

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THOMAS MANGANO,

Plaintiff and Appellant,

v.

VERITY, INC., et al.,

Defendants and Respondents.

H030999

(Santa Clara County  
Super. Ct. No. 1-05-CV-048586)

THOMAS MANGANO,

Plaintiff and Appellant,

v.

VERITY, INC., et al.,

Defendants and Appellants.

H031234

(Santa Clara County  
Super. Ct. No. 1-05-CV-048586)

Plaintiff and appellant Thomas Mangano appeals from a judgment entered after the trial court granted summary judgment in favor of his employer, defendant and appellant Verity, Inc. (Verity), and his former supervisor, defendant and appellant Steven R. Springsteel. Mangano claimed discrimination and verbal harassment based on a perceived disability in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900, et seq. We concur with the trial court's

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of sections I.A.-D., II.A.-C. and III.C.

conclusion that defendants are entitled to summary judgment on the FEHA claim and affirm the judgment.

In a separate appeal, both parties challenge the trial court's postjudgment order granting defendants' motion for expert witness fees and denying defendants' motion for attorney's fees, filed February 13, 2007. Mangano appeals from the award of expert witness fees, and Verity and Springsteel cross-appeal the denial of their request for attorney's fees. We find no error and affirm the order.

## **I. Background**

### **A. Factual Background**

Verity, a software company, first employed Mangano as director of manufacturing in 1991. From 1991 to 2003, Mangano worked with four different chief financial officers and five different supervisors. Verity grew considerably during Mangano's tenure. By the end of 2004, Verity had purchased five companies in the preceding three years, was approximately a \$160 million company, and anticipated further growth.

In January 2003, Springsteel joined Verity as senior vice-president of finance and administration and chief financial officer (CFO). Springsteel became Mangano's immediate supervisor and held weekly meetings with his staff. During the meetings, Springsteel referred to Mangano as "Tommy" despite the fact that Mangano used the nickname "Tom" at work and never "Tommy." In approximately June of 2004, Springsteel also began referring to Mangano as "Rainman" during the weekly meetings.<sup>1</sup> Springsteel called Mangano "Rainman" approximately 6 to 10 times. No one else at Verity referred to Mangano as "Rainman." At an offsite company gathering in

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<sup>1</sup> The parties agree this nickname is a reference to the movie "Rain Man," in which the title character is an autistic savant. The character is institutionalized and unable to function normally in general society but also displays extraordinary talent in limited areas.

October 2004, Springsteel awarded Mangano, in absentia, a brass plaque with the inscription: “‘Verity - Longest tenure in G&A - Rainman - Tom Mangano - 2004.’” Springsteel had “approved” the plaque’s content prior to presenting the award.

Upon joining Verity, Springsteel focused on adapting Verity’s processes and procedures in the general and administration group, which included the manufacturing department, to respond efficiently to the company’s growth. To this end, Springsteel conducted a review of the manufacturing department’s structure. He concluded that due to Verity’s growth the then-current infrastructure was insufficient to support a needed increase in the department’s capabilities. In December 2004, Verity began working with an outside recruiter to hire a vice-president of manufacturing and operations. This new position would be between Mangano’s director-level position and Springsteel’s position as CFO. Among other things, Verity intended that the new vice-president would “assess Verity’s current procedures and infrastructure and long-term growth profile.” The vice-president would be expected to “‘deliver a suite of highly complex enterprise software products’” and to implement new processes and procedures to sustain Verity’s growth and business.

On January 5, 2005, Mangano met with Verity’s vice-president of human resources, Jack Landers, and informed Landers he wished to be considered for the vice-president position. Landers suggested that Mangano discuss the issue with Springsteel, and Mangano met with Springsteel later that day. Springsteel told Mangano that he did not consider Mangano qualified for the new position because, in part, Mangano had no experience in a \$300 million company. Springsteel instead asked Mangano to be part of the hiring team for the new vice-president.

On January 7, 2005, Mangano sent an email to Springsteel, Landers, and others, in which he reiterated his interest in the vice-president position. Mangano also referenced recent challenges to his work performance, including “[u]nprofessional, demeaning treatment” by Springsteel. Mangano cited, as an example, Springsteel’s routine use of

the nicknames Tommy and Rainman in front of Springsteel's staff and Mangano's peers. After receiving the email, Springsteel met with Mangano and admitted "mea culpa" in regard to his use of the nicknames. Springsteel did not use the nicknames again.

In March 2005, Verity hired Mark Langowski to fill the new vice-president position. Prior to his tenure at Verity, Langowski had approximately 16 years of experience as a vice-president or above, had worked in companies larger than Verity, and had high-level experience in mergers and acquisitions. As part of the hiring team, Mangano agreed with the selection of Langowski over the other applicant, but felt that Langowski "brought nothing to the table that [Mangano] didn't bring to the table."

