issue to any of the* '*job actions*' *of which he complains*." (Italics added.)

Initially, we contemplated that Marciano may have merely committed an innocent, albeit negligent, oversight. Upon further examination of the record, however, it is abundantly clear Marciano's counsel has been entirely aware the court granted summary judgment on both the second and third elements of a whistleblower retaliation claim. At the outset of the hearing on the City's motion for attorney's fees, Marciano's counsel stated:

> "This is a case where the court—although we dispute the court's reasoning on this, but we respect the court's decision—determined on summary judgment that there was no adverse employment action *and that there was insufficient evidence to establish causation*." (Italics added.)

The City correctly points out that Marciano's failure in his opening brief to address all the independent bases the court gave

for granting summary judgment is fatal to his challenge on appeal.

"[A]n appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal." (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.) Although we independently review a grant of summary judgment, review is "limited to issues adequately raised and supported in the appellant's brief." (*Ibid.*) Here, causation was an essential element of Marciano's complaint. It was also one of the grounds upon which the City sought, and the court granted, summary judgment. Yet, in his opening brief Marciano did not challenge the court's ruling on causation.

Marciano makes no argument whatsoever on the issue of causation; in fact, he dishonestly claims the court did not even address the issue. Having failed to address the causation issue in his opening brief, the trial court's ruling on lack of causation "disposes of the entire complaint and suffices to affirm summary judgment in favor of defendant." (*Christoff v. Union Pacific Railroad Co., supra,* 134 Cal.App.4th at p. 126 [appellant's failure to address trial court's finding of causation in personal injury case forfeits challenge to summary judgment on appeal].)

In his reply brief Marciano attempts to rescue this issue by characterizing the trial court's ruling on the causation issue as a "single-sentence passing reference" that fails to comply with Code of Civil Procedure section 437c, subdivision (g), which requires the court to specifically refer to the evidence it relies upon in determining no triable issue exists. This alleged failure, Marciano asserts, mitigates against a finding of forfeiture.

We are not convinced.

The "key objective" of Code of Civil Procedure section 437c, subdivision (g) is to provide for " 'meaningful appellate review.' " (*Taswell v. Regents of University of California* (2018) 23 Cal.App.5th 343, 363 (*Taswell*).)[1] A court's statement of reasons for granting summary judgment is adequate if it leaves " 'no question about the reason [the] motion for summary judgment was granted.' " (*Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 829; *W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1111.)

It is true the trial court's order here did not specifically refer to the evidence it relied on in determining not only that there was no causation, but also that none of the City's acts constituted adverse job actions. Instead, as additional grounds for its conclusions, the court incorporated by reference all the City's arguments in its moving and reply papers, based on all the evidence in the case. The City's briefing below articulated clearly why Marciano's whistleblower complaint failed as a matter of law, and the court expressly agreed with the City's arguments and adopted them as its own. Although the court's order granting summary judgment was brief and arguably less detailed than most, we have no trouble discerning the reasons the court

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[1] Marciano relies on *Taswell* to argue the court's order was not sufficient. In *Taswell*, however, the order issued by the trial court addressed whether there was any triable issue of material fact by merely stating, " '[plaintiff] does not get a second bite out of the apple, unless he can show the court there are triable issues of genuine fact which he has not done.' " (*Taswell*, *supra*, 23 Cal.App.5th at p. 364.) Here, however, the court's order incorporated by reference the moving papers upon which it based its conclusions. This is sufficient to enable us to conduct a meaningful review here.

concluded there was no nexus between Marciano reporting the ticket issue and the actions he alleged were adverse to him.

Having found any challenge to the court's finding that Marciano failed to establish a nexus between his protected activity and the City's actions forfeited, we need not reach the issue whether the City's actions were adverse as a matter of law. We affirm the judgment.

II. Marciano Did Not Bring this Lawsuit in Good Faith

Upon motion of a defendant, the court may, after granting summary judgment, "determine whether or not the plaintiff . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint." (Code Civ. Proc., § 1038, subd. (a).) An award of attorney fees under section 1038 is justified if the court finds an absence of either reasonable cause or good faith. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 863-864.) The government entity therefore need only prove one of these elements, not both. (*Ibid.*)

"*Good faith,* or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence." (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932, disapproved of on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.) Because the good faith question is factual, we review for substantial evidence the trial court's determination that a

plaintiff brought suit in bad faith. (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183.)

