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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHAEL ADRID, Plaintiff and Appellant, v. LONG BEACH MEMORIAL MEDICAL CENTER, Defendant and Respondent.	B261666 (Los Angeles County Super. Ct. No. BC511002)

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

Peter Law Group, Arnold P. Peter and Marcus J. Lee for Plaintiff and Appellant.

Payne & Fears, Daniel F. Fears and Amy R. Patton for Defendant and Respondent.

INTRODUCTION

Plaintiff Michael Adrid appeals from a summary judgment in favor of his former employer, Long Beach Memorial Medical Center (hospital), on his claims of wrongful termination in violation of Labor Code section 6310 and in violation of public policy. Adrid, a retired lieutenant with the Los Angeles Sheriff's Department, worked for the hospital from 2005 to 2013 on a part-time basis in the hospital's security department. Adrid alleges he made repeated complaints about workplace safety issues and that the hospital retaliated against him by reducing his hours and ultimately terminating his employment. Assuming there are triable issues as to whether Adrid engaged in protected activity and whether there is a causal link between the activity and his termination, summary judgment was properly granted because the hospital presented substantial evidence of a legitimate, nonretaliatory basis for Adrid's termination and Adrid failed to introduce any evidence that the hospital's stated rationale was pretextual. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Adrid worked for the Los Angeles County Sheriff's Department from 1992 until he retired in 2002. In 2005, the hospital hired Adrid as an instructor in the public safety department. Although Elphrain Cruz, the director of public safety at the hospital, offered Adrid a position as a full-time instructor, Adrid chose to work on a part-time, as-needed basis instead.[1] Cruz subsequently hired Robert Scott to fill the full-time instructor position.

The hospital classified Adrid as a resource (or per diem) employee. As such, Adrid had no set work schedule and the hospital did not guarantee him any minimum number of hours or provide him with any employment benefits, such as paid time off or medical insurance. Adrid's written employment agreement stated that if he did not

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[1] While Adrid worked for the hospital, he also provided training at a local police academy and a local university. He declined the full-time position offered by Cruz so that he could continue working at those, and other, facilities.

work for six consecutive months, his employment with the hospital would be automatically terminated.

Between 2005 and 2010, Cruz asked Adrid to provide training to the hospital's security guards from time to time, and Adrid's hours varied significantly during that time period. The hospital used Adrid's services most heavily in 2005 after he was hired, and then again in 2009, after a shooting incident at the hospital. In 2010, the hospital had little need for Adrid's services because the hospital did not experience any emergency situations, as it had in 2009. Due to budgetary constraints, the hospital did not use Adrid's services at all in 2011 or 2012. Instead, Cruz relied upon Scott, the department's full-time instructor, to conduct all of the department's in-house training during those years.

In January 2013, the hospital notified Adrid in writing that it would be taking him off its payroll because he had not been actively employed there for more than six months. The termination was a routine administrative process, consistent with the hospital's stated policy that per diem employees are removed from the hospital's payroll if they do not work for the hospital for six consecutive months. Cruz did not replace Adrid and did not use any contractor or other per diem employee to provide security guard training after Adrid's termination.

Adrid filed a complaint against the hospital alleging that the hospital terminated his employment in retaliation for complaints he made about workplace safety between 2008 and 2010. Specifically, Adrid asserted two claims of wrongful termination, the first citing Labor Code section 6310 (a Cal-OSHA whistleblower provision) and the second citing general public policy. As discussed *post*, Adrid complained about a range of matters including the hospital's use of force policy, incorrect wording on the hospital's security guard uniform shoulder patch and the hospital's allegedly improper certification of its guards' annual training requirements.

The hospital filed a motion for summary judgment and/or summary adjudication. The hospital argued Adrid failed to make bona fide complaints to the hospital about several of his cited workplace safety issues and, in addition, most of the issues Adrid

identified in his complaint did not implicate workplace safety. Moreover, the hospital asserted it reduced Adrid's hours and ultimately terminated his employment due to budgetary concerns, not in retaliation for any complaints he may have made. The court agreed with the hospital and granted the motion for summary judgment, finding that Adrid failed to complain about some of the issues he identified in his complaint, and that in any event the issues he identified did not implicate workplace safety. The court also found, in the alternative, that even if Adrid made a bona fide complaint about a workplace safety issue, the hospital established it terminated Adrid for a legitimate, nonretaliatory purpose and Adrid failed to establish a triable issue of fact on that issue. The court entered judgment in favor of the hospital. Adrid timely appeals.

CONTENTIONS

Adrid contends the trial court erred by granting summary judgment in favor of the hospital because triable issues of fact exist regarding the nature of his complaints to the hospital and regarding the hospital's stated nonretaliatory basis for his employment termination.

DISCUSSION

A. Standard of Review

Summary judgment is properly granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment bears the initial burden of proving the plaintiff's cause of action has no merit by showing one or more elements of the cause of action cannot be established or there is a complete defense. (Code Civ. Proc., § 437c, subds. (a), (o); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67 (*Morgan*).) Once the defendant meets the initial burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (*Ibid.*)

The applicable standard of review is well established. "Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.]

