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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MALCOLM THOMAS,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,

Defendant and Appellant.

B229265

(Los Angeles County
Super. Ct. No. BC416182)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mark V. Mooney, Judge. Reversed and remanded for a new trial.

Carmen A. Trutanich, City Attorney, Claudia McGee Henry, Assistant City
Attorney, and Gregory P. Orland, Deputy City Attorney, for Defendant and Appellant.

Law Office of Herb Fox, Herb Fox; Schimmel & Parks, Alan I. Schimmel and
Michael W. Parks for Plaintiff and Respondent.

Plaintiff Malcolm Thomas (Thomas), a police officer in the Los Angeles Police Department (LAPD), brought suit against the City of Los Angeles (City) for disability discrimination and related claims. After a two-week jury trial, the jury returned a verdict, finding the City liable to Thomas for disability discrimination. The City appeals, arguing that the trial court committed reversible error in giving an incomplete written instruction on Thomas's disability discrimination claim, an instruction that differed from the oral instruction, and submitting a special verdict form to the jury that did not conform to either the oral or written jury instructions.

We agree with the City that the trial court committed prejudicial error in its instruction on Thomas's disability discrimination claim. Accordingly, the judgment is reversed and the matter is remanded for a new trial on that cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

*Factual Background*¹

In 1997, Thomas began his employment with the LAPD. In 2001, he transferred to the Transit Bus Division and from there he applied to and became an investigator with the Los Angeles County District Attorney's Office. After six years, he returned to the LAPD.

Shortly thereafter, Thomas was invited to join the Arrest and Control/Physical Training (ARCON/PT) unit. The purpose of the ARCON/PT division is to train academy recruits and in-service officers on arrest and control and physical training techniques.

In September 2007, Thomas transferred to the training division as an ARCON/PT instructor. In order to become an instructor, Thomas was required to become certified. An instructor must also take a nine-part physical training examination that is normally administered in three parts. Once the instructor completes the last of the three tests, he or she is certified by the LAPD as a primary instructor in physical training. By May 2008, Thomas had completed six sections of the physical training examination.

¹ Our recitation of the facts is limited to those that are relevant to the issues raised in this appeal.

On May 9, 2008, Thomas suffered a knee injury during a training exercise at the LAPD recruitment training center. He suffered a torn meniscus and was put on work restrictions. Specifically, Thomas was prohibited from heavy lifting, squatting, crouching, kneeling, and running; he was instructed to use his left knee minimally.

At some point after his injury, Thomas was pressured and ordered to complete the last three sections of the physical training examination. Even though he had knee surgery scheduled for June 30, 2008, Thomas took the test. The test exacerbated his knee injury.

As scheduled, Thomas underwent knee surgery on June 30, 2008.

On October 15, 2008, Thomas returned to restricted duty, consisting of sedentary work only.

From October through November 2008, Thomas was subjected to intense and repeated verbal abuse, hazing, harassing conduct, and disparaging remarks in the workplace based upon his race and perceived sexual orientation. He also testified that he was subjected to harassment and a hostile work environment in connection with his disabilities and work restrictions.

Thomas was placed off duty in November 2008, and continued off duty until May 2, 2009.

Meanwhile, on January 29, 2009, Thomas provided the LAPD with a medical note, titled "Stay Away Order," from his treating psychiatrist, Dr. Rodney D. Collins. According to Dr. Collins's note, he had been treating Thomas since November 24, 2008, for "acute Stress Disorder and Major Depressive Disorder secondary to issues that have arisen regarding his disability for a knee injury." Dr. Collins opined that it was in Thomas's best interest not to "deal with issues" regarding the LAPD; thus Dr. Collins was "order[ing]" Thomas's "supervisors and his department to stop contact" with him.

Captain Michelle Veenstra testified that she was very concerned about Dr. Collins's letter and Thomas suffering from stress and major depression. According to Captain Veenstra, it is "very serious, very severe" when a physician indicates that an employee is suffering from more than just a knee injury. Upon realizing the severity of

Thomas's depression, Captain Veenstra made arrangements to contact a medical liaison to talk about suspending Thomas's police powers, for both his safety and public safety.

