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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

YESENIA HETU-TOWERS,
Plaintiff and Appellant,

v.

HAYWARD UNIFIED SCHOOL
DISTRICT,
Defendant and Respondent.

A144512

(Alameda County
Super. Ct. No. HG12646723)

This Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) case concerns Hayward Unified School District’s handling of the posttraumatic stress disorder (PTSD) of one of its teachers, plaintiff Yesenia Hetu-Towers. After plaintiff presented her case in chief at a bench trial, the school district moved for judgment. The trial court, sitting as trier of fact, found there was no reasonable accommodation that could return plaintiff to work. We conclude this finding is supported by substantial evidence, and agree with the trial court that this finding necessarily undercuts all of plaintiff’s FEHA claims. We therefore affirm the judgment.

BACKGROUND

Plaintiff taught for the Hayward Unified School District. On April 26, 2010, a student’s parent threatened her. Shortly thereafter, plaintiff’s psychologist diagnosed her with PTSD. As a result, plaintiff and the school district entered into a memorandum of understanding (MOU) promising plaintiff a period of paid administrative leave, removal

of the student to another school in the next academic year, a bar on the parent coming on campus, enforcement of revised school safety policies, and appropriate action by the school district if new trouble arose.

After reaching a point of stability, plaintiff returned to teaching for the 2010–2011 and a limited part of the 2011–2012 school years. During this time, plaintiff was able to perform her job and viewed herself as protected by the MOU.

But in November 2011, plaintiff observed the offending parent in a school parking lot, approaching in a threatening manner. Plaintiff took two days off, then worked for three more days, during which she requested additional protection from the school. Getting none, she consulted with her doctor and sought further leave starting on November 17, 2011. The school district granted plaintiff leave through June of 2012, the end of the school year.

During the bench trial, two school district employees testified about a March 2012 effort to find plaintiff a position as a Teacher on Special Assignment or TOSA. According to Risk Manager Andrew Lathrop, he had reviewed documents stating an offer of modified duty was made and a special assignment position offered.

A human resources specialist, Ursula Reed, testified in greater detail. She stated “Donna Becnel in conjunction with risk management”¹ offered plaintiff, as an accommodation, a special assignment position in the “State and Federal Programs” office, which was away from distractions and the source of her discomfort. Reed was not sure who communicated the offer and how it was done, but believed someone named Jai Liu was involved. Liu would not have had the authority herself to decide on an offer to plaintiff; she only followed directions. Authorization would have come from the school

¹ Becnel, another HR professional, testified at trial. She was asked “Did you personally ever contact [plaintiff] regarding an offer of employment.” Her response: “no.” She was not asked about special assignments and was not asked about directing anyone else to personally make an offer of such an assignment.

district's risk management personnel. When Reed was shown trial exhibit 69, a March 2012 email chain amongst school district officials, it reinforced her recollection that a special assignment position had indeed been offered through risk management. In the e-mail chain, one school district official wrote "we offered [plaintiff] a position" "doing TOSA work" but noted plaintiff had refused. Reed, however, agreed she did not have personal knowledge of the offer.

In contrast to this testimony, plaintiff took the stand and denied receiving a special assignment offer.

A month after the effort to make a special assignment offer, in April 2012, plaintiff's doctor determined plaintiff's disability had become "permanent and stationary," meaning plaintiff's condition was unlikely to change. He concluded plaintiff could work as a teacher elsewhere, but could not work for the School District. If she returned to the School District in any capacity, she would deteriorate.

The school district received a written copy of the doctor's April conclusions in July 2012. It was the final word, written or otherwise, from the doctor to the district.

Plaintiff testified the doctor said his final, April 2012 conclusion would change if the school put in safety measures. But the doctor never testified about how any particular safety measure would change his April 2012 opinion, the written report does not contain this caveat, plaintiff never contested the report, and plaintiff never conveyed all this to the school district. Additionally, another doctor later evaluated plaintiff and reached the unequivocal conclusion plaintiff could not return to the school district "without it deteriorating her psychological condition."

The school district, in turn, offered testimony plaintiff could have returned to school up to the time of trial if her medical restrictions had been modified.

