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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DIOSDADO FACTOR, Plaintiff and Appellant, v. MERCY SERVICES CORPORATION, Defendant and Respondent.	A128459 (City & County San Francisco Super. Ct. No. CGC-08-471194)

In this action challenging his termination from employment, plaintiff Diosdado Factor, Jr., appeals from a summary judgment in favor of his former employer, Mercy Services Corporation (Mercy). He contends his evidence raises a triable issue of material fact as to whether his termination resulted from discriminatory or retaliatory animus. We conclude that the overwhelming, undisputed evidence establishes that plaintiff was terminated for legitimate business reasons and that plaintiff presented no evidence suggesting that those reasons were pretextual. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff's third amended complaint alleges causes of action under the Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq.,[1] for discrimination, harassment and retaliation, as well as a cause of action for wrongful termination in violation of public policy. Mercy moved for summary judgment. The following undisputed facts were submitted in support of Mercy's motion:

[1] All statutory references are to the Government Code unless otherwise noted.

"Plaintiff is of Asian descent. [He] is from the Philippines and is a Filipino-American." Prior to his termination in June 2006, plaintiff had been employed for approximately 15 years as a maintenance worker at a low-income housing facility in San Francisco. In 1999, when ownership and management of the facility was transferred to an affiliate of Mercy, plaintiff became Mercy's employee. From at least December 2005, plaintiff's direct supervisor was Anthony Camel.

On December 6, 2005, Camel sent plaintiff a memorandum instructing him to give Camel advance notice of any request for time off. On January 4, 2006, Camel issued plaintiff an "Employee Warning Notice" indicating that on December 30, 2005, plaintiff requested time off without giving Camel advance notice. Plaintiff refused to sign the warning.

On February 24, 2006, Camel issued plaintiff a second Employee Warning Notice based on his failure to report a maintenance problem to Camel in a timely fashion. Again, plaintiff refused to sign the notice.

On May 30, 2006, Camel issued plaintiff a third Employee Warning Notice. The notice indicated that on May 8, plaintiff did not work his scheduled shift and did not call in sick. Camel explained that on May 7 plaintiff called to tell him that he had been admitted to the hospital and was unsure whether he would be returning to work the following day. On May 8 it was reported to Camel that plaintiff did not work a full day as scheduled and that he did not inform his supervisor that he was sick. The notice advised plaintiff, "*Failure of employee to correct problem will result in termination of employment without any additional warnings issued*."

In response to the notice, plaintiff wrote a letter to Jacquie Hoffman, his third-level supervisor. The letter stated that plaintiff worked an eight-hour shift on May 8, from 7:00 a.m. to 3:30 p.m. and that he spoke to Camel by phone at approximately 8:00 a.m. that morning. "I mentioned to Mr. Camel that I might work for that day for a couple of hours while I'm waiting for my doctor's call. Mr. Camel's response was 'you can not and I'll be there tomorrow.' Since my doctor did not schedule me an appointment not until 4:00 p.m. that day I ended up working until 3:30 p.m.. I worked 8 hours that day but

when I received my pay check on May 26, 2006, there is an unpaid day. During our meeting today Mr. Camel told me that I left early. The truth is I worked that day and by law I deserve to get paid." Hoffman met with plaintiff and Camel the following day and on June 5 informed plaintiff in writing that "[Camel] is reviewing your work schedule with other staff and records for May 8 and will make sure that you are paid for any time worked."

On June 21, 2006, Hoffman terminated plaintiff's employment. Prior to doing so, Hoffman was told that plaintiff had been paged three times on the evening of June 19 because a caregiver for a facility resident was locked in the dumpster room but that plaintiff failed to respond to the pages. She was also told that, contrary to her prior instructions, plaintiff failed to check with Camel at the beginning and end of his shift on June 20.

In opposition to the motion, plaintiff acknowledged that he was not asserting any claim for discrimination by Hoffman. He argued, however, that a triable issue of fact existed as to whether the decision to terminate him was made by Camel or by Hoffman and, assuming it was made by Camel, whether the decision was motivated by discriminatory animus. He also argued that a triable issue of fact existed as to whether his May 30 letter constituted protected activity for purposes of his retaliation claim.

The trial court granted Mercy's motion for summary judgment, holding that the undisputed evidence established that plaintiff was terminated for a legitimate business reason and that plaintiff had failed to present any "specific or substantial evidence of discrimination, retaliation or harassment." The court explained, "In deposition, plaintiff did not testify that any discrimination was mentioned by his supervisors. Plaintiff's letter of May 30, 2006, wherein he complains that he wasn't properly paid, viewed in the light most favorable to plaintiff, does not create a triable issue of fact on any of the claims, as plaintiff is merely stating that in his opinion Camel withheld pay. Plaintiff's personal suspicions of improper motive based on conjecture or speculation are insufficient. Plaintiff's opinion alone, without more, does not create a triable issue of fact." Plaintiff filed a timely notice of appeal.

