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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Amador)

WARREN LUCAS,

Plaintiff and Appellant,

v.

DEPARTMENT OF CORRECTIONS AND
REHABILITATION, etc.

Defendants and Respondents.

C067859

(Super. Ct. No. 09CV5883)

In this employment discrimination case, the trial court granted summary judgment in favor of defendant California Department of Corrections and Rehabilitation (the department) because plaintiff Warren Lucas filed a defective separate statement in response to the department's motion for summary judgment/summary adjudication. We conclude the trial court abused its discretion in ruling against Lucas on this basis; however, we conclude the trial court reached the correct result because no reasonable jury could find on the evidence presented that Lucas was subjected to a hostile work environment based on his race. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Lucas, who is African-American, is employed as an electrician in plant operations at Mule Creek State Prison. In August 2007, Lucas left work because of a back injury. He returned two weeks later with a doctor's note that limited the work he could do. Because no light duty assignment was made available to him, Lucas remained off work until October, when his doctor released him to full duty.

Between August 2007 and August 2008, there were six incidents in which Lucas's supervisors yelled at him. Further detail regarding these incidents will be set forth in the discussion section below.

In August 2008, Lucas filed two complaints with the Department of Fair Employment and Housing. In February 2009, he commenced the present action by filing a complaint against the department for racial and age discrimination, harassment, and retaliation. Lucas claimed discrimination based on the denial of a light duty assignment and harassment based on the incidents when his superiors yelled at him.

The department moved for summary judgment or summary adjudication. In its notice of motion, the department asserted that if summary judgment could not be granted, it was "mov[ing] in the alternative, for summary adjudication and request[ing] that the Court order that the following causes of action and claims have no merit and are eliminated from this case." The department then set forth 17 paragraphs.

In the first paragraph, the department asserted it was "entitled to summary judgment because the undisputed evidence established that Plaintiff did not suffer any unlawful employment practices under Government Code section 12940." Thus, paragraph one was not a request for summary adjudication of a particular cause of action, but instead a reiteration of the department's request for summary judgment.

The second and third paragraphs asserted, respectively, that Lucas's cause of action for racial harassment failed as a matter of law because he could not make a prima

facie showing of severe or pervasive harassment or that the department's actions were based on his race.

The fourth and fifth paragraphs asserted, respectively, that Lucas's cause of action for age harassment failed as a matter of law because he could not make a prima facie showing of severe or pervasive harassment or that the department's actions were based on his age.

The sixth, seventh, eighth, and ninth paragraphs asserted, respectively, that Lucas's cause of action for racial discrimination failed as a matter of law because he could not make a prima facie showing that he suffered any adverse employment action or that the department acted with any discriminatory motive, because the department had legitimate business reasons for its actions, and because he was unable to present evidence of pretext.

The 10th, 11th, 12th, and 13th paragraphs asserted, respectively, that Lucas's cause of action for age discrimination failed as a matter of law because he could not make a prima facie showing that he suffered any adverse employment action or that the department acted with any discriminatory motive, because the department had legitimate business reasons for its actions, and because he was unable to present evidence of pretext.

The 14th, 15th, 16th, and 17th paragraphs asserted, respectively, that Lucas's cause of action for retaliation failed as a matter of law because he could not make a prima facie showing that he suffered any adverse employment action or of a causal link between any alleged adverse employment action and any protected activity, because the department had legitimate business reasons for its actions, and because he was unable to present evidence of pretext.

The department's separate statement of undisputed facts was structured based on the 17 paragraphs set forth in the notice of motion, with the department identifying each paragraph as an issue. Thus, "ISSUE 1" was the assertion that the department was entitled to summary judgment because the undisputed evidence established that Lucas did

not suffer any unlawful employment practices under Government Code section 12940. Under the heading of that issue, the department set forth 60 undisputed facts.

“ISSUE 2” was the assertion that Lucas’s cause of action for racial harassment failed as a matter of law because he could not make a prima facie showing of severe or pervasive harassment. Under the heading of that issue, the department set forth seven undisputed facts. These facts, however, had the same numbers (19, 20, 21, 22, 23, 24, and 25) as, and were identical to, facts that had been set out under Issue 1. Indeed, in the opening explanatory paragraph to its separate statement, the department explained that “[f]or the ease of the Court, duplicative [undisputed material facts] relevant to different causes of action or claims are assigned the same . . . number.”