Here, the trial court determined Marciano's suit was brought without good faith or reasonable cause. We find substantial evidence that Marciano did not bring this action in good faith and need not address whether he brought it with reasonable cause. In his complaint Marciano alleged multiple times that he received negative counseling sessions, negative writeups and performance evaluations, denial of promotions, losses in earnings, and threats of transfer. Yet, Marciano admitted in his deposition he never received negative counseling sessions, writeups, or performance evaluations. To the contrary, he received a positive comment card in 2015 while at North Hollywood. Marciano also admitted he never applied for a promotion.

Marciano was also never "threatened" with transfer; rather, a captain asked him to transfer and offered to put him at the top of the list for his preferred division. After Marciano expressed his desire to stay at North Hollywood, the captain dropped the matter entirely, and Marciano has not alleged he was ever asked to transfer again. Additionally, Marciano suffered no loss of earnings; in fact, by the time of his deposition, Marciano admitted he was making more money at Pacific.

Although Marciano had not yet transferred to Pacific at the time he filed his complaint, he had been there for almost one year by the time of his deposition. Code of Civil Procedure section 1038 "encompasses both the initial filing of an action and its continued maintenance if done without good faith and reasonable cause." (*Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, 332.) Therefore, Marciano's insistence on

pursuing this lawsuit *after* he landed in a division of his choosing, where he made more money, where resumed partnering with Cota, and where his supervisors treated him well, is further evidence of his lack of good faith.

Not only did Marciano lie about several claimed injuries in his complaint, he failed to allege crucial facts that directly contradict his claim that his assignment to desk and kit duty was adverse or caused by his protected activity.

Marciano admitted in deposition that, in frustration over Toledo's criticism over his performance, Marciano asked Toledo to place him on desk duty. It is simply a matter of common sense that an assignment requested by an employee cannot be construed as *adverse* to that employee. Any detriment ensuing from a requested assignment can only be attributed to the employee himself for seeking it out. Even though Marciano may have requested desk duty in a moment of frustration, the City cannot be punished for heeding the request.

Additionally, Marciano admitted in deposition that he was first placed on kit duty *before* Toledo imposed a ticket quota. This fact alone unambiguously establishes that there was no nexus between Marciano's protected activity and Toledo's decision to put him on desk and kit duty. It is nonsensical and dishonest to claim that Marciano's reporting of a ticket quota in January 2015 could have caused the City to put him on kit duty in December of 2014. Marciano's attempt to convert a fact that establishes a lack of causation into evidence of retaliation is an act of bad faith.

Ultimately, the record strongly suggests Marciano was not performing well as a police officer at the North Hollywood division. He was repeatedly criticized for being a low producing

officer; he complained about not getting his requested days off in December 2014 when he had just taken off for vacation the entire month of November 2014; he manipulated his work schedule and then complained he was not getting the schedule he wanted; he lied to his supervisor, Toledo, to manipulate a partnering assignment with Cota; and he repeatedly spoke disrespectfully in a raised voice to Toledo.

An adverse employment action is one that " 'materially affect[s] an employee's job performance or opportunity for advancement in his or her career.' " (*Patten v. Grant Joint Union High School Dist.*, *supra*, 134 Cal.App.4th at p. 1387.) "Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment." (*Ibid.*) Ultimately, an employment action must be "both detrimental and substantial" to be adverse within the meaning of the whistleblower statute. (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511.) Although we judge good faith from the point of the plaintiff, not counsel, we conclude no reasonable layman would believe, in good faith, that Marciano's complaints—alone or in their totality—were substantial or detrimental enough to have materially affected any aspect of his career.

Based on the above, we conclude there is substantial evidence supporting the court's determination that Marciano did not bring this lawsuit against the City in good faith. Accordingly, we affirm the court's award of attorney fees.

DISPOSITION

The judgment and order are affirmed. Costs are awarded to respondent.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.