After Langowski was hired, he reviewed the manufacturing department to determine whether the goals and responsibilities of each position were being maximized to meet Verity's current and future business needs. Based on this review, Langowski made changes to the department's organizational structure. Among other things, Langowski restructured Mangano's responsibilities by focusing his position on the following areas: standardizing the product release process across all of the company's product lines, readying operations to sell products, leading the effort to improve efficiencies within a number of business processes, and developing and executing an internal audit program for Sarbanes Oxley compliance. In the new position, Mangano no longer had responsibility for some areas, such as facilities, that had been within his purview. Mangano had said for years that a full-time person should be devoted to release management, but felt the new job was a "demotion." Mangano was given a new title, director of product release and operational readiness, and there was no reduction in his salary or benefits.

In August 2005, a doctor diagnosed Mangano, for the first time, with Asperger's Syndrome. Prior to this diagnosis, Mangano was not aware he had the condition. Asperger's Syndrome, as described in Mangano's Reply Brief, is an "'autism spectrum disorder'" that is "'characterized by difficulties in social communication and reciprocal

social skills, and in restricted and stereotyped interests and activities.’’ Springsteel left Verity in December 2005 when it was purchased by another company. At the time of his deposition in this case, Mangano was still employed at Verity (having not been effected by Verity’s reductions in force in June 2005 and January 2006).

### **B. Complaint**

On September 8, 2005, Mangano filed a complaint against Verity and Springsteel asserting three causes of action: (1) violation of FEHA; (2) wrongful and constructive termination of implied contract of employment; and (3) intentional infliction of emotional distress. Mangano sought \$25,000 in compensatory damages, punitive damages against Springsteel on the second cause of action, and attorney’s fees.

### **C. Summary Judgment Motion**

On June 9, 2006, Verity and Springsteel filed a motion for summary judgment or, in the alternative, summary adjudication. Defendants argued that the first cause of action fails because Mangano cannot prove that he has a disability, that he suffered an adverse employment action due to a disability, or that defendants’ legitimate business reasons for its employment actions were a mere pretext. Additionally, defendants argued that there is no individual liability for employment discrimination under FEHA and that there is no sound claim for harassment for a variety of reasons. Defendants also argued that the second and third causes of action fail as a matter of law. Defendants submitted a statement of undisputed facts, supported by the following additional evidence.

Springsteel called Mangano “Tommy” because it is a natural derivative of the name Thomas. Mangano admitted in his deposition that his family calls him “Tommy” and that he does not feel it is a condescending name when his family uses it. Springsteel used the nickname “Rainman” because he thought Mangano “had moments of brilliance” coupled with a “quirky manner.” For instance, Mangano displayed an amazing memory

for past customer orders and manufacturing history. At the same time, Mangano would sometimes “appear not to be associated with the activities going on around him” or would be disconnected from “the flow of conversation.” Springsteel did not use the nicknames to suggest that Mangano was not intelligent or that he was disabled, and he did not intend to offend or to harass Mangano. Mangano never asked Springsteel what he meant by the nicknames, and, as Mangano admits, the January 7, 2005 email was the first time Mangano complained to anyone at Verity regarding the use of the names. The nicknames were not used after Mangano’s email complaint.

The new vice-president position took over responsibility for manufacturing and facilities (previously under Mangano), but also included areas not previously part of Mangano’s area of responsibility, such as order entries. After working with Mangano for a year, Springsteel recognized Mangano’s wealth of historical knowledge regarding Verity customers and products, but felt that Mangano had not demonstrated the skills necessary to act as an effective vice-president in the growing company. Specifically, Springsteel observed that Mangano did not work effectively with other departments and had not put into place those organizational processes Springsteel deemed necessary for Verity’s new size and continued growth. Springsteel had repeatedly requested that Mangano “build a scalable organization,” but Mangano had been unable to fulfill that request. In informing Mangano that he was not qualified for the new position, Springsteel cited Mangano’s need to improve his communication with Verity’s product marketing group and to obtain the support of other departments. Springsteel had assured Mangano, however, that he was a valued employee and that he was not being “pushed out.”

Springsteel did not know about Mangano’s Asperger’s Syndrome diagnosis until after Langowski was hired and after Springsteel had ceased using the controversial nicknames; indeed, Springsteel was not aware of the diagnosis until this lawsuit was filed.

Likewise, Langowski did not know that Mangano had Asperger's Syndrome until after Mangano's position had been changed. Langowski did not view the job change as a demotion, but a restructuring to take advantage of Mangano's strengths and to accommodate his weaknesses. Langowski states that he was responsible for the changes to Mangano's position and only sought Springsteel's final approval once the decisions had been made; Springsteel concurs with this description of the process. When Langowski and Mangano met to discuss Mangano's new assignment, Mangano agreed the job was an important one. Mangano had said for years that the company needed a dedicated person to perform product release management and he agreed that performance of that role has a direct impact on Verity's revenue. Mangano also admitted that he does not believe Langowski has any bias against him.