Plaintiff's leave was ultimately extended to November 2012, at which point plaintiff exhausted her leave status and the school district placed her on its 39-month re-employment list, in the event her work restrictions changed and she could be rehired.

At the close of plaintiff's case in chief, the school district moved for nonsuit. The trial court viewed the motion as one for judgment, requested supplemental briefing, and held a hearing. It granted the motion, published a tentative decision, entered a final decision after considering plaintiff's objections (many of which echo plaintiff's contentions on appeal), and entered a judgment of dismissal.

DISCUSSION

Judgment After Plaintiff's Case in Chief

After a plaintiff presents her evidence in a bench trial, the defendant may move for judgment. (Code Civ. Proc., § 631.8, subd. (a).) “The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence.” (*Ibid.*)

In ruling on motions for judgment, the trial court “must weigh the evidence and may draw reasonable inferences from that evidence.” (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 369.) As a result, unless the material facts are undisputed, “such rulings are normally reviewed under the substantial evidence standard, with the evidence viewed most favorably to the prevailing party.” (*Ibid.*; *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528; cf. *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 126 [review of judgment granted under section 631.8 is “governed by the same rules which apply on appeal following any other findings”].)

In cases where the trial court grants judgment based on the plaintiff's failure to satisfy a burden of proof, the straightforward substantial evidence inquiry is modified to reflect the reality that defendant has not yet presented its case. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 733 (*Eriksson*).) “[T]he question for a reviewing court becomes whether the evidence compels a finding in favor of the [plaintiff] as a matter of law. [Citations.] Specifically, the question becomes whether the [plaintiff's] evidence was (1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to

leave no room for a judicial determination that it was insufficient to support a finding.” ’ ’ (Ibid.)

Applying these standards, we address plaintiff’s causes of action.

Third Cause of Action: Reasonable Accommodation

The FEHA prohibits an employer from “fail[ing] to make reasonable accommodation for the known physical or mental disability of an . . . employee.” (Gov. Code, § 12940, subd. (m).)² “ ‘The elements of a failure to accommodate claim 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 accommodate the plaintiff’s disability.’ ” (Lui v. City and County of San Francisco (2012) 211 Cal.App.4th 962, 971.) “A reasonable accommodation is ‘a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.’ ” (Ibid.) The plaintiff bears the burden of proving an accommodation would have allowed him or her to perform essential job functions. (Ibid.; Nadaf-Rahrov v. Neiman Marcus Group, Inc. (2008) 166 Cal.App.4th 952, 976–977 (Nadaf-Rahrov).)

Thus, FEHA does not aid an employee if a reasonable accommodation would not be effective at allowing the employee to perform essential job duties. (Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 976, citing Green v. State of California (2007) 42 Cal.4th 254, 262.) An accommodation that “eliminat[es] . . . an essential function is not a reasonable accommodation.” (Nealy v. City of Santa Monica (2015) 234 Cal.App.4th 359, 375 (Nealy).)

The trial court, in its statement of decision, concluded there was no further reasonable accommodation available to plaintiff in light of “her psychologist’s opinion

² All further statutory references are to the Government Code unless otherwise indicated.

that [she] could not return to work for defendant.” It rejected as unreasonable and ineffective the proposed accommodations of having the School District: (1) additionally require the offending parent to obtain a badge from the school office before appearing on campus (the parent was already barred from campus); and (2) obtain a restraining order against the parent on plaintiff’s behalf. Finally, the trial court found the school district had, aside from offering extended paid leave (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 [leave can be FEHA accommodation]), offered plaintiff a special assignment position, even if she did not receive or accept it. At bottom, “there was no testimony from any witness as to what else reasonably could have been done to protect plaintiff,” “there was no reasonable accommodation,” and thus, “no violation of FEHA.”

On appeal, plaintiff suggests the school district should have, at trial, identified possible accommodations for her benefit. This is contrary to the allocation of burdens just discussed.

Plaintiff also urges the possible badge requirement as an accommodation. First, contrary to how FEHA has been applied, she contends the effectiveness of the accommodation is “irrelevant” to the question of whether the school district failed to make a reasonable accommodation. Next, she criticizes the trial court for “speculating” the badge requirement would be ineffective, but does not point to any evidence in the record, as is her burden as appellant, which compels the conclusion this seemingly redundant requirement would be an effective and reasonable accommodation. (See *Eriksson, supra*, 233 Cal.App.4th at p. 733.)

