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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LORIE BOCK,

Plaintiff and Appellant,

v.

CITY OF HEALDSBURG,

Defendant and Respondent.

A132200

(Sonoma County
Super. Ct. No. SCV244425)

Appellant Lorie Bock sued her former employer, respondent City of Healdsburg (Healdsburg or City), alleging that she suffered various forms of discrimination while employed as a meter reader. A jury found in favor of respondent on all causes of action. Appellant argues that the trial court erroneously instructed the jury regarding who was required to have knowledge of her physical disability in order to establish liability on two of her causes of action. We affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In April 1999, appellant started working for respondent as a meter reader, responsible for reading water and electric meters in Healdsburg, a job that involved walking. Roger Cathey was appellant's supervisor. Cathey's supervisor was Kathleen Bradbury, the City's accounting and information systems manager. Bradbury, in turn, reported to City finance director Tamera Haas, who herself reported to City manager Chester Wystepek.

In February 2007, Marjorie Pettus became Healdsburg's assistant city manager. When she first started working for the City, Pettus's primary duty was to focus on personnel practices and policies. As part of that process, she reviewed the most recent contract between Healdsburg and appellant, which had expired in January 2004. Pettus concluded that the contract did not reflect solid business or personnel practices, because it was inconsistent with the then-current pay scale, it included elements of both an employer-employee arrangement as well as an independent contractor arrangement, and it included scheduling flexibility that likewise was inconsistent with what Healdsburg generally offered. Pettus noted that City employees referred to appellant as an independent contractor, whereas her contract referred to her as an employee. After consulting with supervisor Cathey, the city attorney, and finance director Haas, Pettus began drafting a proposal to have appellant become either an independent contractor or a City employee under different terms.

Witnesses gave conflicting accounts at trial regarding the extent to which appellant complained in 2007 regarding pain in her feet. Appellant testified that, beginning in early 2007, she complained to Cathey on a weekly basis that her feet bothered her because of the prolonged walking she did at her job, and because she was on her feet for up to eight hours each day. Appellant told Cathey that there was "burning" in her feet, that it was taking longer to finish her routes, and that she wished she had a scooter or roller blades to her make her job easier, but that Cathey did not take her concerns seriously. Appellant testified that at some point, she went so far as to take off her shoes and socks in order to show her bare feet to Cathey; however, Cathey testified that this never happened. Cathey also denied that appellant ever told him that her feet hurt or that it was taking longer to finish her routes. He testified that appellant once said it would be "fun" to use a Segway to complete her route, but that this comment was taken "in jest," and was not brought up as a suggested "requirement."

Appellant testified that she also spoke about the pain in her feet with manager Bradbury. Bradbury, in turn, testified that around the summer of 2007, appellant would share during casual "chitchat" at the end of the day that her feet hurt. Bradbury later

discussed with Cathey and Haas that she felt someone should be trained to do appellant's job, in case appellant was ever out sick, or for any other reason. However, Bradbury also testified that she did not think that appellant's various comments amounted to a complaint that she was having " 'problems' " with her feet, and appellant never asked Bradbury for an accommodation or any time off from work.

Pettus testified that she did not perceive appellant to be disabled, she was not aware that appellant had any limitation on the ability to do her job, and she was not aware that appellant ever claimed she needed an accommodation to do her job. City manager Wystepek likewise testified that he was not aware of any problems that appellant had with her feet. Finance director Haas also testified that Cathey never told her that appellant was experiencing pain in her feet.

In September 2007, Pettus, Cathey, and Haas met with appellant, and presented her with various options for continuing to work as a meter reader with a change in job status, including becoming an independent contractor, or working as an employee for a different number of hours per month than she previously had been working (at a reduction in pay of more than a half). Appellant would not agree to become an independent contractor, which would have involved losing her retirement benefits. Appellant was told that she had to provide notice by December 1, 2007, as to what she decided. Instead, appellant left her keys on Cathey's desk after she read meters on December 16, because, in her words, she was "forced to leave" due to the unacceptable options with which she was presented. City manager Wystepek wrote to appellant on January 7, 2008, informing her that her employment was terminated because she had vacated her job by not returning.

After appellant left her job as a meter reader, an orthopedic surgeon diagnosed appellant with osteoarthritis in her feet. Appellant underwent surgery for her condition.

Appellant filed a complaint on January 29, 2009. A second amended complaint filed in August 2010 alleged five causes of action under the California Fair Employment

and Housing Act (FEHA) (Gov. Code, § 12900 et seq.),¹ for gender, age, and disability discrimination, as well as for failure to provide a reasonable accommodation of a physical disability and for failure to engage in the interactive process for a physical disability. The complaint also alleged a cause of action for a violation of Labor Code section 1102.5. A jury found in favor of respondent on all causes of action, and this timely appeal followed.