On March 24, 2009, Thomas received notice that the LAPD was removing him from payroll and cancelling his benefits.

On April 2, 2009, Thomas was interviewed by Internal Affairs to discuss the alleged retaliation against him and the loss of his pay and vacation/sick time and threatened loss of his benefits and income. Four days later, he received an order suspending his police powers and requiring him to relinquish his gun, badge, and police identification.

Thomas's Complaint

On June 19, 2009, Thomas filed a complaint against the City alleging causes of action for : (1) Workplace harassment in violation of the Fair Employment and Housing Act (FEHA); (2) Retaliation in violation of FEHA; (3) Failure to investigate in violation of FEHA; (4) Discrimination in violation of FEHA; (5) Retaliation in violation of statutory policy; and (6) Declaratory and injunctive relief under FEHA. In the fourth cause of action, Thomas lumps together his claims for disability discrimination, racial discrimination, and sexual orientation discrimination. Specifically, Thomas alleges that the City discriminated against him "on the basis of his: a) actual and/or perceived medical disability, impairment and/or condition; b) actual or perceived sexual orientation; c) race." "As a proximate result of [the City's] discrimination, [Thomas] suffered adverse employment actions as a result of this discrimination. [Thomas] requested, but was denied, reasonable accommodation for his disabilities. [The City] failed to engage in an interactive process with [Thomas] and acted in an unreasonable and hostile manner towards [Thomas] and his disabilities. [The City] not only denied reasonable accommodation to [Thomas] but [it] ordered and pressured [Thomas] to engage in physical activities against medical advice as a condition of employment, thereby causing bodily injury and suffering to [Thomas]."

Thomas further alleges that "[a]s a proximate result of [the City's] discrimination, [the City] also denied promotion and/or job benefits to [Thomas]. [The City] also

stripped [Thomas] of procedural and substantive rights as a sworn police officer and employee of the LAPD.”

Jury Instructions

In its oral instructions, the trial court told the jury that in order for Thomas to prevail, he had to establish that the City “violated his work restrictions by denying reasonable accommodation for his disabilities, failure to engage in the interactive process, denying promotional and job benefits to [Thomas].” The jury was also informed that it would be provided with written copies of the instructions.

The written instructions submitted to the jury provide that, in order to prevail, Thomas was required to establish that the City “violated [his] work restrictions by denying a reasonable accommodation to . . . Thomas” and that “Thomas’s actual or perceived disability was a motivating reason for [the City’s] denial of a reasonable accommodation.” There is no mention of violation of work restrictions or failure to engage in the interactive process or the denial of promotional and job benefits.

Verdict and Judgment

The jury was given a special verdict to complete. Questions 14 through 18 track the written jury instruction (CACI No. 2540):

“14. Did the . . . City know that [Thomas] had an actual or perceived disability that limited his work performance? [¶] . . . [¶]

“15. Was [Thomas] able to perform the essential job duties with reasonable accommodation for his actual or perceived disability? [¶] . . . [¶]

“16. Did the . . . City violate [Thomas’s] work restrictions, deny reasonable accommodation for his disabilities, fail to engage in the disability interactive process, suspend police powers or deny promotional or job benefits to [Thomas]? [¶] . . . [¶]

“17. Was [Thomas’s] actual or perceived disability a motivating reason for the . . . City to violate [Thomas’s] work restrictions, deny reasonable accommodation for his disabilities, fail to engage in the disability interactive process, suspend police powers or deny promotional or job benefits to [Thomas]? [¶] . . . [¶]

“18. Was the . . . City’s conduct a substantial factor in causing harm to [Thomas]?”

On July 23, 2010, the jury returned its special verdict, answering “YES” to question Nos. 14 through 18² and awarding Thomas \$705,804 in damages. Judgment was entered on October 5, 2010. The City’s posttrial motions were denied, and its timely appeal ensued.

DISCUSSION

The City asks us to reverse the judgment and remand the matter for a new trial on the grounds that the written jury instructions, which differ from the oral instructions, conflict with the special verdict, which differs from both the oral and written jury instructions.

I. *Standard of Review*

“[T]here is no rule of automatic reversal or ‘inherent’ prejudice applicable to any category of civil instruction error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [Citation.]” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

“When 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, italics omitted.)

