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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HESHAM ELSHAZLY, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SOLANO
COUNTY,

Respondent;

MV TRANSPORTATION, INC., et al.,

Real Party in Interest.

A139378

(Solano County
Super. Ct. No. FCS038236)

In this employment action, petitioners Hesham Elshazly and Richard Blackwell challenge respondent superior court's order granting real party in interest MV Transportation, Inc.'s (MV) motion for summary adjudication dismissing causes of action for race and national origin harassment and failure to prevent harassment in violation of the Fair Employment and Housing Act (FEHA) (Govt. Code, § 12940, subs. (j)(1), (k)). We agree with petitioners that their harassment claims should not have been summarily resolved because of the existence of triable issues of material fact. Accordingly, we will issue a peremptory writ directing respondent superior court to vacate so much of its July 9, 2013, order as granted MV's motion for summary adjudication dismissing the causes of action for harassment and failure to prevent harassment and to enter a new and different order denying the motion for summary adjudication as to those causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

MV is a privately-held transportation management company that contracts with public and private agencies throughout the country to provide fixed-route and paratransit passenger transportation services. Elshazly was born in Saudi Arabia and identifies himself as Muslim and Arab, and Blackwell identifies himself as Black/African-American. Both petitioners were employed at MV's Oxnard Division. Elshazly worked as the Safety and Operations Manager from October 26, 2009 to September 2, 2010, when he was terminated because of inadequate job performance. Blackwell began working as a paratransit driver in December 2009. He became disabled and unable to work in April 2011. The parties dispute his current employment status: Blackwell contends he was terminated, while MV contends Blackwell is on indefinite leave. Both petitioners allege they reported to MV's general manager Alfredo Villa and Blackwell was also supervised by MV's maintenance manager John Pellegrin.

In support of their claims of harassment and failure to prevent harassment (fourth and fifth causes of action in their first amended complaint), petitioners alleged they were continually harassed during their employment by management and staff making insulting comments and/or slurs because of petitioners' race and/or national origin. Elshazly alleged that "[t]hroughout his employment" he was harassed by the use of "racially demeaning comments and slurs, such as 'terrorist' and 'nigger,'" Villa made derogatory remarks related to Elshazly's race and national origin including concern that Elshazly was associating with "Osama Bin Laden and terrorists in general from the Middle East," Villa instructed Elshazly not to visit MV's client because Elshazly was perceived as a terrorist based on his race and national origin, and Villa ordered Elshazly to " 'fire that nigger,' " referring to Blackwell, but when Elshazly refused to do so he was verbally harassed by Villa. Elshazly further alleged that Villa conveyed his belief to Elshazly that " 'every nigger should be burned alive.' " Elshazly allegedly reported the harassment to MV's corporate management in or about March 2010, but on information and belief, MV took no steps to address or remedy the harassment. Blackwell alleged that beginning in April 2010, he was subjected to constant harassment, including one

incident when his supervisor Pellegrin physically harassed him by grabbing Blackwell by the back of his shirt collar.

After filing an answer and discovery, MV moved for summary judgment and/or summary adjudication challenging, in relevant part, the causes of action for harassment and failure to prevent harassment, which request was opposed by petitioners. Respondent superior court found petitioners had failed to allege sufficient evidence to raise any triable issue of material fact supporting their causes of action for harassment and failure to prevent harassment. The court found the alleged incidents of racial/national origin harassment during Elshazly's 10-11 month employment included the following comments made by his supervisor Villa: (1) telling Elshazly to " 'fire that nigger,' " referring to Blackwell; (2) calling Elshazly a " 'camel jockey;' " (3) telling Elshazly "that men in Saudi Arabia do not respect women," and (4) asking Elshazly "if he was related to bin Laden." The court found the alleged incidents of racial harassment that Blackwell identified he was aware of during his employment included: (1) an incident during which MV supervisor Pellegrin grabbed Blackwell's collar (which was reported to MV and did not reoccur); (2) during a discussion, Pellegrin told Blackwell that he (Pellegrin) had once served on a jury and convicted a gang-banger; (3) during another discussion, Pellegrin told Blackwell to wash buses if he wanted more hours; and (4) Pellegrin refused to sit at the same break table as Blackwell, or left the table immediately if Blackwell came in and sat down at the table. The court held that the aforementioned incidents, individually or collectively, were not sufficient to create a triable issue of material fact as to petitioners' harassment claims. Because the court found there was no actionable harassment, the related cause of action for failure to prevent harassment was necessarily not actionable.