II. DISCUSSION

Appellant argues that the trial court committed reversible error by giving incorrect jury instructions as to two of her FEHA causes of action: failure to provide a reasonable accommodation for a physical disability (§ 12940, subd. (m)), and failure to engage in the interactive process to determine a reasonable accommodation for her disability (§ 12940, subd. (n)). Specifically, appellant contends that the instructions misled the jury regarding who was required to have knowledge of her physical disability in order to find liability.

A. Applicable Legal Principles.

“In addition to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer’s failure to provide a reasonable accommodation for an applicant’s or employee’s known disability. (§ 12940, subds. (a), (m).) ‘Under the express provisions of the FEHA, the employer’s failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself.’ [Citations.] Similar reasoning applies to violations of Government Code section 12940, subdivision (n), for an employer’s failure to engage in a good faith interactive process to determine an effective accommodation, once one is requested. (§ 12940, subd. (n); [citations].)” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 (*Gelfo*).

“The elements of a failure to accommodate claim [§ 12940, subd. (m)] are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably

¹ All statutory references are to the Government Code unless otherwise indicated.

accommodate the plaintiff's disability.” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010.) “Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.] While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue [§ 12940, subd. (n)], each necessarily implicates the other.” (*Gelfo, supra*, 140 Cal.App.4th at p. 54.)

An employer is required to provide a reasonable accommodation for, and engage in the interactive process regarding, disabilities that are “known” to the employer. (§ 12940, subs. (m)-(n).) “[A] ‘known’ disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer’s attention, it is based on the employer’s own perception—mistaken or not—of the existence of a disabling condition, or . . . the employer has come upon information indicating the presence of a disability.” (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21.) “The employee bears the burden of giving the employer notice of his or her disability. [Citation.] Although no particular form of request is required [citation], ‘[t]he duty of an employer reasonably to accommodate an employee’s handicap does not arise until the employer is ‘aware of [the employee’s] disability and physical limitations.’ [Citations.]’ [Citation.]” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 (*Avila*).) “A supervisor is the employer’s agent for purposes of vicarious liability for unlawful discrimination.” (*California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1015 (*Gemini*).)

B. Instructions Given to Jury.

Consistent with the foregoing legal principles, the jury was instructed, pursuant to Judicial Council of California Civil Jury Instructions, CACI No. 2541, that in order to establish a claim for failing to reasonably accommodate her physical disability (§ 12940, subd. (m)), appellant was required to prove, among other things, that “the City of

Healdsburg thought that Lorie Bock had a physical condition that limited her ability to walk and/or her ability to work,” or that “the City of Healdsburg knew that Lorie Bock had a physical condition that limited her ability to walk and/or her ability to work.”² The jury also was instructed, pursuant to CACI No. 2546, that in order to establish a claim for failure to engage in the interactive process (§ 12940, subd. (n)), appellant was required to prove, among other things, that appellant had a physical condition “that was known to the City of Healdsburg.”³

Appellant contends that the trial court erred when it gave two additional instructions, which the parties’ attorneys discussed with the trial court after the close of evidence, and which are discussed separately below.

1. Special instruction No. 10

The parties’ written proposed instructions are not included in the record on appeal; however, it is clear that appellant submitted a proposed special instruction (No. 10) regarding the imputation of a supervisor’s knowledge to his or her employer.

² The jury also was instructed that, in order to prevail on this cause of action, appellant was required to prove that Healdsburg was an employer, that appellant was an employee of Healdsburg, that appellant was able to perform the essential job duties with or without reasonable accommodation for her physical condition until the day she was constructively discharged and/or her employment was terminated, that Healdsburg failed to provide reasonable accommodation for appellant’s physical condition, that appellant was harmed, and that Healdsburg’s failure to provide reasonable accommodation was a substantial factor in causing appellant’s harm.

³ The jury also was instructed that, in order to prevail on this cause of action, appellant was required to prove that Healdsburg was an employer, that appellant was an employee of Healdsburg, that appellant requested that Healdsburg make reasonable accommodations for her physical condition so that she would be able to perform the essential job requirements, or that once Healdsburg knew that appellant had a disability that affected her ability to perform essential job functions, Healdsburg was obligated to engage in a good faith interactive process to determine whether reasonable accommodation could be made, that appellant was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that she would be able to perform essential job requirements, that Healdsburg failed to participate in a timely good-faith interactive process with appellant, that appellant was harmed, and that Healdsburg’s failure to engage in an interactive process was a substantial factor in causing appellant’s harm. (CACI No. 2546.)