A review of the remainder of the facts set forth in the department’s separate statement under the remaining 15 issues reveals that *all* of those facts were identical to, and had the same numbers as, facts that had been set forth under Issue 1. In other words, the department asserted 60 facts in support of its motion for summary judgment and asserted some subset of those 60 facts in support of each of its 16 requests for summary adjudication.¹

In his responsive separate statement, Lucas began by noting that “[s]everal of the issues upon which [the department sought] summary disposition ha[d] been mooted by [Lucas’s] abandonment . . . of his” causes of action for age discrimination, retaliation, and harassment based on age. In particular, Lucas noted that the department’s Issues 4, 5, 10, 11, 12, 13, 14, 15, 16, and 17 were all moot. As a matter of deduction, that left Issues 1, 2, 3, 6, 7, 8, and 9. Lucas began by setting out the department’s Issue 1 and then set forth responses to all 60 of the department’s undisputed facts. Thereafter, (not surprisingly in view of the format of the department’s separate statement) Lucas did not

¹ This document represents a triumph of the word processor and copy-and-paste technique over the legal requirements for preparation of separate statements by counsel.

set out any of the six remaining issues or repeat his responses to the various subsets of facts the department had asserted in support of each of those issues.

In its reply brief, the department argued (among other things) that Lucas's separate statement "only addresses [the department's] first issue and does not address the remaining sixteen issues." The department asserted that because of this omission, Lucas "concedes all of [the department's] material facts for the only remaining two causes of action in this case" and therefore the "motion for summary judgment should be adjudicated against [Lucas]." The department also argued that Lucas had presented no evidence of severe or pervasive harassment, that Lucas had admitted the alleged harassment was not based on his race, that Lucas was not subjected to any adverse employment action, that Lucas had provided no admissible evidence the department's actions were based on a discriminatory motive, and that Lucas had failed to rebut the department's legitimate business reasons with any showing of pretext or intentional discrimination.

Three days before the hearing on the department's motion, Lucas filed a motion for leave to file an amended complaint. Essentially, Lucas conceded that under the existing complaint, the department's motion for summary adjudication of the cause of action for racial discrimination was well taken because he had not been able to produce evidence in support of the allegation that the department had discriminated against him by refusing to assign him light duty, but he *could* produce evidence of *other* allegedly adverse actions, and he sought leave to amend the complaint to allege those actions.

Apparently as a result of the filing of the motion for leave to amend, the hearing on the department's motion for summary judgment or summary adjudication was continued. The department opposed the motion for leave to amend.

The trial court denied the motion for leave to amend the complaint on the ground that it "appear[ed] to [have] be[en] made for the sole purpose of defeating the Motion for Summary Judgment." With respect to the motion for summary judgment or summary

adjudication, the court first sustained seven of the department's objections to Lucas's evidence. The court then ruled that Lucas "failed to comply with the requirements for a separate statement as to issues 2, 3, 6, 7, 8, and 9," and the court granted summary adjudication on those issues on that basis. Concluding that this left "no triable issues regarding the essential elements of the [remaining] claims presented in the complaint," the court granted summary judgment.

From the resulting judgment, Lucas timely appealed.

DISCUSSION

I

The Trial Court's Statement Of Reasons

Lucas first contends the trial court failed to provide an adequate statement of reasons for its ruling pursuant to subdivision (g) of Code of Civil Procedure section 437c. He is incorrect.

As relevant here, subdivision (g) of section 437c of the Code of Civil Procedure provides as follows: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."

Here, the trial court explained in its ruling that it was granting the department's motion for summary judgment because Lucas "failed to comply with the requirements for a separate statement as to issues 2, 3, 6, 7, 8, and 9" and, as a result, there were "no triable issues regarding the essential elements of the claims presented in the complaint." The trial court also specifically cited to rule 3.1350(f) of the California Rules of Court

and subdivision (b)(3) of section 437c of the Code of Civil Procedure in support of its ruling.

Subdivision (b)(3) of section 437c of the Code of Civil Procedure provides as follows: “The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court’s discretion, for granting the motion.”

Rule 3.1350(f) of the California Rules of Court, which, like the foregoing statute, addresses the content of a separate statement in opposition to a motion for summary judgment or summary adjudication, provides as follows: “Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party’s references to exhibits. On the right side of the page, directly opposite the recitation of the moving party’s statement of material facts and supporting evidence, the response must unequivocally state whether that fact is ‘disputed’ or ‘undisputed.’ An opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted.”

Lucas contends the trial court’s statement of its reasons for its ruling was insufficient because the statute and the rule the court cited “refer to many requirements, and [he] was entitled to be advised which requirement(s) [the court] deemed he had failed

to meet.” But combined with the court’s express statement that Lucas “failed to comply with the requirements for a separate statement as to issues 2, 3, 6, 7, 8, and 9,” it is obvious what failure the court had in mind when it cited California Rules of Court, rule 3.1350(f) and Code of Civil Procedure section 437c, subdivision (b)(3). What the court found deficient was that Lucas’s separate statement did not list issues 2, 3, 6, 7, 8, and 9 at all and therefore (in the court’s view) did not set forth any response to the material facts that the department had asserted in support of its requests for summary adjudication of those issues. No further explanation was necessary. Accordingly, Lucas’s challenge to the trial court’s statement of reasons is without merit.