Mangano conceded he never told anyone at work that he had Asperger's Syndrome. In deposition, Mangano stated that he "do[es] not know" if the syndrome interfered with his ability to succeed at Verity and does not know how Asperger's Syndrome affects any major life activities. Mangano further stated he does not know the symptoms of Asperger's Syndrome and does not know how Asperger's Syndrome could be accommodated in the workplace.

In opposition to defendants' motion for summary judgment, Mangano argued that he has direct evidence of discrimination and that there are "undisputable triable issues of fact with respect to the first cause of action." Mangano pointed to the following additional evidence in support of his opposition.

The use of the nickname "Tommy" caused "laughter among the staff" and Mangano felt the name "to be demeaning, childlike and disrespectful in a professional setting." Likewise, the use of "Rainman" during the staff meetings caused Mangano "extreme embarrassment and humiliation and derisive laughter amongst [the] coworkers present." Mangano was embarrassed by the plaque awarded to him as "Rainman" and placed it out of sight in his office. He did not think the plaque was funny or in "good

taste.” Others received plaques with humorous inscriptions (e.g., “The Great Karnak,” “Minute Man,” and “Sandbagger of the Year”), but none of the other plaques mocked the recipient’s health condition or disability. Mangano believes that the plaque evidences the fact that Springsteel “identified [him] as a person with autistic characteristics.”

Prior to the hiring for the vice-president position, Mangano had never been told that he needed to improve his work performance. Springsteel never told Mangano he “did not have the training, experience and qualities for the new [vice-president] position.” Moreover, from Mangano’s point of view, “the duties and responsibilities of the new position virtually duplicated those [he] was already performing” as director of manufacturing. As a result of Springsteel’s actions and the changes in Mangano’s role in the company, Mangano has suffered emotional distress and severe depression.

#### **D. Trial Court’s Ruling**

On August 30, 2006, the trial court filed its written order granting defendants’ motion for summary judgment. In regard to the discrimination claim, the court found (1) that “[d]efendants met their burden of proving that they had legitimate, nondiscriminatory reasons for taking each of the challenged actions,” and (2) that Mangano’s rebuttal evidence “[did] not raise a rational inference that defendants were motivated by a perception that plaintiff had a mental or physical disorder or condition that limits a major life activity, or that might do so in the future.” The court likewise found no support for Mangano’s claim of harassment in violation of FEHA: “Defendants met their burden of proving that the alleged harassment was not based upon an actual or perceived disability and was not sufficiently severe or pervasive enough to create an abusive working



environment. [Citation.] Although plaintiff disputes several of defendants' material facts, the evidence he cites does not raise any genuine triable issues of material fact."<sup>2</sup>

On September 5, 2006, in response to a letter brief from Mangano's counsel requesting reconsideration, the trial court declined to reconsider or amend its ruling. The trial court also denied Mangano's subsequent motion for a new trial and, on November 17, 2006, entered judgment for defendants. Mangano timely appealed.

## **II. Summary Judgment**

### **A. Standard of Review**

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The party moving for summary judgment bears the "burden of persuasion" that there are no triable issues of material fact, and that the moving party is entitled to judgment as a matter of law. (*Aguilar*, at p. 850.) "Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 316.)

### **B. Discrimination**

FEHA prohibits discrimination in employment on the basis of a mental disability. (See generally Gov. Code, § 12940, subd. (a).) For purposes of FEHA, a "[m]ental disability" includes "any mental or psychological disorder or condition, . . . that limits a major life activity" and also includes "[b]eing regarded or treated by the employer . . . as

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<sup>2</sup> The trial court also concluded that defendants were entitled to summary adjudication on the second and third causes of action. Mangano does not challenge this portion of the court's ruling on appeal.

having, or having had, any mental condition that makes achievement of a major life activity difficult.” (Gov. Code, § 12926, subd. (i)(1), (4).) “By delineating the protections afforded in section 12926 to persons ‘regarded as’ disabled, the Legislature intended ‘to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.’” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 (*Gelfo*).) In short, “mental disability” is to be “construed so that applicants and employees are protected from discrimination due to an *actual or perceived* . . . mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.” (Gov. Code, § 12926.1, subd. (b), italics added.) Under the statute, working is a major life activity, and a life activity is considered limited if the disability “makes the achievement of the major life activity difficult.” (Gov. Code, § 12926, subd. (i)(1)(B), (C).)

To resolve discrimination claims, including those alleging discrimination based on an actual or perceived disability, California courts employ the three-prong test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.) First, the employee must establish a prima facie case of discrimination. (*Guz*, at p. 354.) The employee “must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion.” (*Guz*, at p. 355, internal citations and quotation marks omitted.) Once the employee establishes a prima facie case, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. (*Guz*, at pp. 355-356.) A reason is “legitimate” if it is “*facially unrelated to a prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*.” (*Guz*, at p. 358.) If the employer meets this burden, the employee

must then show that the employer's reasons are a pretext for discrimination or produce other evidence of intentional discrimination. (*Guz*, at p. 356.)