Respondent's counsel argued that the instruction should be modified so that it specifically addressed the knowledge of a supervisor who participates in the decision-making process. Appellant's counsel objected that, as to appellant's causes of action for failure to provide a reasonable accommodation and failure to engage in the interactive process (§ 12940, subds. (m)-(n)), appellant was not required to prove that a "decision maker" was involved in the prohibited activity. The trial court nonetheless accepted respondent's proposed modification.

The trial court thereafter gave the following jury instruction, as modified: "When an employee's supervisor *who participates in the decision making process* acquires knowledge that an employee has a disability and/or the employer has a duty to provide a reasonable accommodation, a conclusive presumption arises that the supervisor communicated that information to the employer." (Italics added.) On appeal, appellant renews her argument that the italicized portion of the instruction should have been omitted, and that the instruction should have simply referred to " 'a manager' " who acquires knowledge of a disability, without specific reference to a decision maker.

Preliminarily, we reject respondent's contention that this issue was waived because the appellate record does not contain the form of the original proposed jury instruction. It may be true that it is unclear whether appellant originally proposed that the instruction include the word "manager," as opposed to the similar word ("supervisor") that was ultimately included in the instruction. However, it is abundantly clear from a review of the reporter's transcript that appellant's counsel objected to language regarding whether the supervisor be a decision maker, which is the gravamen of her argument on appeal. By objecting to the phrase that appellant complains about on appeal, appellant certainly did not "invite" any error, as respondent suggests. In any event, no objection is necessary to preserve a challenge that a jury instruction misstates the law in any event. (Code Civ. Proc., § 647; *Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7.)

As for the merits of appellant's argument, special jury instruction No. 10 apparently was based on *Gemini, supra*, 122 Cal.App.4th 1004, where an employee sued his employer for failure to accommodate his religious beliefs by denying his request to

attend a Jehovah's Witness convention, and then firing him after he attended the convention. (*Id.* at pp. 1009-1010.) In upholding a finding by the California Fair Employment and Housing Commission that the employer had discriminated against the employee by failing to accommodate his religious beliefs, the court rejected the employer's argument that its "decision makers" did not know that the employee's request for time off was for religious reasons. (*Id.* at pp. 1008-1009, 1015.) The court noted that members of the employer's management committee were the decision makers, and that one committee member knew that the employee's request was for religious reasons. (*Id.* at p. 1015.) Although the record was silent on why that member did not share his knowledge with others, the court stated that "in general, when an agent has acquired knowledge which he or she has a duty to communicate to his or her principal, a conclusive presumption arises that the agent has performed that duty." (*Ibid.*) It was thus not necessary that all "decisions makers" be informed of the employee's religious needs before the employer had an obligation to attempt to provide an accommodation. (*Ibid.*)

We conclude that the jury instruction regarding the presumption that a supervisor who participates in the decision-making process, and who acquires knowledge of a disability, communicated that information to the employer was consistent with *Gemini*. Appellant claims that, because the instruction focused only on supervisors who participated in the decision making process, it "limited the City's agents for purposes of failure to engage in the interactive process, as well as failure to provide a reasonable accommodation and disability discrimination, to participants in the decision making process." (Italics omitted.) She apparently contends that, even though she told "numerous managers" about her disability, special instruction No. 10 precluded a finding of liability if none of those managers played a role in the decision-making process

regarding the actions which led to her constructive discharge,⁴ as opposed to the decision whether to provide a reasonable accommodation.

We acknowledge that the jury instruction is not a model of clarity, because it does not specify whether it concerns the decision-making process regarding appellant's terms of employment, or the duty to accommodate a disability. However, we may fairly read *Gemini* as requiring that a supervisor who plays a role in the decision whether to provide a reasonable accommodation (in that case, whether to provide time off to accommodate religious beliefs) had been informed of the need to provide an accommodation. (*Gemini, supra*, 122 Cal.App.4th at p. 1015.) Contrary to appellant's suggestion, the instruction in this case did not necessarily specify which individuals could be considered "decision makers" for this purpose. Appellant's counsel was free to argue, and in fact did argue, that when appellant complained about her feet to her direct supervisor (Cathey), Healdsburg then had a duty to work with appellant to provide a reasonable accommodation.