II

The Sufficiency Of Lucas’s Separate Statement

Lucas contends that if the trial court granted the department’s motion for the reason we have concluded the court did, the court erred because a party opposing a motion for summary judgment/summary adjudication need only address each undisputed fact asserted by the moving party *once* (which he did) and need not repeat his or her response to each claimed undisputed fact every time the moving party repeats that fact in its separate statement with respect to subsequent requests for summary adjudication.

Lucas is correct that nothing in the statute or the rule cited by the trial court expressly requires a party opposing a motion for summary adjudication made in the alternative to a motion for summary judgment to repeat its responses to the undisputed facts asserted in support of the motion for summary judgment when the moving party reasserts those same facts in support of its subsequent request(s) for summary adjudication. While it would have been the better practice for Lucas to have ensured that his separate statement mirrored the department’s separate statement with respect to all of the issues asserted, his failure in that regard did not give the trial court a reasonable basis for granting summary judgment against him.

“The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed.” (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.) “[W]e do not question the right of a trial court to refuse to proceed with a summary judgment motion in the absence of an adequate separate statement from the opposing party. [Citation.] But the proper response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement rather than entering judgment against that party based on its procedural error.” (*Id.* at p. 1211.)

Here, to get to its ruling in favor of the department, what the trial court did was address the department’s requests for summary adjudication (issues 2, 3, 6, 7, 8, and 9) before addressing the department’s motion for summary judgment (issue 1). In this manner, with blinders on as to what Lucas set forth in his separate statement in response to the motion for summary judgment under the heading of issue 1, the trial court was able to conclude that Lucas had not created any triable issue of fact as to the two causes of action that remained because he had “failed to comply with the requirements for a separate statement as to issues 2, 3, 6, 7, 8, and 9.” Based on this approach, the court was able to grant summary judgment to the department *without ever considering Lucas’s responses to the facts the department asserted in support of its motion for summary judgment*. That was an abuse of discretion. It is true that under subdivision (b)(3) of section 437c of the Code of Civil Procedure, “[f]ailure to comply with th[e] requirement of a separate statement may constitute a sufficient ground, in the court’s discretion, for granting the motion.” However, “[i]t long has been the rule in this state that when discretionary power is conferred upon the courts ‘the discretion intended . . . is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its

exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in the manner to subserve and not to impede or defeat the ends of substantial justice.” (*In re Cook* (1944) 67 Cal.App.2d 20, 24-25.) While it might be an appropriate exercise of discretion to grant a motion for summary judgment where the opposing party failed altogether to file a separate statement in opposition to the motion, it was *not* an appropriate exercise of discretion here for the trial court to grant the department’s motion for summary judgment by approaching Lucas’s opposing papers in a manner that allowed the court to ignore Lucas’s responses to the facts the department asserted in support its motion.

This conclusion does not dispose of Lucas’s appeal, however. “On review of a grant of a motion for summary judgment, our task is to determine the validity of the ruling as a matter of law regardless of the reasons that may have motivated the trial court.” (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 806.) Thus, we must reach the question the trial court failed to reach -- whether the department was entitled to judgment as a matter of law in this case. Accordingly, we now turn to the merits of the summary judgment motion.

III

Racial Harassment

We begin our discussion of the merits by noting that in his reply brief, Lucas admits that the granting of summary adjudication on issue 7 “should be affirmed.” Issue 7 was the department’s assertion that Lucas’s cause of action for racial discrimination “fails as a matter of law because he cannot make a *prima facie* showing that [the department] acted with any discriminatory motive.” Because Lucas concedes the department was entitled to prevail on his cause of action for racial discrimination, the only question that remains is whether the department was entitled to judgment as a matter

of law on Lucas's cause of action for racial harassment. Indeed, Lucas expressly acknowledges that "all that remains in this case" is his "racial harassment claim."

In his complaint, Lucas alleged he was harassed because he "was yelled at, by his supervisors, in front of other employees. Comments were also made by supervisors such as, 'I don't have to talk to you,' and 'your [*sic*] nobody.' " He alleged that this harassment was "based on his race," which is African-American.

In its motion, the department asserted it was entitled to prevail on Lucas's cause of action for racial harassment because Lucas could not show that he was subjected to severe or pervasive harassment and/or that the department's actions were based on his race. On appeal, Lucas contends that either the department did not meet its initial burden of demonstrating that it was entitled to prevail on these grounds or, if the department did meet its burden, he offered sufficient evidence to create a triable issue of fact.