'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)[2]

B. The court properly granted summary judgment in favor of the hospital.

1. Elements of a Retaliation Claim

Adrid's complaint contains two causes of action, both claiming the hospital terminated his employment in retaliation for complaints he made relating to workplace safety. Adrid's first cause of action alleges the hospital violated Labor Code section 6310, which prohibits an employer from discriminating against an employee who has made "a bona fide oral or written complaint" regarding "unsafe working conditions, or work practices, in his or her employment or place of employment."[3]

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[2] In his reply brief, Adrid argues the trial court erred by sustaining the hospital's objections to his declaration and the declaration of his law enforcement expert, Raymond Foster, submitted in support of Adrid's opposition to the hospital's motion for summary judgment. Because Adrid did not raise this argument in his opening brief, we do not consider it. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Accordingly, we also reject Adrid's arguments to the extent they are supported solely by the portions of the declarations excluded by the trial court.

[3] Section 6310 reads, in pertinent part: (a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative. [¶] . . . [¶] (b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative, of unsafe working conditions, or work practices,

(Labor Code, § 6310, subd. (b); see also Labor Code, § 6310, subd. (a).) "Section 6310, independently and together with other provisions of Cal-OSHA, reflects a significant public policy interest in encouraging employees to report health and safety hazards existing in the workplace without fear of discrimination or reprisal. [Citations.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350, citing *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 299-300.) Adrid's second cause of action is similar, but is based on common law principles.[4] (See, e.g., *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 ["[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions."].)

Because employees rarely have direct evidence of an employer's improper intent, California courts have adopted a three part burden-shifting analysis in wrongful employment termination cases. (*Yanowitz, supra*, 36 Cal.4th at p. 1042; *Morgan, supra*, 88 Cal.App.4th at p. 68 [citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792].) First, to establish a prima facie case of retaliation in violation of public policy, or in violation of Labor Code section 6310, a plaintiff must show (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the employer's action. (See, e.g., *Yanowitz, supra*, 36 Cal.4th at p. 1037 [FEHA]; *Loggins v. Kaiser Permanente Intern.* (2007) 151 Cal.App.4th 1102, 1108-1109 [FEHA, public policy] (*Loggins*); *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 451, overruled on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003)

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in his or her employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. . . .

[4] Because our analysis of Adrid's claims is identical in all material respects, we discuss them together throughout our decision.

29 Cal.4th 1019 [Labor Code, § 6310, public policy].) Once the plaintiff establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Ibid*.) If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation. (*Ibid*.)

In the context of a summary judgment motion, however, the burden-shifting analysis is modified; the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of a plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors. (See *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523.) Where an employer offers undisputed evidence of a proper motive for the employee's termination, the employee "must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual" in order to avoid summary judgment. (*Loggins, supra*, 151 Cal.App.4th at pp. 1112-1113.)

2. Adrid's Prima Facie Case of Retaliation

Both the trial court and the parties focused primarily upon the first prong of the analysis, namely whether Adrid made any bona fide complaints about workplace safety prior to his termination. We need not resolve that issue, however. For the reasons stated *post*, we affirm the judgment because, even assuming Adrid could establish a prima facie case of retaliation, the hospital established a legitimate, nonretaliatory basis for Adrid's termination. Adrid failed to raise a triable issue of fact on that issue, which is fatal to his retaliation claims. In order to provide some context for our decision, we discuss the basis of Adrid's alleged complaints very briefly here.

Adrid claims he complained to his supervisor about a range of issues prior to the reduction in his hours and eventual termination. First, Adrid met with an attorney for the hospital in connection with some ongoing litigation against the hospital. During that conversation, Adrid told the hospital's attorney that the hospital did not have

a use-of-force policy. The attorney apparently relayed Adrid's statement to Cruz, Adrid's supervisor. Second, Adrid discovered copies of a written examination related to a training course required for peace officers under Penal Code section 832 in a security department office. Adrid contends it was unlawful for the hospital to possess copies of the examination. Third, Adrid asserts the hospital failed to ensure its security guards completed their required annual training and that he complained to Cruz about it. Specifically, Adrid claims the hospital issued training completion certificates which falsely represented that the hospital's guards had completed mandatory continuing education courses. Finally, Adrid advised Cruz that the hospital's guard uniforms did not comply with applicable laws and regulations because the shoulder patches on the uniform stated "public safety" rather than "private security." Adrid made these complaints between 2008 and 2011 and it is undisputed Adrid performed no work for the hospital after late-2010.

We assume without deciding, for purposes of brevity, that Adrid established triable issues of fact relating to his prima facie case of retaliation, thus shifting the burden to the hospital to offer a legitimate, nonretaliatory justification for its decision to reduce Adrid's hours and ultimately terminate his employment.

