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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CARLA SALAZAR, Plaintiff and Appellant, v. EASTER SEALS SOUTHERN CALIFORNIA, INC., Defendant and Respondent.	B267211 (Los Angeles County Super. Ct. No. BC569123)

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

Law Offices of Robert S. Scuderi and Robert S. Scuderi for Plaintiff and Appellant.

Epstein Becker & Green, Adam C. Abrahms, and Amy B. Messigian for Defendant and Respondent.

Carla Salazar brought claims under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940) and a claim for wrongful termination in violation of public policy against her former employer, Easter Seals Southern California, Inc. (Easter Seals). Salazar appeals the judgment in favor of Easter Seals entered after the trial court sustained Easter Seals' demurrer without leave to amend. We conclude that Salazar failed to state a cause of action and the trial court therefore properly sustained the demurrer. Accordingly, we affirm.

BACKGROUND

Salazar alleged she worked for Easter Seals as a therapeutic aid beginning in September 2013. In June 2014, she fractured her foot, which required that she take time off from work. In July, while on leave, she received a letter from Easter Seals informing her she was fired effective five days after her injury.

Salazar sued Easter Seals, alleging five causes of action: disability discrimination in violation of Government Code section 12940, subdivision (a);[1] failure to accommodate a physical disability in violation of section 12940, subdivision (m); failure to engage in an interactive process in violation of section 12940, subdivision (n); violation of public policy; and retaliation in violation of section 12940, subdivision (h).

Easter Seals demurred on the ground that Salazar failed to state any cause of action.

Finding that Salazar failed to allege Easter Seals knew she was disabled within the meaning of the FEHA, the trial court sustained the demurrer without leave to amend.

Salazar filed a motion for reconsideration but presented no new or different facts, circumstances, or law in support of it. Noting Salazar had offered no proposed amendment that would cause the court to grant leave to amend, the trial court denied the motion and subsequently entered judgment in favor of Easter Seals, dismissing the action. Salazar timely appealed.

[1] All further statutory citations are to the Government Code.

DISCUSSION

I. Standard of Review

We review de novo the dismissal of a civil action after a demurrer is sustained without leave to amend. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) In doing so, "we determine whether the complaint states facts sufficient to constitute a cause of action." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Ibid.*) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) If any proper ground for sustaining the demurrer exists, we will affirm even if the trial court sustained the demurrer on an improper ground or the defendant failed to raise the proper ground in the trial court. (*Cantu v. Resolution Trust Corp.*, *supra*, 4 Cal.App.4th at p. 880, fn. 10.) To establish that a cause of action has been adequately pleaded, a plaintiff must demonstrate she has pleaded "facts sufficient to establish *every element of that cause of action*. [Citation.] Thus, if the defendant[] negate[s] *any* essential element of a particular cause of action, this court should sustain the demurrer to that cause of action." (*Id.* at pp. 879-880.)

When a demurrer "is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

II. Disability Discrimination–based Claims

The FEHA "prohibits several employment practices relating to physical disabilities." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 371.) Among these prohibited practices, an employer may not refuse to hire, discharge, or otherwise discriminate against an employee because of a physical disability. (§ 12940, subd. (a).) Also, an employer may not fail to make reasonable accommodation for the known physical disability of an employee. (*Id.*, subd. (m).) Further, an employer may not fail to

engage in a timely and good faith interactive process with an employee to determine effective reasonable accommodations. (*Id.*, subd. (n).) There is a separate cause of action for each of these prohibited practices. (*Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at p. 371.) Additionally, an employee may sue for wrongful discharge in violation of public policy based on policy embodied in the FEHA. (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 608; *Rope v. Auto-Chlor System of Wash., Inc.* (2013) 220 Cal.App.4th 635, 660 (*Rope*), superseded on other grounds by statute, § 12940, subd. (m)(2), added by Stats. 2015, ch. 122 (Assem. Bill No. 987), § 2.)

