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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON LOPEZ, Plaintiff-Appellant, v. WINCO HOLDINGS, INC.; WINCO FOODS, LLC, Defendants-Appellees.	No. 21-16565 D.C. No. 3:19-cv-05727-CRB MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted December 7, 2022[**]
San Francisco, California

Before: BRESS and VANDYKE, Circuit Judges, and RESTANI,[***] Judge.

Plaintiff-Appellant Jason Lopez appeals the district court's decision granting summary judgment in favor of Defendants-Appellees WinCo Holdings, Inc., and

[*] 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).

[***] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

WinCo Foods, LLC (collectively, "WinCo"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Lopez worked as a WinCo store manager in Pittsburg, California. In early 2017, he began to develop depression. He did not at that time inform anyone at WinCo of his mental health issues, but his work performance began to suffer. He received his first written warning in January 2018, after WinCo leadership inspected Lopez's store and found "unacceptable and intolerable store conditions," including empty bins, moldy produce, disheveled displays, unsanitary conditions in the deli, and no carts in the lobby.

In a December 2018 email to management, Lopez disclosed his depression, requested a lateral transfer to be closer to family, and requested occasional time off for counseling sessions. WinCo's human resources director assisted Lopez with his workers' compensation claim, and WinCo offered Lopez the first available transfer that came open, to Vacaville, California.

Three inspections at Lopez's new Vacaville store in March and April of 2019 revealed continuing problems, including empty shelves, rotting fruit, and dirty conditions. Despite warnings, Lopez's poor performance continued. In short, "[t]he store [was] not being run properly." Lopez was suspended for one week in early April 2019, and an inspection three days after he returned from the suspension continued to find "unacceptable conditions." Ultimately, WinCo terminated Lopez

based on his history of "performance concerns" from January 2018 to May 2019. Lopez sued WinCo, alleging violations of California's Fair Employment and Housing Act (FEHA) and the Federal Family Medical Leave Act, including disability discrimination, failure to accommodate, and retaliation. The district court granted summary judgment in favor of WinCo on all claims.

We review de novo. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017). Summary judgment is appropriate if there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56. When determining whether a genuine dispute exists, the court views the facts in the light most favorable to the non-moving party. *Santillan v. USA Waste of Cal., Inc.*, 853 F.3d 1035, 1042 (9th Cir. 2017).[1]

Lopez argues he experienced disability discrimination under FEHA. To establish a prima facie case of disability discrimination, a plaintiff must show (1) he suffers from a disability, (2) he is otherwise qualified for his job, (3) he experienced an adverse employment action, and (4) there is indicia of a discriminatory motive. *See Faust v. Cal. Portland Cement Co.*, 58 Cal. Rptr. 3d 729, 745 (Cal. Ct. App. 2007).

It is undisputed Lopez suffered from a disability and was otherwise qualified

[1] We need not decide whether the district court erred in considering the declaration of a former Vacaville store manager, as WinCo contends. We agree with the district court that this declaration does not change the outcome because the other manager was not similarly situated to Lopez.

for his job. Lopez argues he experienced adverse employment actions when he was transferred, suspended, and terminated. He cannot, however, establish a prima facie case of discrimination based on a transfer he himself requested. Lopez attempts to causally link the transfer to a discriminatory motive based on temporal proximity to his disclosure of his depression, but since (1) Lopez disclosed his disability in the same letter requesting transfer out of Pittsburg, (2) WinCo accommodated his request for transfer with the earliest available opening, and (3) the Vacaville position was not materially worse than the Pittsburg position, this argument, as the district court concluded, simply "does not hold water." Regardless, Lopez has not demonstrated a discriminatory motive in connection with the transfer.

The parties agree that suspension and termination are adverse employment actions. The question, then, is whether Lopez provided evidence linking the suspension and termination to discriminatory animus. The district court accepted Lopez's argument temporally linking WinCo's actions to Lopez's disclosure and requests for accommodations (including workers' compensation and counseling sessions).

But even assuming Lopez presented a prima facie case based on temporal proximity alone, Lopez cannot show that WinCo's justifications for his suspension and termination were pretextual. WinCo presents ample evidence of Lopez's performance issues at work, well before and after he disclosed his disability and

sought treatment. As early as January 2018, he received a write-up for "unacceptable and intolerable store conditions," and despite multiple opportunities to fix issues in his store, Lopez continued to ignore WinCo's warnings. With each repeat inspection, WinCo leadership continued to find Lopez's work "substandard." These were legitimate, non-discriminatory reasons for suspending Lopez and later terminating him. Without evidence of discriminatory motive, the district court didn't err in granting summary judgment in favor of WinCo on this claim. For the same reasons, Lopez's retaliation claims also fail.[2]

Finally, we need not consider Lopez's mixed-motive argument, because Lopez waived it by raising it for the first time on appeal. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). Regardless, the argument does not provide a basis for reversal.

AFFIRMED.

[2] Like the prima facie elements for disability discrimination, retaliation requires a causal connection between protected activity and an adverse employment action. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1034–35 (9th Cir. 2006).