We also stress that special instruction No. 10 focused on the narrow issue of when a presumption arises that a supervisor has communicated information to the employer, and did not preclude a finding that the employer knew of appellant's disability from other sources. Under the particular facts and circumstances of this case, we conclude that the trial court did not err in giving the challenged jury instruction.

2. Decision maker's awareness of physical disability

Respondent's counsel proposed an additional jury instruction regarding an employer's knowledge of an employee's disability, which the trial court read to the jury as follows: "While knowledge of a disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. *The decision maker must be the one aware*

⁴ Appellant does not dispute that the people involved in the decision-making process regarding her terms of employment had to know about her disability in order for respondent to be liable for disability discrimination (§ 12940, subd. (a)), as opposed to failure to accommodate (§ 12940, subd. (m)).

of the physical disability when the adverse employment decision is made. Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of an obligation under California’s Fair Employment and Housing Act. [¶] The duty of an employer reasonably to accommodate an employee’s disability does not arise until the employer is aware of the employee’s disability and physical limitations.” (Italics added.) Appellant argues that the italicized portion of the instruction, regarding the necessity that a decision maker be aware of a physical disability when an adverse employment decision is made, should have been omitted.⁵

With the exception of the italicized portion quoted above, the contested jury instruction is taken almost verbatim from various portions of *Avila, supra*, 165 Cal.App.4th at pages 1248 and 1252. Plaintiff in *Avila* was fired from his job at an airline’s food services division because of excessive absences due to his hospitalization for acute pancreatitis. (*Id.* at pp. 1243-1245.) Plaintiff alleged, among other things, that his employer discriminated against him on the basis of a disability (§ 12940, subd. (a)), and also failed to reasonably accommodate his disability (§ 12940, subd. (m)). (*Avila* at pp. 1245-1246, 1252.) The *Avila* court affirmed summary judgment in favor of defendant employer as to both causes of action. (*Id.* at p. 1243.)

As for plaintiff’s disability discrimination cause of action, the *Avila* court rejected plaintiff’s argument that the fact he told about 50 coworkers of his medical condition raised a triable issue that his employer knew of his alleged disability, because there was no evidence that any of those coworkers had a duty to relay the information to anyone involved with the decision to fire plaintiff. (*Avila, supra*, 165 Cal.App.4th at p. 1250.) The court likewise concluded that evidence that plaintiff told a decision maker *after* he was terminated that he had been hospitalized for pancreatitis did not create a triable issue of fact, because a “decision maker must be aware of [a plaintiff’s] disability ‘when the

⁵ Although appellant did not object to the instruction below, no such objection was necessary in order to preserve for appellate review the issue of whether the instruction contained an incorrect statement of law. (Code Civ. Proc., § 647; *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 705-706.)

adverse employment decision was made.’ ” (*Id.* at p. 1251.) The foregoing quote appears to be the basis for the instruction to the jury in this case that “[t]he decision maker must be the one aware of the physical disability when the adverse employment decision is made,” and we conclude that this statement of law was consistent with *Avila*.

Appellant’s main objection to the instruction appears to be that it was based on the portion of *Avila* that addressed the plaintiff’s disability discrimination cause of action (§ 12940, subd. (a), *Avila, supra*, 165 Cal.App.4th at pp. 1246, 1251-1252), whereas here the instruction clearly related to appellant’s cause of action for failure to provide a reasonable accommodation. To the contrary, the challenged language appears in a paragraph of the instruction that addresses no specific cause of action, but instead refers to knowledge of a disability generally. Of course, appellant here sued for disability discrimination (§ 12940, subd. (a)), so it was appropriate to instruct the jury on the legal principles applicable to that cause of action. Because the instruction refers to “the adverse employment decision,” it is clear that it was directed at appellant’s constructive discharge, as opposed to any decision regarding whether to accommodate her disability.

We acknowledge that the challenged instruction also specifically referred (in a separate paragraph) to the “duty of an employer reasonably to accommodate an employee’s disability” only when “the employer is aware of the employee’s disability and physical limitations.” Again, however, this portion of the jury instruction was taken almost verbatim from *Avila*, in a section that addressed the plaintiff’s cause of action for failure to accommodate his disability (*Avila, supra*, 165 Cal.App.4th at p. 1252), and was therefore a correct statement of law regarding the employer’s (as opposed to any particular decision maker’s) duty to accommodate appellant. To the extent that the instruction led the jury to believe that a decision maker had to be aware of appellant’s disability before offering a reasonable accommodation, as set forth above, this was consistent with *Gemini, supra*, 122 Cal.App.4th at page 1015. (*Ante*, § II.B.1.)