² The jury found in favor of the City on all other claims.

II. *The Trial Court Committed Reversible Error*

We conclude that the trial court's written instructions³ on Thomas's disability discrimination claim were erroneous.

It seems that the trial court improperly commingled two distinct claims based upon Thomas's theories of disability discrimination.⁴ To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate that he is disabled and otherwise qualified to do the job and was subjected to an adverse employment action because of such disability. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 432–433, fn. 2.)

The elements of a failure to accommodate claim are similar, but there are important differences. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [“The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]’ [Citation.]”]) In other words, the employee need not establish that an adverse employment action was caused by the employee's disability; under the express provisions of FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 246.)

In spite of the distinctions between these two types of claims, as set forth above, the elements were conflated in the written jury instructions. The jury was told that Thomas had to prove that his “actual or perceived disability was a motivating reason for

³ We will not address whether the trial court's oral instructions were adequate. As the parties agree, the oral instructions conflict with the written instructions. Under these circumstances, the written instructions control. (*People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Crittenden* (1994) 9 Cal.4th 83, 138.)

⁴ We reiterate that the complaint also muddled all of Thomas's discrimination theories into one cause of action.

the [City's] denial of a reasonable accommodation.” This makes no sense. How could Thomas's disability have been a motivating reason to deny him a reasonable accommodation? If the trial court was intending to instruct the jury on Thomas's burden on disparate treatment claim, then it should not have mentioned the denial of a reasonable accommodation. (See, e.g., CACI No. 2540.)⁵ On the other hand, if the trial court was intending to instruct the jury on Thomas's denial of a reasonable accommodation claim, then the question of whether Thomas's disability was a motivating reason behind the City's decision would have been irrelevant. (See, e.g., CACI No. 2541.)

This instructional error was prejudicial. The written instructions were confusing and incomplete. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1092 [jury must be instructed on the law applicable to the theory of the case].) And, in light of Captain Veenstra's testimony, a different result was reasonably probable. After all, the jury could have concluded that the City had a legitimate reason for certain employment decisions, such as suspending Thomas's police powers, that were made. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201.) Yet, with blurred instructions, the jury was not given the opportunity to make proper findings.

Exacerbating the prejudicial error was the inconsistent special verdict⁶ form that was given to the jury.⁷ As set forth above, the jury was instructed that Thomas only

⁵ We express no opinion on whether CACI No. 2540 is adequate. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231.) We do not issue advisory opinions. (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178–1179.)

⁶ We reject Thomas's assertion that the jury was given a general verdict, not a special verdict. Aside from the fact that the verdict form is titled “Special Verdict Form,” the form is a textbook special verdict form. (Code Civ. Proc., §§ 624, 625.)

⁷ Thomas offers no legal authority to support his assertion that the trial court's instructional error was actually “cured” by the special verdict form. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

needed to prove that his disability was a motivating reason for the City's denial of a reasonable accommodation. However, the jury was asked by way of the special verdict form to determine whether Thomas's disability was a motivating reason for the City to violate Thomas's work restrictions, deny him reasonable accommodation for his disabilities, fail to engage in the interactive process, suspend police powers, *or* deny him promotional or job benefits. Because the jury was never told in the written jury instructions how to evaluate these alternative adverse employment actions (other than the denial of a reasonable accommodation), the jury could have been confused by the options given in the special verdict.⁸

The fact that substantial evidence may support each of the alternative findings in the special verdict form is irrelevant. It is well-established that a special verdict affords no presumption or implied findings in favor of one party or the other. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.)

All remaining arguments, including the City's claim that the trial court erred in failing to instruct the jury that Thomas had the burden of proving that the City acted with discriminatory intent, are moot.

⁸ It follows that we are not convinced by Thomas's claim that any instructional error was cured by other written instructions. The written instruction on retaliation sets forth the elements of that cause of action; it does not suggest, let alone state, that the elements are similar for Thomas's disability discrimination/disparate treatment claim.

DISPOSITION

The judgment is reversed. The matter is remanded for a new trial on Thomas’s disability discrimination claim. The City is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