To succeed on these causes of action, a plaintiff must establish he or she is disabled. (*Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at pp. 373, 378-379.) Under the FEHA, a physical disability includes having a physiological condition that affects the musculoskeletal system and limits a major life activity. (§ 12926, subd. (m)(1).) A physiological condition limits a major life activity if it makes the major life activity difficult to achieve. (*Ibid.*) "Major life activity" is broadly construed, and includes physical, mental, and social activities, and working. (*Ibid*.)

"An actual or existing disability is not necessary." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 345.) Under the FEHA, a "disability" may also include "[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 that may do so in the future. (§ 12926, subds. (m)(4) & (5).)

To state a cause of action for disability discrimination, failure to accommodate, or failure to engage in an interactive process, a plaintiff must also establish that the employer had knowledge of the disability. (§ 12940, subds. (m) & (n); *Arteaga v. Brink's, Inc.*, *supra*, 163 Cal.App.4th at pp. 344-345, 349; *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247, 1252; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61.)

Here, Salazar alleged she fractured her foot, received medical treatment, was restricted in her working ability, and was given time off work. Her doctor also provided a note indicating she needed time off from work. Easter Seals knew she had injured her

foot and needed time off work, but approximately three to four weeks after her injury, while she was on leave, it sent her a letter informing her she was fired effective five days after the injury.

However, an injury does not necessarily constitute a disability. (*Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1249.) Indeed, the FEHA regulations provide that conditions with little residual effect, such as sprains and other mild conditions, often do not qualify as disabilities under the FEHA. (Cal. Code Regs., tit. 2, § 11065, subd. (d)(9)(B).)[2] Salazar failed to allege she was actually disabled. Further, Easter Seals' knowledge that Salazar had fractured her foot and needed time to recover did not necessarily mean it knew she was disabled, or that it regarded her as disabled. Therefore, the demurrer was properly sustained as to the causes of action for disability discrimination, failure to accommodate, and failure to engage in the interactive process. Because these FEHA causes of action failed, the trial court also properly sustained the demurrer as to Salazar's claim for wrongful termination in violation of public policy. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229.)

III. Retaliation

Under the FEHA, an employer may not retaliate against an employee for engaging in a protected activity—that is, opposing practices prohibited by FEHA or filing a complaint, testifying, or assisting in a FEHA proceeding. (§ 12940, subd. (h).)

Salazar alleges she requested time off from work, which she claims was a request for a reasonable accommodation. But at the time of the events at issue here, requesting a reasonable accommodation did not constitute a protected activity. (*Rope*, *supra*, 220 Cal.App.4th at pp. 652-653; *Nealy v. City of Santa Monica*, *supra*, 234 Cal.App.4th at p. 381.) Although a recent amendment to section 12940 now makes a request for

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[2] The regulation reads in full: "'Disability' does not include: [¶] . . . [¶] (B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders."

accommodation a possible predicate for a retaliation claim (§ 12940, subd. (m)(2), added by Stats. 2015, ch. 122 (Assem. Bill No. 987), § 2), that amendment became effective only in 2016, and does not apply retroactively. (*Moore v. Regents of the University of California*, *supra*, 248 Cal.App.4th at p. 245 [citing Stats. 2015, ch. 122 (Assem. Bill No. 987), § 1].)

Because failure to honor a request for accommodation did not constitute retaliation, the demurrer was properly sustained as to the fifth cause of action for retaliation.

IV. Leave to Amend

As noted above, it is an abuse of discretion for a trial court to deny leave to amend if there is a reasonable possibility that defects in a complaint can be cured. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) The plaintiff bears the burden to prove the trial court abused its discretion by showing how the complaint can be amended to cure the defects. (*Ibid.*) The plaintiff may meet this burden by submitting a proposed amended complaint or, on appeal, presenting facts and demonstrating how they establish a cause of action. (*Cantu v. Resolution Trust Corp*., *supra*, 4 Cal.App.4th at p. 890.)

Salazar had not met her burden. She submitted no proposed amended complaint at the trial court. On appeal, she raises no argument that the trial court improperly denied leave to amend and again suggests no curative amendment. Accordingly, we conclude the trial court did not abuse its discretion in denying leave to amend.

DISPOSITION

The judgment is affirmed. Easter Seals is to receive its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J. LUI, J.