Assuming, arguendo, that Mangano has set forth a prima facie case of discrimination against Verity,<sup>3</sup> we focus, as did the trial court, on defendants' asserted reasons for its employment decisions and on Mangano's rebuttal to this showing.<sup>4</sup>

Defendants have presented sufficient evidence to establish that defendants had a legitimate business reason for hiring an outsider, over Mangano, to fill the new vice-president position and for restructuring Mangano's director position. As support for its employment actions, defendants cite both the growth of the company and Mangano's failure to satisfy defendants' expectations regarding scalable processes and coordination with other Verity departments. The new position encompassed a broader range of responsibilities than Mangano's role as director of manufacturing and it was therefore consistent to expect that the vice-president would require a different or broader skill set. Mangano had not previously held a vice-president-level position, nor had he worked in a company larger than Verity's then-current size; in contrast, Langowski had many years of experience at the executive-level in large companies. (See, e.g., *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1044-1046 [affirming grant of summary judgment for employer where employee failed to provide substantial evidence to controvert employer's contention that it hired another to take over the responsibilities the plaintiff

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<sup>3</sup> Although the cause of action was originally asserted against both Verity and Springsteel, Mangano voluntarily dismissed the claim against Springsteel during the summary judgment proceedings.

<sup>4</sup> Defendants argue briefly that because the complaint alleges that Mangano was discriminated against based on a disability, he cannot argue on summary judgment that the discrimination was based on a *perceived* disability. Because the definition of disability under FEHA includes being "regarded" as having a mental condition that limits a life activity (see Gov. Code, § 12926, subd. (i)(4)), we find Mangano's summary judgment argument consistent with his pleading and we reject defendants' argument.

had previously assumed because the other applicant was more qualified].) In regard to Mangano's new role as product release director, a more specialized position with the same compensation in a larger organization could be viewed as a reasonable lateral move to better utilize Mangano's talents. A company has a legitimate business interest in structuring its organization to best utilize its personnel, and Mangano admits that Langowski was not biased against him. Mangano also concedes the new position was an important one with a direct impact on Verity's revenue and that the role required a dedicated, full-time person. Thus, the burden shifts to Mangano to show that defendants' asserted reasons for its actions are a mere pretext and that defendants acted with discriminatory animus.

“[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).) It is not sufficient for an employee opposing summary judgment to speculate as to discriminatory motive. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735 (*Martin*).) It is, instead, incumbent upon the employee to produce “substantial responsive evidence” demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer. (*Martin*, at p. 1735.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.)

To rebut defendants' showing, Mangano relies primarily on the use of the “Tommy” and “Rainman” nicknames and on his own perception of the demands of the vice-president job and his relative qualifications. Neither provides an adequate basis for

the factfinder to conclude that defendant acted with discriminatory animus, or that defendants' asserted reasons for the employment actions are implausible, baseless, or inconsistent and, therefore, a mere pretext for discriminatory action. (See *Hersant*, *supra*, 57 Cal.App.4th at p. 1009.)

It is undisputed that at the time Mangano was denied the vice-president position, neither Springsteel nor Mangano was aware of the Asperger's Syndrome diagnosis. Thus, Mangano relies on the use of the nicknames to establish that Springsteel regarded him as disabled. However, the mere fact that Springsteel thought Mangano "quirky," or even that Mangano bore some resemblance to the autistic savant depicted in the movie "Rain Man," does not prove that Springsteel perceived Mangano as disabled within the meaning of FEHA. Disabled means much more than just socially awkward or with eccentric or unique personality characteristics. To rise to the level of a mental disability, a mental condition must limit, or "make difficult," a major life activity. There is no evidence from which a reasonable trier of fact could conclude that defendants thought that Mangano had a disability that rendered him unable to perform the essential functions of the vice-president position or his long-term position as director of manufacturing. (*Gelfo*, *supra*, 140 Cal.App.4th 34, 52 ["The sole issue under the 'regarded as' definitional prong is whether the employer believes an applicant or employee is . . . disabled."].)

*Gelfo* provides an instructive comparison. In that case, the employer admitted that its employment decision was based on its belief that the medical restrictions imposed due to the employee's existing injury made him unable to perform the essential functions of the job. (*Gelfo*, *supra*, 140 Cal.App.4th at p. 49.) Thus, the court held that the employer functionally admitted that it took the adverse employment action because it perceived the employee as limited in his ability to work. (*Gelfo*, at p. 49.) There is no such admission regarding a belief in Mangano's inability to perform the essential functions of any of the relevant positions. The evidence in the record is instead overwhelming that Verity valued

Mangano as an employee. Mangano was director of manufacturing for 13 years, during which time the company grew significantly, and, as of the start of this litigation, he continued to hold a director-level position at Verity.