DISCUSSION

Summary judgment is properly granted if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On appeal, we review de novo the trial court's decision to grant summary judgment. We independently determine whether the record supports the trial court's conclusions that the asserted claims fail as a matter of law. (*Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935, 951.) We must view the evidence submitted in connection with a motion for summary judgment in a light most favorable to the party opposing the motion and resolve "any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

1. *Discrimination*

Plaintiff alleges that Mercy terminated his employment because of his "national origin or race, perceived disability, medical condition and age." It is an unlawful employment practice for an employer "to discharge [a] person from employment" based on that person's race, national origin, age, or physical disability, whether actual or perceived. (§ 12940, subd. (a); *Green v. State of California* (2007) 42 Cal.4th 254, 262.) Discriminatory intent is an essential element of plaintiff's claim. Such intent may be proved by direct, indirect or circumstantial evidence. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354.) Direct evidence of discriminatory intent usually " 'consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision,' [citation]." (*Patten v. Wal-Mart Stores E., Inc*. (1st Cir. 2002) 300 F.3d 21, 25.) Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz v. Bechtel*, *supra*, at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.) Under this test, (1) the plaintiff/employee must set forth sufficient evidence to establish a prima facie case of discrimination, (2) the defendant/employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment action, and (3) the employee then

has the opportunity to show the employer's articulated reason is pretextual. (*Guz v. Bechtel*, *supra*, 24 Cal.4th at p. 355.) "A defendant employer's motion for summary judgment slightly modifies the order of these showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred." (*Kelly v. Stamps.com Inc*. (2005) 135 Cal.App.4th 1088, 1097-1098, citing *Guz v. Bechtel*, *supra*, at p. 357.) Plaintiff's evidence " 'must be "specific" and "substantial" . . . to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) " 'To avoid summary judgment, [plaintiff] "must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses." [Citation.] . . .' We emphasize that an issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture." (*Horn v. Cushman & Wakefield Western, Inc*. (1999)72 Cal.App.4th 798, 807.)

In this case, Mercy amply met its burden of showing legitimate, nondiscriminatory reasons for plaintiff's termination. The undisputed evidence establishes that plaintiff's employment was terminated because he repeatedly refused to follow work requirements imposed by his supervisor and because he failed to respond to an emergency page required by his employment. This evidence placed on plaintiff the burden to present substantial evidence that Mercy's reasons were pretextual and its actions motivated by discriminatory animus.

Even if Camel made the decision to terminate plaintiff's employment, there is no evidence that his decision was motivated by discriminatory animus based on race, age or other prohibited factor. Plaintiff asserts that on one occasion while conducting inventory Camel said "Why is it taking you so long? You are a slow worker." Contrary to

plaintiff's suggestion, this comment cannot reasonably be construed as an inappropriate comment about his age. Plaintiff also argues that "Camel reduced the hours of another Filipino worker so much so that he was forced to retire and in his place Camel decided to hire an African-American friend who happened to last only a few months." Plaintiff testified in his deposition, however, only that the hours of the other Filipino employee "could have been" reduced because of his age or race and that "perhaps" the replacement employee was hired because he was African-American. No evidence was presented regarding the other Filipino employee's work history or the qualifications of his replacement. Plaintiff's speculation as to Camel's motives is not substantial evidence of discriminatory intent.

Finally, plaintiff argues that "his deposition testimony proved that the warnings were based on lies and therefore pretextual." At his deposition, plaintiff disputed the accuracy of the factual assertions contained in the Employee Warning Notices. With respect to the first Employee Warning Notice, he claimed that he gave Camel three days notice of his request for time off on December 30, and he asserted that he fixed the maintenance problem at issue in the second Employee Warning Notice.[2] Even assuming the warnings were based on incorrect facts, plaintiff's evidence does not demonstrate that the warnings were a pretext for discrimination. "It is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for . . . discrimination. While, given the inherent difficulties in showing discrimination, the burden-shifting system established by the Supreme Court is a useful