Petitioners filed this timely petition for writ of mandate challenging that portion of respondent superior court's order as granted summary adjudication dismissing the causes of action for harassment and failure to prevent harassment. We stayed the trial proceedings, requested informal briefing, and gave notice that, if circumstances

warranted, we might issue a peremptory writ in the first instance pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 (*Palma*).

DISCUSSION

I. Appropriateness of Writ Review and the Standard of Review of Summary Adjudication

“An order granting a motion for summary adjudication may be reviewed by way of a petition for a writ of mandate.” (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81.) “[W]e independently examine the record in order to determine whether triable issues of fact exist to reinstate” the causes of action for harassment and failure to prevent harassment. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) “In performing our de novo review, we view the evidence in the light most favorable to [petitioners] as the losing parties,” and “we liberally construe [their] evidentiary submissions and strictly scrutinize [MV’s] own evidence, in order to resolve any evidentiary doubts or ambiguities in [petitioners’] favor.” (*Ibid.*)

II. Triable Issues of Material Fact Preclude Summary Adjudication of Petitioners’ Harassment Cause of Action

FEHA provides, in pertinent part, that “[i]t is an unlawful employment practice [¶] . . . [¶] [f]or an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry . . . to harass an employee” (Gov. Code, § 12940, subd. (j)(1).) FEHA regulations define harassment as including both verbal harassment, “e.g., epithets, derogatory comments or slurs,” and physical harassment, e.g., “assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual” (Cal. Code Regs., tit. 2, § 11019, subd. (b)(1) (A), (B).) “As the regulation implies, harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.” (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63.)

In interpreting FEHA claims based on harassment, California courts consider the federal counterpart of employment discrimination claims under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII). (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [“[v]erbal harassment in the workplace also may constitute employment discrimination under [T]itle VII”]; see *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464 [Title VII cases may be considered in interpreting FEHA] (*Etter*).) As explained by the United States Supreme Court: “When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ [citation], that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ [citation], Title VII is violated.” (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.) “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.” (*Id.* at p. 23.) Consequently, no “mathematically precise test” is applied when reviewing harassment claims. (*Etter, supra*, 67 Cal.App.4th at pp. 463–464.) “[T]here is neither a threshold ‘magic number’ of harassing incidents that gives rise . . . to liability . . . nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.” (*Rodgers v. Western-Southern Life Ins. Co.* (7th Cir. 1993) 12 F.3d 668, 674 (*Rodgers*).) And, as recognized by the court in *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, “ ‘[p]erhaps no single act can more quickly “ ‘alter the conditions of employment and create an abusive working environment’ ” . . . than the use of an [unambiguous] racial epithet . . . by a supervisor in the presence of his subordinates.” (*Id.* at p. 36 [supervisor’s remark to employee of Filipino descent, “ ‘it is your Filipino understanding versus

mine’ ” was “ethnic slur, both abusive and hostile”]), quoting from *Rodgers, supra*, 12 F.3d at p. 675.)

MV argues that “[a]t best,” petitioners’ harassment cause of action is premised on “isolated comments and incidents over a period of many months,” which do not amount to “severe or pervasive” harassment as a matter of law, and that neither petitioner presented evidence that raises a triable issue of fact that any harassment was motivated by racial or national origin animus. We disagree.

In opposing MV’s request for summary relief, both petitioners submitted direct evidence of harassing conduct as alleged in their complaint and as described by respondent superior court in its decision. In analyzing whether a jury might reasonably find such harassment to be “severe or pervasive,” we consider “[t]he whole pattern of conduct,” which “cannot be fully understood by ‘carving it “into a series of discrete incidents.’ ” ” (*Sheriff v. Midwest Health Partners, P.C.* (8th Cir. 2010) 619 F.3d 923, 930.) “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81–82.) Additionally, we must look at the evidence in the light most favorable to petitioners and draw all reasonable inferences from the evidence presented in their favor. In so considering the record, we hold that a triable issue of material fact exists as to whether the harassing conduct as alleged by petitioners was severe or pervasive.

