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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY J. ANDREWS, Plaintiff-Appellant, v. U.S. BANK, N.A., a Delaware corporation; et al., Defendants-Appellees.	No. 22-56120 D.C. No. 8:22-cv-00117-DOC-DFM MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted February 14, 2024[**]
Pasadena, California

Before: W. FLETCHER, NGUYEN, and LEE, Circuit Judges.

Plaintiff Gregory Andrews appeals an order from the district court granting Defendants U.S. Bank, N.A. and U.S. Bancorp Investments, Inc.'s motion for summary judgment in this diversity action involving California state employment

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

discrimination claims. The district court had jurisdiction pursuant to 28 U.S.C. § 1332, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 746 (9th Cir. 2003) (en banc). We affirm.

1. Andrews' disability discrimination claim under the California Fair Employment and Housing Act ("FEHA") fails because he cannot establish that his alleged disability was a substantial motivating reason for U.S. Bank's decision to terminate him.

California has adopted the three-step burden-shifting analysis on summary judgment of a disability discrimination claim under the FEHA: (1) "the plaintiff bears the burden of establishing a prima facie case of discrimination"; (2) "the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action"; and (3) if the employer does so, "the plaintiff must offer evidence" of pretext sufficient to withstand summary judgment. *Alamillo v. BNSF Ry. Co.*, 869 F.3d 916, 920 (9th Cir. 2017) (applying FEHA). To establish his prima facie case, Andrews must show (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and (3) he was subjected to adverse employment action because of his disability. *Faust v. Cal. Portland Cement Co.*, 150 Cal. App. 4th 864, 886 (2007).

Andrews' prima facie case fails on the third prong—he cannot establish a

genuine dispute about whether he was terminated *because of* his alleged disability. To establish causation, the disability must be a "substantial motivating reason" for Defendants' decision to terminate his employment. *Alamillo*, 869 F.3d at 920. This requires employees to prove that their "employer had knowledge of the employee's disability when the adverse employment decision was made." *Brundage v. Hahn*, 57 Cal. App. 4th 228, 236–37 (1997). An employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." *Faust*, 150 Cal. App. 4th at 887 (citation omitted).

Andrews admits that he never directly told Rod Dolan, his supervisor who ultimately made the decision to terminate Andrews, that he was diagnosed with Tourette's Syndrome or any other tic disorder. And the evidence in the record is insufficient to impute knowledge of such a disability to Dolan by inference or observation. Andrews' passing references to his medication and his tic disorder are, at best, "[v]ague or conclusory statements revealing an unspecified incapacity," which "are not sufficient to put an employer on notice of its obligations under the [FEHA]." *Brundage*, 57 Cal. App. 4th at 237. Nor was the conduct that Andrews was terminated for—aggressive behavior toward two of his subordinates—so obviously a manifestation of his alleged disability that it would

be reasonable to infer that U.S. Bank had actual knowledge of such a disability. *See Hedburg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995). Accordingly, there is no genuine dispute of fact as to U.S. Bank's actual or imputed knowledge of Andrews' alleged disability.

This conclusion is bolstered by Andrews' argument that U.S. Bank and its investigators should have made further inquiries into his medical condition upon learning that he was taking medication. His contention that U.S. Bank "ignored" evidence of his alleged disability undercuts any claim that U.S. Bank took an adverse employment action *because of* his disability. *See Alamillo*, 869 F.3d at 920 (affirming summary judgment where employee conceded that employer "disregarded" disability in termination decision). Andrews bore the burden of putting U.S. Bank on notice of his disability, *Featherstone v. S. Cal. Permanente Med. Grp.*, 10 Cal. App. 5th 1150, 1167 (2017), and he cannot impute knowledge of his disability to his employer based on its purported failure to probe deeper into references to medication or an unspecified condition.

We agree with the district court's conclusion that the evidence fails to establish a prima facie case of disability discrimination under the FEHA.

2. Andrews' failure to accommodate and interactive process claims under the FEHA similarly fail because he never informed U.S. Bank of his purported disability, he never requested an accommodation, and he does not

identify what reasonable accommodation he should have been offered. An employer is ordinarily not liable under the FEHA for failing to accommodate a disability of which it had no knowledge. *King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426, 443 (2007). It is the responsibility of the employee to "understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." *Id*. The record does not show that Andrews requested any accommodation or presented any restrictions prior to his termination, nor has Andrews set forth any reasonable accommodation that "would have been available at the time the interactive process should have occurred." *Alamillo*, 869 F.3d at 922–23. On appeal, Andrews argues that "the disciplinary process [would] have concluded differently" had U.S. Bank known of his purported disability, but "not terminat[ing the plaintiff] for prior misconduct" does "not qualify as reasonable accommodations under California law." *Id.* at 922.

3. Because Andrews' unfair competition and wrongful termination claims are predicated on his FEHA claims, which fail for the reasons set forth above, the district court properly granted summary judgment with respect to these derivative claims.

4. We also find that the district court properly granted summary judgment to U.S. Bancorp Investments, Inc. (USBI) on Andrews' claim that it

failed to provide him with the "Dual Employee Acknowledgement Form" within 30 days of his request in violation of Cal. Lab. Code § 1198.5(a). At the outset, we disagree with USBI's argument that Andrews lacks standing to pursue this claim because it sent his counsel two checks in the amount of the statutory penalty and attorneys' fees. The appropriate inquiry is whether USBI's offer to settle, which Andrews rejected, rendered Andrews' claim moot, and we believe that it did not. *See Chen v. Allstate Ins. Co*. 819 F.3d 1136, 1138 (9th Cir. 2016) ("Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff actually receives complete relief on that claim, not merely when that relief is offered or tendered.").

Nevertheless, we affirm the district court's grant of summary judgment on the merits of this claim because the Dual Employee Acknowledgment form is not the type of document covered by Cal. Lab. Code § 1198.5(a). That statute requires employers to produce "records that the employer maintains relating to the employee's performance or to any grievance concerning the employee." Cal. Lab. Code § 1198.5(a). That includes records "that are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action." *Wellpoint Health Networks, Inc. v. Superior Ct.*, 59 Cal. App. 4th 110, 124 (1997). Andrews argues that there is a genuine dispute as to whether the Dual Employee Acknowledgment

Form falls within this definition. We disagree. The form itself merely reflects Andrews' acknowledgment that in his employment, he serves in a "dual capacity governed by and supporting U.S. Bancorp Investments, Inc." It lists obligations and duties owed by Andrews in that dual capacity. It does not describe Andrews' qualifications, compensation, promotions, or any other information specific to Andrews. Andrews has not presented any evidence that this form was used to determine his qualifications for employment, promotion, additional compensation, termination, or other disciplinary action. *Wellpoint*, 59 Cal. App. 4th at 124.

AFFIRMED.