Mangano's assertion that the vice-president position was virtually identical to the position he had held for years, and, thus, that there can be no legitimate reason for denying him the promotion, is insufficient to establish pretext. The submitted evidence shows, in fact, that the new position encompassed a broader range of responsibilities (e.g., order entries). Mangano does not dispute this specific fact. Mangano's personal belief that there is no difference between heading manufacturing and related processes in a \$160 million company and in (an anticipated) \$300 million company does not establish that defendants lacked a legitimate business interest in hiring someone with lengthy executive-level experience at a larger company. Likewise, Mangano's insistence that he was not allowed even to apply for the new position does not render implausible, or even undermine, defendants' asserted rationale for hiring Langowski. Mangano's lengthy tenure at Verity did not entitle him to the new, broader position, and the lack of a formal application in this context is immaterial. Springsteel was Mangano's immediate supervisor for a year prior to the hiring process for the vice-president position. Springsteel thus was familiar with Mangano's qualifications and abilities and, once aware of Mangano's interest in the position, had all of the information needed to make a decision regarding Mangano's suitability in the new role.

Regarding his suitability for the vice-president position, Mangano argues that "[t]he facts suggest that any problems with Mangano's department were caused by Springsteel, not Mangano." Mangano stresses that Springsteel failed to provide for additional support personnel in manufacturing, including a manager dedicated to product release; gave Mangano additional day-to-day tasks that took him away from his director-level responsibilities; and worked directly with Mangano's subordinate regarding facilities. These facts are immaterial. A factfinder could certainly conclude that

Springsteel was a poor manager and/or that he contributed to Mangano's inability to scale the manufacturing department's processes, but that does not prove Springsteel acted with discriminatory animus. FEHA does not protect against bad managers, only decisions and actions with a discriminatory basis. "[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citation.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Guz, supra*, 24 Cal.4th at p. 358; see also *Hersant, supra*, 57 Cal.App.4th at p. 1005 ["The [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."].)

The dearth of evidence of pretext or discriminatory animus is particularly apparent in regard to Mangano's restructured position. Mangano admits that Langowski harbored no bias against him, and the undisputed evidence points to the restructuring being Langowski's decision. To contest the latter point, Mangano cites only Springsteel's influence in the hiring of another subordinate in the manufacturing department. This single incident occurred just after Langowski started and a couple of months prior to Mangano's job change. It is insufficient to show that Springsteel, not Langowski, drove the manufacturing department's restructuring and the change in his position to product release management. Moreover, Mangano stresses that Langowski showed confidence in his abilities, including his communication skills, by assigning him an important role within the restructured organization. This is directly contrary to an assertion that the restructure of Mangano's role was driven by an erroneous, stereotyped belief that Mangano was disabled and, thus, limited in a major life activity.

Mangano stresses that disability discrimination, like race, sex, and age discrimination, "violates the basic principle that each person should be judged on the basis of individual merit, rather than by reference to group stereotypes." (See *Stevenson*

*v. Superior Court* (1997) 16 Cal.4th 880, 896.) While we do not disagree, Mangano has not pointed to any fact beyond his own speculation that supports a finding that defendants judged Mangano on the basis of group stereotypes. The mere observation that effective communication was not among Mangano's strengths in his role as director (at a time when even Mangano was unaware of his disorder) is inadequate to form the basis of a discrimination claim. Mangano's central contention—because he was denied a promotion and his job restructured, defendants must have thought him impaired and unable to perform the essential functions of that job—is simply a bootstrap argument that is insufficient to avoid summary judgment.

“[T]he great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.” (*Guz, supra*, 24 Cal.4th at p. 361.) We find that such is the case in this appeal.

### **C. Harassment**

Separate from discrimination, FEHA prohibits harassment of an employee on the basis of the employee's mental disability. (Gov. Code, § 12940, subd. (j)(1).) In general, an employee “cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.” (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*).) “Although annoying or ‘merely offensive’ comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful[.]” (*Lyle*, at p. 283.) In addition, “[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he or] she was actually



offended.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609-610 (*Fisher*), fn. omitted.) Thus, “a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception.” (*Lyle*, at p. 284.) Whether the conduct is sufficiently pervasive is determined from the totality of the circumstances. (*Fisher*, at p. 609.)

Mangano argues that Springsteel, through the use of the offensive nicknames, “engaged in harassment based on a perceived disability.” We cannot agree. In light of Mangano’s concession that his family used the nickname Tommy on a regular basis, and his failure to correct the use of this natural derivative of his given name prior to January 2005, we cannot conclude that the nickname was offensive or harassing or that it even obliquely referred to a perceived disability. Likewise, Mangano’s personal belief that Springsteel must have meant to imply that he thought Mangano a “dummy,” or that Mangano was “autistic” and “mentally retarded,” is insufficient to support a finding that the use of Rainman insulted or demeaned Mangano on the basis of a perceived disability. It is undisputed that Springsteel (and even Mangano) was unaware of the Asperger’s Syndrome diagnosis at the time he used the nickname, and that Springsteel ceased using the term as soon as he was aware of Mangano’s discomfort with it. Although Springsteel concedes that he used the nickname Rainman 6 to 10 times, he asserts that he did not intend to refer to a disability. Mangano points to no other statements or actions that would suggest Springsteel was referring to a perceived or potential disability. We expressly reject, as an unreasonable inference, Mangano’s argument that if an employer perceives an employee is “quirky,” the employer necessarily believes the employee has a mental deficit, even if the employer is unaware of the precise deficit involved.