We also conclude that petitioners proffered evidence sufficient to raise a triable issue of material fact that the harassing conduct was motivated by racial and national-origin animus. In addition to petitioners’ own deposition testimony, they submitted sworn declarations from other persons¹ asserting that MV’s managerial staff used racial

¹In the trial court, MV filed extensive evidentiary objections to some of the sworn declarations. MV asked respondent superior court to rule on its evidentiary objections only to the extent it was necessary to resolve its motion. Respondent superior court made no express rulings on MV’s evidentiary objections. Accordingly, we deem the

and national-origin epithets in general and specifically concerning petitioners, albeit not always in petitioners' presence. MV argues petitioners cannot rely on racial or national origin epithets that were not made in their presence to raise a triable issue of fact. We disagree in part. Concededly, the racial and national origin epithets not heard by petitioners cannot be used by them to prove their workplace was "subjectively" hostile as to them. (*Sandoval v. American Bldg. Maintenance Industries, Inc.* (8th Cir. 2009) 578 F.3d 787, 803 (*Sandoval*); see *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 520–521 (*Beyda*)).) However, the proffered evidence is "highly relevant to prove, among other things, the type of workplace environment to which [petitioners] w[ere] subjected," and that MV had constructive notice of the harassment. (*Sandoval, supra*, at p. 803; see also *Beyda, supra*, at p. 521 [evidence of conduct towards other victims "would have been relevant to establish the pervasiveness of sexual harassment in appellant's workplace"]; *Bennett v. Nucor Corp.* (8th Cir. 2011) 656 F.3d 802, 812 [evidence of serious complaints of racial harassment admissible to show company had notice of the allegations but failed to investigate or redress the matter].)

We conclude our discussion by noting that "we are . . . cognizant of the line that divides actionably severe or pervasive harassment in the workplace from isolated offensive acts that, as an irritant of collective life, go without legal redress. The issues raised by these concerns, however, are for the trier of fact's resolution. Here, we conclude only that given the factual record before it on [MV's] motion, [respondent] superior court was presented with a triable issue of material fact that precluded summary

"objections were presumptively overruled" and "preserved for appeal." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) To the extent MV now asks us to consider some of its evidentiary objections, we conclude that the sworn declarations are admissible to the extent the declarants describe their personal observations of events and statements heard by them and explain under what circumstances they observed those incidents or heard the statements.

[adjudication]” of petitioners’ cause of action for harassment. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1008.)²

III. Summary Adjudication of the Cause of Action for Failure to Prevent Harassment Must Be Reversed

Government Code section 12940, subdivision (j)(1) provides, in pertinent part, that “[h]arassment of an employee . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring. . . .” In their fifth cause of action in the first amended complaint, petitioners alleged MV had failed to take reasonable steps to prevent harassment. MV successfully sought summary adjudication dismissing this cause of action on the ground that no claim for the failure to prevent harassment may be pursued in the absence of actionable harassment. In opposing petitioners’ request for writ relief, MV presents no argument challenging the substantive basis for petitioners’ cause of action for failure to prevent harassment. It argues only that such a cause of action cannot survive without actionable harassment. Therefore, in light of our decision reinstating petitioners’ harassment cause of action, we will also direct respondent superior court to reinstate petitioners’ cause of action for failure to prevent harassment. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 288.)

DISPOSITION

We conclude that the accelerated *Palma* procedure is appropriate in this case because “[n]o purpose could reasonably be served by plenary consideration of the issue[s]” raised in this writ petition. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

²We see nothing in the cases cited by MV that supports a different result in this matter.

Let a peremptory writ of mandate issue directing respondent Superior Court of Solano County to vacate so much of its July 9, 2013, order as granted the motion for summary adjudication dismissing the causes of action for harassment and failure to prevent harassment as alleged in the fourth and fifth causes of action in the first amended complaint, and to enter a new and different order denying the motion for summary adjudication as to those causes of action. The stay issued by this court shall automatically dissolve on the issuance of the remittitur. Petitioners are entitled to their allowable costs.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.