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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALEX IGBINEWEKA,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS,

Defendant and Respondent.

A141355

(Alameda County
Super. Ct. No. RG13671604)

In this employment discrimination action, plaintiff Alex Igbineweka appeals after the trial court sustained the demurrer of respondent California Department of Industrial Relations (Department) without leave to amend. We affirm.

BACKGROUND

Plaintiff filed the instant lawsuit in March 2013. The first amended complaint alleged he worked for the Department from 2007 until his termination in 2010. The complaint alleged, under the California Fair Employment and Housing Act (FEHA; Govt. Code §§ 12900 et seq.),¹ race discrimination, age discrimination, and a hostile work environment arising from the race and age discrimination.² With respect to administrative remedies, the first amended complaint alleged that plaintiff filed a

¹ All undesignated section references are to the Government Code.

² The first amended complaint also alleged disability discrimination and contract claims. The trial court sustained the Department's demurrer to these claims without leave to amend. Plaintiff does not challenge these rulings on appeal.

complaint with the United States Equal Employment Opportunity Commission (EEOC) and received a notice of right to sue in January 2013.

The Department demurred on the ground that plaintiff failed to exhaust his administrative remedies. The trial court sustained the demurrer, granting leave to amend the FEHA claims. The demurrer order denied leave to amend to add causes of action under Title VII of the Civil Rights Act of 1964 (Title VII; 42 U.S.C. §§ 2000e et seq.).

Plaintiff filed a second amended complaint alleging he filed a FEHA complaint with the California Department of Fair Housing and Employment in December 2010 and received a right-to-sue letter in January 2011. The complaint further alleged plaintiff appealed his termination to the State Personnel Board (Personnel Board) in December 2010 and the Personnel Board issued its decision in June 2012. Finally, the complaint alleged plaintiff filed an EEOC complaint in December 2012 and received a right-to-sue notice in January 2013.

The Department demurred to the second amended complaint on the ground that plaintiff's claims were not timely filed. Specifically, the Department argued that plaintiff failed to file his lawsuit within a year of the FEHA right-to-sue notice and that plaintiff's appeal of his termination with the Personnel Board was not sufficient to equitably toll this statute of limitations. The Department requested the trial court judicially notice the Personnel Board's written decision on plaintiff's termination appeal. The trial court took judicial notice of the Personnel Board decision and sustained the demurrer without leave to amend.

DISCUSSION

“When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must

decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).

I. FEHA Claims

A plaintiff must file a lawsuit alleging claims under FEHA within one year of the date of the right-to-sue notice issued by the Department of Fair Housing and Employment.³ (§ 12965, subd. (b).) Plaintiff’s FEHA right-to-sue letter issued in January 2011 and his lawsuit was filed in March 2013, well over a year later.

Plaintiff argues this statute of limitations was equitably tolled when he appealed his termination to the Personnel Board. “The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.’ ” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*)). “Broadly speaking, the doctrine applies ‘ “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.” ’ ” (*Id.* at p. 100.) A plaintiff seeking the benefit of the equitable tolling doctrine must show “three elements: ‘timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.’ ” (*Id.* at p. 102.) “ “ “The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the

³ An EEOC complaint will not satisfy this requirement under FEHA. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1726 [“an EEOC right-to-sue notice satisfies the requirement of exhaustion of administrative remedies *only* for purposes of an action based on title VII” and not for FEHA claims].)

second claim. Generally this means that the defendant in the first claim is the same one being sued in the second.” [Citation.] “The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second.” ’ ’ (*Id.* at p. 102, fn. 2.)

Plaintiff’s Personnel Board appeal does not satisfy the second requirement. The Personnel Board’s 12-page decision sets forth the factual issues and the parties’ contentions.⁴ The Department terminated plaintiff for “making unwelcomed romantic advances toward a co-worker and being dishonest during the investigation concerning these advances.” In his defense, plaintiff testified he was sexually harassed by the accusing co-worker. There is no suggestion in the Personnel Board decision that plaintiff contended he was discriminated against on the basis of race or age. Moreover, plaintiff does not claim that he raised any such contentions. His brief states: “[Plaintiff’s] SPB [Personnel Board] claims consist[] of his claim of sexual harassment by respondent’s employee . . . , retaliation, his denial of sexually harassing respondent’s employee . . . , [and] the imposition of an inappropriate penalty[,] in this case termination of his employment.” These claims are not “identical” to the complaint’s race and age discrimination claims, nor are they “so similar that the defendant’s investigation of the first claim will put [it] in a position to fairly defend the second.” ’ ’ (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2.)