Even if the Tommy and Rainman nicknames could be reasonably understood as references to an actual or perceived disability, Mangano has failed to show that the alleged harassment was severe or pervasive enough to interfere with a reasonable

employee's work performance. The sporadic use of ambiguous but potentially demeaning nicknames, absent any indication from the employee that the names are offensive and absent any other harassing actions by the employer, is insufficient to create an objectively hostile workplace environment. We therefore affirm the grant of summary judgment as to Mangano's harassment claims.

### **III. Expert Witness Fees and Attorney's Fees**

#### **A. Post-Judgment Order**

After the entry of judgment, on November 17, 2006, defendants moved for an award of attorney's fees and expert witness fees. On May 1, 2006, approximately five weeks prior to filing their summary judgment motion, defendants offered to pay Mangano \$2,500 in exchange for dismissal of the lawsuit with prejudice. Under the terms of the settlement offer, each party would bear its own costs and attorney's fees. Mangano did not accept the offer of settlement. Because the judgment ultimately awarded Mangano less than \$2,500, defendants sought an award of their expert witness fees and their postoffer attorney's fees pursuant to Code of Civil Procedure section 998.<sup>5</sup>

On February 9, 2007, the trial court granted the motion for expert witness fees and, pursuant to the stipulation of counsel at the hearing on the motion, fixed the amount of fees at \$20,000. At the same time, the court denied defendants' motion for attorney's fees. Both parties timely appealed. This court previously determined that the appeals from the postjudgment order would be considered with Mangano's appeal from the judgment.

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<sup>5</sup> All further statutory references are to the Code of Civil Procedure unless otherwise noted.

## **B. Section 998**

“Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (§ 1032, subd. (b).) Although expert witness fees are not ordinarily recoverable as costs (§ 1033.5, subd. (b)), section 998 covers costs and fees in those cases in which there has been a settlement offer by a defendant. The statute provides, in relevant part: “(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial . . . or during trial . . . of the case by the defendant.” The purpose of section 998 is to “encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer.” (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.)

## **C. Expert Witness Fees**

Mangano challenges the award of \$20,000 in defendant’s expert witness fees pursuant to section 998. We find no abuse of discretion in the court’s award of fees, and affirm the order.

Mangano’s only argument on appeal is that defendants’ \$2,500 settlement offer amounted to a “token” offer and was not reasonable.<sup>6</sup> This argument derives from a line

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<sup>6</sup> As noted, Mangano stipulated to the amount of expert fees and does not dispute the amount on appeal.

of cases that has held that “[a] section 998 offer must be made in good faith and be realistically reasonable under the circumstances of the particular case, and carry with it some reasonable prospect of acceptance.” (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 129, internal quotation marks omitted [noting broad application of standard].) If the settlement offer “‘is in a range of reasonably possible results and the offeree has reason to know the offer is reasonable, then the offeree must accept the offer or be liable for costs under Code of Civil Procedure section 998.’” (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1025.) Some courts have further held that a “token” or “nominal” offer does not satisfy the good faith requirement and cannot provide a basis for a fee award pursuant to section 998. (See *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821 (*Wear*).) However, “[e]ven a modest or ‘token’ offer may be reasonable if an action is completely lacking in merit.” (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134 (*Nelson*).) “Whether the offer was made in good faith and was reasonable is left to the sound discretion of the trial court.” (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471 (*Hartline*).)

Assuming, for purposes of this appeal, that the reasonableness of the offer is a prerequisite to an award of fees and that the prohibition on a “token” offer applies, we find no abuse of discretion in the trial court’s award of fees. Because defendants prevailed in this action, the \$2,500 settlement offer is presumed to meet the reasonableness requirement, and Mangano bore the burden below to prove otherwise. (*Nelson, supra*, 72 Cal.App.4th at p. 134; *Hartline, supra*, 132 Cal.App.4th at p. 471 [“Where the defendant obtains a judgment more favorable than its offer, the judgment is prima facie evidence that the offer was reasonable.”].) Moreover, the present case is factually distinguishable from those cases in which the court found the pretrial offer to be a mere “token.” In *Wear, supra*, 121 Cal.App.3d at page 821, the defendant offered \$1 to settle the action. The jury eventually found for that defendant but awarded over \$18,000 against the codefendants. (*Wear*, at p. 821.) The court found that in those circumstances

