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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PATERSON UBARIEKE,

Plaintiff and Appellant,

v.

WAL-MART STORES, INC., et al.,

Defendants and Respondents.

D058556

(Super. Ct. No. 37-2009-00092256-
CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,
Richard E. L. Strauss, Judge. Affirmed.

The trial court in this employment discrimination case, which is being prosecuted in propria persona by plaintiff, granted defendants' motion for summary judgment. Contrary to plaintiff's arguments on appeal, the trial court did not abuse its discretion in refusing to consider opposition papers plaintiff filed on the day before defendants' motion for summary judgment was heard. There is nothing in the record which excused plaintiff's failure to either timely file his opposition to the motion or obtain an extension

of time in which to file them. In any event, the record shows the defendants successfully established they were entitled to a judgment of dismissal and nothing in the opposition plaintiff filed successfully overcame the matters established by defendants' motion. Accordingly, we affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Employment*

Plaintiff Paterson Ubarieke was employed by defendant Wal-Mart Stores, Inc. (Wal-Mart), from October 2005 until November 2010, when he resigned from his position as a retail associate at Wal-Mart's Poway store.

Ubarieke worked in the store's electronics department from February 2006 until November 2006, when he was transferred to the store's hardware department. The transfer was prompted by complaints from a number of female associates who reported Ubarieke behaved inappropriately around them and an actual altercation between Ubarieke and a female associate who stated Ubarieke acted disrespectfully towards her. Although the record is not entirely clear, it appears that as a result of Ubarieke's transfer to the hardware department, his pay was decreased from \$8.50 per hour to \$8.30 an hour for November and December 2006 and then increased to \$8.55 per hour.

In June 2008, a Wal-Mart assistant manager, defendant Michael Macumber, gave Ubarieke a "coaching" session, the initial level of discipline Wal-Mart uses with its

employees.¹ The coaching addressed an incident in which Ubarieke ignored a directive from Macumber and argued with Macumber and other management personnel in the presence of customers.

In March 2009, Ubarieke received another coaching for insubordination when he ignored directives from his supervisors.

On June 12, 2009, Ubarieke received a third coaching because he both ignored a directive and threatened a supervisor with legal action.

On June 19, 2009, Ubarieke, acting in propria persona, filed the instant employment discrimination action against Wal-Mart and a number of Wal-Mart supervisors, including Macumber.

In May 2010, Ubarieke commenced a medical leave of absence. As we indicated, in November 2010 Ubarieke resigned.

2. Trial Court Proceedings

After Wal-Mart and the other defendants had successfully demurred to various versions of Ubarieke's complaint, he filed a fourth amended complaint which made discrimination, retaliation, harassment, breach of contract, and distress claims against Wal-Mart and Macumber. On June 21, 2010, Ubarieke served form interrogatories on Wal-Mart; on July 19, 2010, Ubarieke served special interrogatories and requests for documents on Wal-Mart.

¹ Verbal coaching is followed by written coaching, "decision-making day," and termination.

On August 6, 2010, Wal-Mart filed and served a motion for summary judgment, which was set for hearing on October 22, 2010. Prior to the hearing on Wal-Mart's motion, Wal-Mart served discovery responses, including objections to some of Ubarieke's discovery requests and Ubarieke moved to compel further responses. At the time the trial court set a hearing on Ubarieke's motion to compel, the court declined his request that the motion for summary judgment be continued. Instead, the trial court stated that if it granted the motion to compel further discovery, the court would then consider continuing the motion for summary judgment.

Although Ubarieke's opposition to the motion for summary judgment was due on October 8, 2010, he did not file any opposition papers on that day.

The trial court heard and denied Ubarieke's motion to compel on October 15, 2010, one week prior to the hearing on the motion for summary judgment. The trial court found that, among other matters, Ubarieke's motion was in part untimely and that the remainder of his discovery requests was overly broad and invaded the privacy of other Wal-Mart employees. At the hearing on the motion to compel, Ubarieke again asked the trial court to continue the motion for summary judgment and the trial court again denied his request.