3. No prejudicial error

Even assuming *arguendo* that the challenged jury instructions somehow amounted to error, we stress that “[w]hen deciding whether an instructional error was prejudicial,

‘we must examine the evidence, the arguments, and other factors to determine whether it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury.’ [Citation.] A ‘reasonable probability’ in this context ‘does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.’ [Citation.]” (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682, original italics.) The assessment of prejudice “requires evaluation of several factors, including the evidence, counsel’s arguments, the effect of other instructions, and any indication by the jury itself that it was misled.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

Appellant claims that the trial court’s instructions effectively foreclosed the jury from finding that appellant’s complaints to Cathey, as well as to Bradbury and Haas, were sufficient to establish liability on her causes of action for failure to accommodate and failure to engage in the interactive process, because although those people were supervisors, they were not “decision makers.” This argument is apparently based on appellant’s claim that Cathey attempted to “disavow any decision-making role” regarding appellant’s employment, such as when he testified that he was “kind of a bystander [or] facilitator if questions came up,” but that he “wasn’t an integral part of the process.” Appellant also claims that Haas “characterized herself as a scrivener” who simply followed Pettus’s instructions. However, the challenged jury instructions did not refer to any particular City employee, and so did not specifically preclude a finding that Cathey, Haas, or anyone else was a “decision maker.” Appellant’s counsel specifically asserted during his closing argument that both Cathey and Haas were part of the decision-making process. He further argued that appellant complained about pain in her feet to Cathey and “seems like everybody else at the City of Healdsburg” as well, which gave rise to respondent’s liability.

Although respondent’s counsel briefly emphasized in her closing argument that a decision maker (Pettus or Wystepek) had to know of appellant’s disability, her main argument was that respondent could have no knowledge of such a disability *because appellant was not limited in her ability to do her job*. Counsel further argued that

although appellant may have complained to Cathey about foot pain, this did not give rise to liability—not because Cathey was not a “decision maker,” but because pain alone is insufficient to establish a disability. (E.g., *Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 334.) Counsel also highlighted Cathey’s testimony that appellant never showed Cathey her swollen feet as she claimed. Again, counsel did not focus on the issue of whether or not Cathey played a role in any decision-making process.

Appellant apparently contends that the state of the evidence supports her argument that the alleged instructional error is a ground for reversal, claiming that there was overwhelming evidence that her managers (as opposed to the city manager or assistant city manager) knew of her disability. However, most of her argument is unsupported by citation to the record. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [where no record citations to support argument, issue may be treated as waived].) In light of the testimony of appellant’s direct supervisor (Cathey) that appellant never complained to him of disabling problems with her feet, we do not consider it reasonably probable that a jury instruction including a broader definition of “supervisor” would have led to a different result.

Looking at the effect of other instructions, the jury also was instructed that “[a]n employer is presumed to ‘know’ about an employee’s physical disability if the disability is reasonably obvious. An employer may also ‘know’ about an employee’s physical disability if the employee has *brought it to the employer’s attention* or the employer *has come upon information* indicating the presence of a disability.” (Italics added.) In other words, the jury was instructed that Healdsburg could be presumed to “know” about appellant’s alleged disability by means other than a decision maker communicating it to the employer, such as by observing appellant, by appellant telling her employer, or by the employer learning the information through people other than decision makers.

Finally, we reject appellant’s argument that the verdict forms (which appellant’s counsel prepared) somehow indicate that the jury was actually misled by the allegedly erroneous jury instructions. As for both of appellant’s causes of action, failure to accommodate and failure to engage in the interactive process, the jury found that

appellant had a physical condition that limited walking or working. The jury nonetheless found, with respect to the reasonable accommodation cause of action (§ 12940, subd. (m)), that appellant was not perceived as having such a physical condition, and that Healdsburg did not “know” of appellant’s physical condition. The verdict form for this cause of action made no mention of decision makers, or the specific requirement that a decision maker (as opposed to Healdsburg generally) be aware of appellant’s disability. As for the failure to engage in the interactive process cause of action (§ 12940, subd. (n)), the jury found that appellant had not requested that Healdsburg make a reasonable accommodation—with no mention whatsoever in the verdict form of Healdsburg’s or any decision maker’s knowledge of appellant’s disability.⁶ Under the circumstances, it is not reasonably probable that any alleged instructional error actually misled the jury. (*Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at p. 682.)

⁶ Appellant also claims, without any citation to the appellate record, that an alternate juror’s posttrial assessment of the case somehow supports her arguments. Because the appellate record does not contain any factual support for her allegations, we dismiss her arguments out of hand.

III.
DISPOSITION

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

Sepulveda, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.