We conclude that the issue of severe or pervasive harassment is dispositive here. It is unlawful for an employer or any other person to harass an employee because of the employee's race. (Gov. Code, § 12940, subd. (j)(1).) To establish harassment, it is not necessary to show loss of a tangible job benefit. (*Ibid.*) To be actionable, however, there must be more than occasional, isolated, sporadic, or trivial incidents of harassment. (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 466-467.) The harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile working environment. (*Id.* at p. 465.) " "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended." " (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130-131.) " "[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.' ” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517, quoting *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23 [126 L.Ed.2d 295, 302-303].)

On review of the summary judgment, our task is to determine whether, when the evidence is viewed in the light most favorable to Lucas, a jury could reasonably find that defendant's conduct crossed “the line that divides actionably severe or pervasive harassment in the workplace from isolated [or trivial] offensive acts that, as an irritant of collective life, go without legal redress.” (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1008.)

Here, Lucas concedes that his cause of action for racial harassment was premised on “six incidents over a one[-]year period in which he had been yelled at by supervisors.” Specifically, Lucas premised his harassment cause of action on the following events:

1) In November 2007, Robert Birge yelled at Lucas, but Lucas could not recall anything he said.

2) That same month, Lucas asked Ray Eisert about being paid for overtime he had worked that Eisert had “kept off the books.” Eisert denied that Lucas had any overtime to be paid. When Lucas said that he was entitled to be paid if he worked the hours, Eisert “got upset.” Lucas said he was going to file the paperwork to get paid, and Eisert yelled that Lucas “could do whatever [he] darn well want[ed] to,” but Lucas was not going to get paid. However, Lucas did get paid for the overtime.

3) In December 2007, Lucas believed some work that was being attempted was unsafe, and Birge yelled at Lucas that he (Birge) could “basically do what he deemed appropriate” “[a]nd there was words that went back and forth.”

4) In April 2008, Eisert yelled at Lucas over the intercom when other employees were present. Eisert asked Lucas to take care of a job, and Lucas said, “ ‘All right, I need some information. Do you know where a Jim Hanely is?’ ” At that point, Eisert “began yelling and screaming at [Lucas].” Eisert told Lucas, “ ‘Don't ask any questions, darn it.

If I say go, you just go.’ ” Eisert was “screaming at the top of his lungs [so that Lucas] had to hold the phone away from [his] ear.” After Lucas completed the job, he told Eisert it was “very disrespectful to be screaming and yelling,” but Eisert only proceeded to “beg[i]n yelling and screaming” again, repeating that Lucas was “a nobody” and that Eisert did not have to talk to him. When Lucas turned to leave, Eisert yelled that he did not “have to ever talk to [Lucas] because [Lucas didn’t] really matter.”

5) On July 11, 2008, three supervisors -- Birge, Williams, and Steve Melendes -- “came into the electrical shop and began yelling and screaming at [Lucas].” First, Williams “said something to the effect that he had had enough of [Lucas] interfering or disrupting their projects or jobs. He’s not going to put up with it.” At the same time, “Bob Birge was saying that he’s tired of [Lucas] telling them how they are going to do a job and it went on with the screaming and yelling.” After about four minutes of that, “Steve Melendes stepped forward and began yelling in [Lucas’s] face and saying, ‘This is bullshit, this is fucking bullshit, who do you think you are,’ you know, ‘You don’t tell us what to do, we are the bosses, we tell you and you just better damn well do it,’ and continued along that line.” When Lucas “tried to tell them that there was no problem . . . and that this was unnecessary,” Melendes told him “to shut up, who do I think I fucking am, I’m nothing and, you know, and it went on like that.” When Lucas raised his voice and started to leave, Williams explained that he did not really know what was going on, he had only followed Birge and Melendes because he believed Lucas was stopping them from being able to do the job that day. Lucas told Williams that if Williams “was doing his job as supervisor, he should have stopped them, called them in his office, f[oun]d out what was going on before he came in and joined in.” At that point, Williams apologized to Lucas and Lucas “said something to the effect that everyone needed to apologize for what had just happened.”

6) In August 2008, Lucas began asking questions at a safety meeting, and Eisert came out of his office and began screaming at Lucas that he needed to shut up, that Eisert

had had enough of Lucas, and Eisert did not have to answer any of Lucas's questions because Lucas was disruptive.

Even assuming the foregoing incidents were racially motivated, we conclude that a reasonable jury could not find the allegedly harassing behavior Lucas encountered was so severe or pervasive that it would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee. Because, as a matter of law, the incidents did not amount to actionable harassment, the trial court acted correctly (albeit for the wrong reason) in granting the department's motion for summary judgment.

DISPOSITION

The judgment is affirmed. The department shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

MURRAY, J.