the only purpose of the “token” offer was to make the defendant eligible for expert fees and, therefore, that the offer did not meet the “good faith” requirement. (*Wear*, at p. 821; see also *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698 [settlement offer of \$15,001 found to be “token” offer after jury found the plaintiff’s damages to exceed \$1,000,000, even though the defendant’s net judgment was less than the section 998 offer due to a credit for the codefendants’ payments].) Here, in contrast, Mangano failed to recover on all claims against both defendants, and there is no indication that at the time of the offer defendants possessed unique information regarding the merit, or lack thereof, of Mangano’s complaint. (Compare, e.g., *Nelson, supra*, 72 Cal.App.4th at pp. 136-137 [the trial court denied fees and the appellate court affirmed where the defendant failed to offer proof that the plaintiff was aware of merits of suit and thus that the offer was reasonable at the time it was made].)

The amount a jury might award in a successful employment discrimination claim carries little weight in these circumstances. The settlement offer was made after the completion of Mangano’s deposition. Although modest, \$2,500 was a reasonable amount based on defendants’ objectively reasonable belief that there was no liability under any of Mangano’s legal theories and that there was a strong likelihood defendants would prevail on summary judgment or at trial. (See *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1528-1529 [“‘When a defendant perceives himself to be fault free and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer.’”].) We find no abuse of discretion in the trial court’s award of expert witness fees.

#### **D. Attorney’s Fees**

Defendants contest the trial court’s denial of attorney’s fees as part of their award of costs pursuant to section 998. We again find no error and affirm the trial court’s order.

In addition to expert fees, the costs awarded to a prevailing party pursuant to section 998 may include attorney's fees "when authorized by" statute. (§ 1033.5, subd. (a)(10)(B); see also §§ 998, 1032.) In regard to attorney's fees, FEHA provides, in relevant part: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs . . . ." (Gov. Code, § 12965, subd. (b).) Despite its discretionary language, however, the statute applies only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387-1388 (*Cummings*).) The United States Supreme Court set forth this standard in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 (*Christiansburg*), a federal discrimination action.<sup>7</sup> The court affirmed that although a prevailing plaintiff in a discrimination case is entitled to attorney's fees "unless special circumstances would render such an award unjust[,]" a prevailing defendant cannot obtain attorney's fees unless the court finds the claim "frivolous, unreasonable, or groundless." (*Christiansburg*, at pp. 416-417, 422.) The court explained that "while Congress wanted to clear the way for suits to be brought under the Act" by making it easier for plaintiffs with limited means to bring a meritorious suit, Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis." (*Christiansburg*, at p. 420.) Thus, "'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." (*Christiansburg*, at p. 421.)

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<sup>7</sup> "The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under title VII of the federal Civil Rights Act," including the principles governing the award of attorney's fees. (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865, quoting *Cummings*, *supra*, 11 Cal.App.4th at pp. 1386-1387.)

The trial court's written order in this case denies the motion for attorney's fees summarily, but the court's comments at oral argument suggest that it believed the *Christiansburg* standard must be applied in a FEHA action regardless of the application of section 998.<sup>8</sup> Defendants argue that the court erred in applying the limitations set forth in *Christiansburg* to determine their eligibility for attorney's fees. Defendants contend that because they are the prevailing parties pursuant to section 998, and FEHA authorizes the award of attorney's fees to the prevailing party, they are entitled to attorney's fees as part of their section 998 costs despite the restrictions generally imposed in awarding a prevailing defendant fees in a FEHA action. This argument is unpersuasive.

Our high court's decision in *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103 (*Scott*) provides the blueprint for our analysis in this case. The plaintiff in *Scott* rejected the defendant's \$900,000 section 998 settlement offer prior to trial. (*Scott*, at p. 1107.) At trial, the plaintiff was awarded approximately \$442,000 in damages. (*Ibid.*) Both sides sought attorney's fees based on a provision in their contract and on the application of Civil Code section 1717 which governs the mutuality of attorney's fees provisions in contracts. (See *Scott*, at pp. 1107-1108.) Because the plaintiff's recovery failed to exceed the amount of the settlement offer, the defendant relied on the application of section 998 to argue that it was a prevailing party for purposes of its postoffer attorney's fees. (*Scott*, at p. 1107.) The trial court awarded the plaintiff its preoffer costs and attorney's fees as the prevailing party under the contract, and awarded the defendant its postoffer fees under section 998. (*Scott*, at pp. 1107-1108.)

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<sup>8</sup> In considering whether the *Christiansburg* standard was met, the court observed at the hearing that "it's a really close" case. On appeal, defendants contend only that the court should not have used the *Christiansburg* standard. Defendants do not challenge the trial court's implicit finding that the case does not meet that standard.