Also, on October 15, 2010, Wal-Mart filed and served a notice of non-opposition. Wal-Mart's notice not only stated that Obarieke had failed to timely file any opposition to Wal-Mart's motion for summary judgment, but objected to any order extending the time in which Obarieke could file an opposition.

Without leave of court, on October 21, 2010, Ubarieke filed his opposition to the motion for summary judgment. The trial court conducted a hearing on the motion the following day, October 22, 2010; Ubarieke did not appear at the hearing. The trial court did not consider Ubarieke's untimely opposition and granted Wal-Mart's motion.

Ubarieke filed a motion for reconsideration, in which he argued that Wal-Mart had improperly noticed its motion for summary judgment. The trial court denied the motion for reconsideration. Ubarieke filed a timely notice of appeal.²

DISCUSSION

I

In his principle argument on appeal, Ubarieke contends the trial court erred in failing to consider his untimely opposition papers.

In considering Ubarieke's argument, we begin by noting the well-established principle that although a party may choose to act as his or her own attorney " [s]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]" [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure.

[Citations.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

This brings us to Code of Civil Procedure³ section 437c, subdivision (b)(2), which states in pertinent part: "Any opposition to the motion shall be served and filed not less

² We grant Ubarieke's request for judicial notice.

than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise." Significantly, "the case law has been strict in requiring good cause to be shown before late filed papers will be accepted." (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, disapproved on other grounds *Colmenares v. Braeman County Club, Inc.* (2003) 29 Cal.4th 1019, 1035.)

Here, Ubarieke never formally asked the trial court for permission to file his papers after the statutory deadline, did not include within the papers any declaration setting forth good cause for their late filing and in fact did not appear at the hearing and request that the papers be considered. In light of the fact Wal-Mart had filed and served a notice of non-opposition, including opposition to any request for additional time to file an opposition, it is clear Ubarieke was aware that he would need leave of court and a showing of good cause, in order to file a late opposition. On this record, in which, although aware of the need to do so, Ubarieke made no attempt to make a showing of good cause, the trial court literally had no power to consider his late opposition papers. (See *Hobson v. Raychem Corp.*, *supra*, 73 Cal.App.4th at p. 625.)

In this regard, we must recognize an unexpressed, albeit obvious subtext in Ubarieke's conduct in filing his opposition *on the day before* the hearing on Wal-Mart's motion. Had the trial court ignored the statutory time limits for filing opposition papers and considered Ubarieke's opposition papers, it would have effectively deprived Wal-

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Mart of the opportunity to file a reply to the opposition, as provided in section 437c, subdivision (b)(4). Thus, as a practical matter, in order to give Wal-Mart an opportunity to file reply papers, had the trial court been inclined to consider Ubarieke's opposition, the trial court would have been compelled to continue the motion for summary judgment. Under these circumstances, Ubarieke's late filed papers were little more than a *de facto* attempt to extract a continuance from the trial court. The trial court quite properly ignored Ubarieke's attempt to obtain a continuance by way of such an abuse of the procedures and processes available to him.

Moreover, even if we were inclined to find error or abuse of discretion in either the trial court's observation of the statutory time limits or its unwillingness to continue the hearing—and we are not—Ubarieke was not prejudiced by the trial court's expressed and implied rulings. Ubarieke's opposition papers, even if they had been considered, did not meet his burden on a motion for summary judgment.

In its moving papers, Wal-Mart established that although Ubarieke was an at-will employee, it had not terminated his employment or demoted him and thus had not violated any implied employment contract which may have arisen. Nothing in Ubarieke's opposition rebutted Wal-Mart's characterization of the limited nature of the discipline it imposed. Thus, notwithstanding Ubarieke's opposition, Wal-Mart was entitled to judgment on his implied contract cause of action.