Because we find plaintiff has failed to show the lack of prejudice element of equitable tolling, we need not decide whether equitable tolling would have otherwise been available. The trial court properly sustained the demurrer on the ground plaintiff’s FEHA claims were untimely.

⁴ Plaintiff does not contend the Personnel Board decision should not be considered. (See *Schifando, supra*, 31 Cal.4th at p. 1081 [when reviewing demurrer ruling, “[c]ourts must . . . consider judicially noticed matters”].)

II. Title VII Claims

Plaintiff argues he should have been granted leave to amend his complaint to state claims under Title VII. The parties dispute whether plaintiff raised this issue below. We need not decide, as we reject plaintiff's contention in either event.

The complaint alleges plaintiff filed a complaint with the EEOC in December 2012. This claim was not timely for purposes of a Title VII claim. When a Title VII claimant "has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice," an EEOC charge must be filed "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier" (42 U.S.C. § 2000e-5(e)(1).) Even assuming plaintiff's proceedings with the Department of Fair Housing and Employment (terminated in January 2011) and the Personnel Board (terminated in June 2012) fall within this provision, his complaint is not timely. Plaintiff's complaint was filed well more than 30 days after both of these proceedings terminated, and also more than 300 days following his last date of employment in November 2010.⁵

In his brief, plaintiff claims he also filed an EEOC complaint in December 2010. However, despite submitting numerous other documents in connection with his FEHA and EEOC complaints, plaintiff has submitted no documents in connection with the purported December 2010 EEOC complaint. More significantly, plaintiff has failed to make factual representations or legal argument showing that his lawsuit was timely filed in connection with this purported EEOC complaint. (42 U.S.C. § 2000e-5(f)(1) [EEOC lawsuit must be filed within 90 days of receipt of the right-to-sue notice]; *Schifando*,

⁵ Plaintiff argues, without citation to authority, that his termination was not effective until the Personnel Board proceedings concluded in 2012. This argument is unpersuasive. Plaintiff's complaint alleges he was terminated in 2010. This allegation is not contradicted by the Personnel Board decision, which finds plaintiff was employed by the Department "until his dismissal on November 23, 2010." Plaintiff's December 2012 EEOC complaint also identifies November 23, 2010 as the latest date of alleged discrimination.

supra, 31 Cal.4th at p. 1081 [“The plaintiff has the burden of proving that an amendment would cure the defect.”].) The trial court’s denial of leave to amend to add Title VII claims was not an abuse of discretion.

III. Appellate Attorney Fees

The Department argues plaintiff’s appeal was without foundation and seeks attorney fees for its work defending the appeal pursuant to section 12965, subdivision (b), which authorizes an award of attorney fees to the prevailing party in a FEHA action. “[A] prevailing defendant in an employment discrimination action cannot recover attorney fees unless the action was unreasonable, frivolous, meritless or vexatious.” (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419 (*Leek*)). “ ‘In applying these criteria, it is important that a . . . court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.’ [Citation.] A meritless case in this context is one that is groundless or without a legal or factual basis.” (*Id.* at p. 420.)

The Department argues this case is similar to *Robert v. Stanford University* (2014) 224 Cal.App.4th 67 (*Robert*), in which the Court of Appeal upheld the trial court’s award of section 12965, subdivision (b), fees. In *Robert*, the FEHA plaintiff “never had or even claimed to have any evidence that race discrimination played a role in his termination other than his own opinion.” (*Id.* at p. 73.) Indeed, at the close of evidence in the trial court, the plaintiff “conceded that he had no evidence to support his discrimination cause of action.” (*Id.* at p. 69.) *Robert* is distinguishable. While plaintiff’s appeal was not successful, we cannot say it was without any legal or factual basis. Plaintiff invoked the equitable tolling doctrine by alleging an administrative proceeding involving his employment. Although we disagree with plaintiff’s characterization of the issues in that proceeding as identical to those alleged here, we are not persuaded that this is one of the “rare cases” in which attorney fees should be awarded to a prevailing defendant. (*Leek, supra*, 194 Cal.App.4th at p. 420.)

DISPOSITION

The trial court's orders are affirmed. Respondents are awarded their costs on appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

(A141355)