The *Scott* court affirmed the award of the plaintiff's attorney's fees, finding that section 998 did not limit the preoffer fees.<sup>9</sup> (*Scott, supra*, 20 Cal.4th at p. 1112.) The court further held that section 998 required the trial court to treat the defendant as the prevailing party for purposes of its postoffer costs. (*Scott*, at p. 1114.) In so concluding, the court stressed that the "very essence of section 998" is its encouragement of the acceptance of reasonable settlement offers through the treatment of those losing parties whose settlement offers exceeded the final judgment *as prevailing parties*. (*Scott*, at p. 1114.) Thus, pursuant to section 998, "the defendant may recover all those postoffer costs to which it would have been entitled had it been a prevailing party, including attorney fees." (*Scott*, at p. 1115.) Because the contract between the parties (combined with the application of Civil Code section 1717) awarded attorney's fees to the prevailing party in the contract action, the defendant was entitled to his postoffer fees. (See *Scott*, at pp. 1114-1116.) The *Scott* court did not end its discussion there, however. The court acknowledged the asymmetry that may result even under section 998's apparently even-handed treatment of preoffer and postoffer costs. (See *Scott, supra*, 20 Cal.4th at p. 1115 & fn. 3.) Because the discussion in this footnote bears directly on the issue before this court, we quote it in full: "Ordinarily, the categories of postoffer costs to which a defendant is entitled under section 998 will be the same as the categories of preoffer costs to which the [prevailing] plaintiff is entitled. This will not always be true, however, because the Legislature has in certain limited instances made a policy decision to treat prevailing plaintiffs and prevailing defendants differently for purposes of attorney fees and other costs. *Section 998 takes these differences as it finds them, applying them for purposes of postoffer costs as if the defendant were the prevailing party but neither expanding nor contracting the categories of costs to which a prevailing defendant in the*

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<sup>9</sup> The court applied an earlier version of section 998, but the revisions have no impact on our analysis.



*circumstances would be entitled.* Thus, if the case is governed by a statute under which a prevailing plaintiff but not a prevailing defendant is entitled to attorney fees, then a defendant who does not prevail but is nonetheless entitled to its postoffer costs under section 998 is not entitled to its postoffer attorney fees as part of those costs, even though the prevailing plaintiff may obtain its preoffer attorney fees as part of its preoffer costs. [Citation.]” (*Scott*, at p. 1115, fn. 3, italics added.)

In other words, section 998 does not grant greater rights to attorney’s fees than those provided by the underlying statute. Section 998 instead merely expands the group of those who are treated as prevailing parties and who therefore may be entitled to attorney’s fees as prevailing parties under the relevant statute. Under FEHA, a prevailing defendant is entitled to attorney’s fees only if the action is deemed unreasonable, frivolous, or meritless. A prevailing plaintiff, in contrast, ordinarily is entitled to fees. A FEHA action therefore presents the very situation contemplated by the California Supreme Court in its footnote: the Legislature has determined that prevailing plaintiffs and prevailing defendants in FEHA actions be treated differently.

Following the court’s observations in *Scott*, we therefore find that section 998 does not eliminate the substantive requirements for awarding attorney’s fees to a prevailing FEHA defendant. We further conclude the trial court was correct to apply the *Christiansburg* standard and, thus, to deny defendants’ request for attorney’s fees on the basis that the action was not without any legal or factual foundation.<sup>10</sup> This result is in keeping with the policy set forth in *Christiansburg* regarding the unequal treatment of prevailing defendants and prevailing plaintiffs in a discrimination suit. (See *Seeever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1562 (*Seeever*) [noting that *Christiansburg* and related California cases demonstrate judicial “sensitivity to the

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<sup>10</sup> As noted above, defendants object only to the application of the *Christiansburg* standard and do not argue on appeal that the claim was “frivolous, unreasonable, or groundless.”

imbalance inherent in allowing equal cost-shifting between unequal parties”].) Defendants present no persuasive argument for allowing the application of section 998 to supplant the established standard that seeks to deter frivolous suits while providing adequate support and incentive for meritorious actions.<sup>11</sup> We thus concur with the trial court’s denial of defendants’ motion for postoffer attorney’s fees.

#### **IV. Disposition**

In appeal number H030999, the judgment is affirmed.

In appeal number H031234, the trial court’s February 13, 2007 postjudgment order awarding defendants \$20,000 in expert witness fees and denying defendants’ motion for attorney’s fees is affirmed.

Each party is to bear its own costs on appeal.

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Mihara, Acting P.J.

WE CONCUR:

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McAdams, J.

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Duffy, J.

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<sup>11</sup> We note briefly that the issues presented in defendants’ primary authorities are materially different from the issue presented in this case. (See *Seever, supra*, 141 Cal.App.4th 1550 [the plaintiff appealed award of section 998 postoffer costs, which did not include attorney’s fees, to the prevailing defendant in FEHA action]; *Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326 [court reviewed trial court’s denial of attorney’s fees to the prevailing *plaintiff* in FEHA action in which the plaintiff rejected settlement offer that exceeded final judgment].)

Trial Court:

Santa Clara County Superior Court

Trial Judge:

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