Plaintiff appears to focus her appellate challenge on the special assignment position. She contends insufficient evidence supports the trial court’s finding the school district actually offered that accommodation. Assuming for the sake of argument the special assignment position would have been a reasonable accommodation at the time, the testimony of Reed and Lathrop is adequate evidence an offer was made.

Plaintiff draws our attention to Reed’s lack of confidence in the exact role Liu played vis-a-vis the offer and the trial court’s statement that “Reed testified that a Jai Liu sent the offer.” Reed actually testified Liu “probably” sent the offer, but did not “think it was Jai Liu” who had the authority to approve it. In any case, plaintiff has not demonstrated Reed, or Lathrop for that matter, harbored any doubt about whether an offer was sent by *someone*, and the trial court reasonably credited Reed and Lathrop and concluded one was sent.³ The name of the person actually sending the offer was immaterial, and even if the trial court was wrong about the person who actually sent it, the error was harmless and not a basis for reversal. (*Smith v. Dubost* (1906) 148 Cal. 622, 624 (*Smith*) [“Where the matters which are found necessarily defeat the plaintiff’s right of recovery, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial.”]; *Pas v. Hill* (1978) 87 Cal.App.3d 521, 524, fn. 2 [“erroneous findings may be disregarded as surplusage if they are not essential to the judgment”]; *Del Bosque v. Singh* (1937) 19 Cal.App.2d 487, 490 [“A judgment cannot be reversed because of a mistaken finding on an immaterial fact.”]; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 [harmless error not basis for reversal].)

In sum, the trial court’s finding that no reasonable accommodation could assist plaintiff is supported by substantial evidence and its rejection of her FEHA accommodation claim must be affirmed.

³ Plaintiff does not challenge the hearsay nature of Reed and Lathrop’s testimony. Indeed, hearsay, if no objection is raised in the trial court, can provide the substantial evidence to support a trial court’s findings of fact. (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1245, 1247–1248; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268; *Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd.* (1984) 153 Cal.App.3d 262, 269.)

Fourth Cause of Action: Good Faith Interactive Process

The FEHA also “makes it unlawful for an employer ‘to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.’ (§ 12940, subd. (n).)” (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003 (*Scotch*)).

“To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred.” (*Nealy, supra*, 234 Cal.App.4th at p. 379; *Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 980–981 [“section 12940(n) imposes liability only if a reasonable accommodation was possible”]; *Scotch, supra*, 173 Cal.App.4th at p. 1018.)⁴ “An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself” (*Scotch*, at p. 1018); nonetheless, by the time of trial, an employee is expected to have used the litigation process to “identify . . . specific, available reasonable accommodation[s]” (*ibid.*).

As discussed, plaintiff failed to identify a reasonable, available accommodation that should have been offered to her.

While plaintiff complains the trial court did not make certain findings related to her interactive process claim, once the court found no reasonable accommodation was

⁴ These cases limit or criticize *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, a case plaintiff cites. *Wysinger* concluded a plaintiff verdict on a claim for failure to engage in the interactive process was not necessarily inconsistent with a defense verdict on a claim for failure to accommodate. (*Id.* at pp. 424–425.) To the extent plaintiff is asserting *Wysinger* holds the existence of a reasonable accommodation is irrelevant to an interactive process claim, no published appellate decision has cited *Wysinger* for that point, and, in light of the cases cited above, *Wysinger* is not good law for that point.

possible—a finding fatal to plaintiff’s claim—it had no obligation to make any further findings. (*Smith, supra*, 148 Cal. at p. 624.)

Remaining FEHA Causes of Action

Finally, plaintiff argues the trial court erred in entering judgment on her discrimination, retaliation, and wrongful termination claims. In connection with this one-paragraph, seven-line argument, plaintiff provides no record cites, no legal analysis, and no clear explanation of the trial court’s asserted error. She has forfeited review.

(*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1196, fn. 2 [noting forfeiture from failure to “present any reasoned legal analysis of [a] point” or failing to support point with “citation to authorities or record,” and noting it is not the court’s function to furnish arguments for appellate counsel]; *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 331.)

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.

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