[2] Plaintiff's explanation regarding the first warning does little to support his claim. He testified, "I had a one-day floating holiday at the end of the year, so I told [Camel] . . . I needed to use it, because if I'm not mistaken it's three days before. [¶] So [Camel] told me, 'No, you cannot do that, Jun, because you have to give me enough time. This is only a short time.' [¶] So I went to the property manager . . . and [she] said, 'Does [Camel] know this?' [¶] And I said 'Yes.' [¶] . . .[¶] When [Camel] came in – if I'm not mistaken, maybe it was January 2 – . . . he told me, 'Jun, why did you – why were you off on that day?' "

device to facilitate the adjudication of claims of discrimination, it ultimately, however, does not change what the employee must prove." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) The trial court did not err in summarily adjudicating this cause of action.[3]

2. *Retaliation*

Plaintiff's complaint alleged a claim for retaliation under section 12940, subdivision (h), which makes it unlawful for an employer to terminate an employee "because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." To establish a prima facie case of retaliation, a plaintiff must show that (1) he or she engaged in protected activity; (2) the employer subjected the plaintiff to an adverse employment action; and (3) the protected activity and the employer's action were causally connected. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Plaintiff argues that his May 2006 letter to Hoffman was a claim for discrimination and harassment and that he was terminated in retaliation for making that claim.[4] While an employee is not required to file a formal discrimination charge, the " 'employee's communications to the employer [must] sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' " (*Id*. at p. 1047 ["complaints about personal grievances or vague or conclusory remarks that fail to put an employer on

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[3] Plaintiff 's claim for harassment fails for the same reason. A claim for harassment under FEHA requires evidence that (1) the employee was subjected to unwelcome conduct or comments; (2) the harassment complained of was based on his or her race or other protected classification; and (3) the harassment was so severe and pervasive as to alter the conditions of employment and create an abusive working environment. (*Etter v. Veriflo Corp*. (1998) 67 Cal.App.4th 457, 463-465.) Plaintiff's evidence fails to make even a prima facie showing of harassment.

[4] For the first time on appeal, plaintiff argues that a conversation he had with a supervisor in April 2006 also supports his retaliation claim. According to his deposition testimony, in that conversation, he complained about "all the write-ups that had been made against me and the work orders and regarding performance" and they discussed how he and Camel "could have a good relationship." Nothing in his testimony suggests that plaintiff complained about discrimination or harassment.

notice as to what conduct it should investigate will not suffice to establish protected conduct"].) In this case, plaintiff's letter cannot be reasonably construed as a claim of discrimination or harassment under FEHA. The clear purpose of the letter was to detail factual disputes with regard to the allegations in the Employee Warning Notices, not to complain about discrimination or harassment. Plaintiff's letter does not expressly or implicitly raise a claim of discrimination based on his race, national origin or age. With respect to his claim of discrimination based on perceived disability, the letter states only that when he spoke to Camel from the hospital on May 7, Camel was "already complaining about my status of my return to work" and that "[a] token sensitivity from my supervisor will be very much appreciated." The only form of harassment mentioned in the letter related to alleged phone calls from Camel to plaintiff's other part-time employer requesting copies of plaintiff's time sheets and other personnel records. Because plaintiff's May 2006 letter cannot reasonably be construed as protected conduct under FEHA, the trial court did not err in summarily adjudicating his claim for retaliation.

3. *Wrongful termination in violation of public policy*

In addition to the above FEHA claims, plaintiff alleged wrongful termination in violation of the public policy against retaliation, predicated on the public policies set forth in Labor Code section 98.6, subdivision (a). This section provides in relevant part that "No person shall discharge an employee . . . because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner . . . ." Plaintiff argues that he was terminated because he complained in his May 2006 letter that he had not been paid properly for all hours worked. As set forth above, plaintiff asserted that he was not paid for eight hours that he worked on May 8 and demanded further investigation of this violation of his

"employee rights."[5] Hoffman responded within a week of plaintiff's letter, informing him that "[Camel] is reviewing your work schedule with other staff and records for May 8 and will make sure that you are paid for any time worked." Plaintiff's letter does not raise concerns about an unfair or illegal labor practice. At most, it requests investigation of an isolated incident involving a factual dispute regarding the number of hours worked on a particular day, which Mercy agreed to investigate. While a slight inference of retaliatory motive might be drawn from the temporal proximity of the letter and plaintiff's termination three weeks later, the progressive discipline began well before the May letter was written, negating the basis for any such inference. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353 ["temporal proximity alone is not sufficient to raise a triable issue as to pretext . . . where the employer raised questions about the employee's performance before he disclosed his symptoms, and the subsequent termination was based on those performance issues"].) Accordingly, the trial court did not err in summarily adjudicating this cause of action.

DISPOSITION

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

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Pollak, Acting P. J.

We concur:

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Siggins, J.

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Jenkins, J.

[5] The letter also asserts a claim for compensation for two hours on December 30 for which Mercy allegedly failed to pay plaintiff. Plaintiff has not discussed this claim on appeal.