3. The Hospital's Justification for Adrid's Termination

The hospital explained that it reduced Adrid's hours and then terminated his employment for purely financial reasons. With regard to the reduction in Adrid's hours after 2010, Cruz stated he did not utilize Adrid's services in 2011 or 2012 because he was operating under budget constraints in those years. Cruz opted to use his existing resources by having Robert Scott, a full-time employee, conduct all in-house security training, rather than hiring Adrid to provide those same services at an additional cost to the hospital. The hospital's position is buttressed by the fact that Cruz did not replace Adrid and has not used any contractor or as-needed employee to provide in-house training since late 2010.

With respect to Adrid's subsequent employment termination, the hospital's termination letter said Adrid would be taken off the hospital's payroll because he had

not worked actively for the security department since the middle of 2011. The hospital's vice president of human resources confirmed Adrid's termination was a routine administrative process. The hospital's position is consistent with Adrid's per diem agreement, which states: "I understand if I do not work for six (6) consecutive months my per diem status with [the hospital] will be terminated."

We conclude the hospital offered substantial evidence of a legitimate, nonretaliatory basis for its decision to reduce Adrid's hours and then terminate his employment.

4. Adrid's Showing of Pretext

To avoid summary judgment, Adrid must offer substantial evidence that the hospital's stated rationale for his termination is untrue or pretextual. "The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot ' "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' " ' " ' " (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388-389, citations omitted.) Adrid fails to create a triable issue of fact on this issue.

As evidence of pretext, Adrid notes that the hospital did not advise him, prior to his termination, that the security department was operating under budgetary constraints or that another employee at the hospital could take on the duties Adrid formerly performed. Adrid contends the hospital's failure to disclose its reasoning *prior* to terminating his employment raises an inference that its proffered rationale is "merely a subterfuge to hide [Cruz's] retaliatory acts." We disagree. Although the standard of review requires us to construe the evidence and draw all reasonable inferences from it in

Adrid's favor, we find Adrid's proffered inference to be unreasonable. The hospital's explanation for its decision is not facially implausible and its failure to discuss the reasons for its decision with Adrid prior to taking him off its payroll does not undermine its explanation.

On a related point, Adrid asserts the hospital offered conflicting reasons for his termination before taking the position that budgetary concerns required his termination. However, we see no evidence in the record before us that the hospital offered multiple, conflicting reasons for Adrid's termination. As noted *ante*, the hospital's 2013 termination letter stated Adrid's employment would be terminated because he had not actively worked for the hospital in some time. The hospital maintains that position on appeal. Adrid claims he was also told by Cruz that the hospital terminated his employment because Cruz failed to provide a performance review for Adrid in 2011 and seems to suggest this explanation is inconsistent with—and therefore undermines the credibility of—the hospital's stated basis for his termination.[5] We see no inconsistency in these explanations. Adrid concedes he did not work for the hospital in 2011 and, further, that Cruz had no basis on which to render a performance evaluation for that year. In our view, the absence of an evaluation is entirely consistent with the hospital's position that it terminated Adrid's employment because he had not worked for the hospital for more than 18 months. As for the reduction in Adrid's hours, Cruz told Adrid that he did not have a budget for Adrid's services during 2011 and 2012. The hospital's position on that issue has also remained consistent.

Finally, Adrid asserts his salary was not part of Cruz's budget for the security department. In making this point, Adrid relies on testimony from Cruz stating Adrid's salary was not a standard budget item, and he obtained funds to pay for Adrid's services through a variance or an overage. Adrid misses the forest for the trees. Regardless whether the funds came from the approved security department budget or from some other budgetary source within the hospital, the hospital paid Adrid by the hour for

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[5] As discussed *ante*, Adrid admits he has no factual basis to believe his services were not used by the hospital for any reason other than budget limitations.

services it eventually determined could be performed by an existing, full-time employee. In an effort to control costs, the hospital elected to stop using Adrid's services. Nonetheless, in an attempt to show that the hospital's stated cost concerns were pretextual, Adrid notes that following his termination, Cruz contacted a member of the Long Beach Police Department to see whether he or someone else at the department might be able to provide some in-house training for the hospital's security guards. Adrid's argument might have some merit if he could establish the hospital paid an outside contractor to conduct training sessions that he taught at the hospital prior to his termination. However, at oral argument, Adrid's counsel conceded there is no evidence Cruz ever paid, or even retained on a voluntary basis, anyone from the Long Beach Police Department. Indeed, the undisputed evidence before us establishes Cruz did not replace Adrid and did not use any contractor or other per diem employee to provide security guard training after Adrid's termination. In short, Adrid's claim that the hospital's stated budgetary concern was pretextual is unsubstantiated.

Accordingly, because the hospital established a nonretaliatory basis for Adrid's termination and Adrid failed to introduce sufficient evidence to establish a triable issue of fact concerning the hospital's motivation for his termination, the trial court properly granted the hospital's motion for summary judgment.

DISPOSITION

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

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JONES, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.