With respect to Ubarieke's discrimination and retaliation claims, although Wal-Mart asserted it never took any cognizable adverse action against Ubarieke, it argued that

any action it may have taken against Ubarieke was justified and did not manifest any discriminatory animus. In support of its argument, Wal-Mart presented evidence Ubarieke had a great deal of conflict with female employees while he was working in the electronics department and that later, while he was in the hardware department, he had conflict with his supervisors and was insubordinate. Thus Wal-Mart's motion provided ample nondiscriminatory reasons for the transfer to hardware and later coaching sessions and placed on Ubarieke the burden of showing that Wal-Mart's explanations were either not credible or were pretexts for discrimination or retaliation against him. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-358.)

However, in his opposition papers Ubarieke agreed that in the electronics department he had experienced conflict with a number of female employees who had repeatedly asked him for assistance carrying out merchandise and that he had had a particularly pointed exchange with one female associate. Ubarieke further agreed that when he was in the hardware department, he had conflicts with Macumber with respect to his unwillingness to operate a cash register when asked to do so and that his work was thereafter subject to scrutiny.

Ubarieke's frank concessions of a history of conflict with other employees and his supervisors do not support any inference the reasons provided by Wal-Mart in its motion were either not credible or were in any way a pretext for discrimination or retaliation. (See *Guz v. Bechtel, supra*, 24 Cal.4th at pp. 354-358.) While Ubarieke's assertion that in both sets of circumstances he was merely responding to what *he* considered was unfair

treatment by other employees and supervisors may call into question the judgment Wal-Mart's supervisors exercised, such errors in judgment will not support either a discrimination or retaliation claim. (*Guz v. Bechtel, supra*, 24 Cal.4th at p. 358.)

In sum, Ubarieke's opposition papers did not undermine Wal-Mart's right to judgment and hence he was not prejudiced by the trial court's unwillingness to consider them.

II

Following the trial court's order granting Wal-Mart's motion for summary judgment, Ubarieke moved for reconsideration. In his motion, Ubarieke argued Wal-Mart failed to give him 75 days' notice required by section 437c, subdivision (a).

The record shows Wal-Mart both mailed and *personally* served its motion 77 days before the hearing. Thus, Ubarieke received adequate notice of the hearing. In any event, any defect in notice of the hearing was not a new fact which would support a motion for reconsideration. (§ 1008, subd. (a).) Accordingly, the trial court did not err in denying Ubarieke's motion for reconsideration.

III

Ubarieke also argues the trial court erred in denying his motion to compel further answers to his interrogatories. In a closely related argument, Ubarieke contends the trial court erred in denying the requests to continue the motion for summary judgment he made both before and immediately after his motion to compel was denied. We review the trial court's orders denying the motion to compel and requests for continuance for

abuse of discretion. (*Costco Wholesale Corp. Superior Court* (2009) 47 Cal.4th 725, 732 [discovery]; *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270 [continuance].)

Wal-Mart served responses to Ubarieke's form interrogatories on July 26, 2010, and responses to his special interrogatories on August 18, 2010. By way of his October 1, 2010 motion to compel, Ubarieke sought further responses to both his form and special interrogatories. The trial court properly denied the motion to compel further responses to the form interrogatories because as to those interrogatories, Ubarieke's motion was untimely. (§ 2030.300, subd. (c).)

As to the special interrogatories, which sought wholesale information about the terms of compensation, benefits and conditions of employment of all associates in Wal-Mart's various departments hired in the prior six years, the trial court properly denied the motion to compel. The interrogatories were overly broad in seeking information completely unrelated to the conflicts which gave rise to Wal-Mart's discipline of Ubarieke and invaded the privacy of large numbers of current and past Wal-Mart employees.

Because Ubarieke was not entitled to any of the discovery he sought by way of his motion to compel, a continuance of the motion for summary judgment would not have permitted him to provide the court with any further material information. Under these circumstances, the trial court did not abuse its discretion in denying Ubarieke's requests for a continuance. (See *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254-258.)

DISPOSITION

The judgment of the trial court is affirmed. Respondents to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.