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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EARNEST A. DAVIS,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT  
INSURANCE APPEALS BOARD,

Defendant and Respondent;

COUNTY OF SAN DIEGO,

Real Party in Interest and Respondent.

D060471

(Super. Ct. No. 37-2010-00096624-  
CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Michael S. Groch, Judge. Affirmed.

Earnest A. Davis, in propria persona, appeals the trial court's denial of his petition for a writ of administrative mandamus requesting that a ruling of the California Unemployment Insurance Appeals Board (the Board) be set aside. He contends the Board wrongfully upheld the denial of his application for unemployment compensation

benefits on the ground the County of San Diego (the County) terminated his employment for "misconduct" within the meaning of Unemployment Insurance Code section 1256 (section 1256). Davis, however, has forfeited any challenge to the ruling by submitting briefing that violates basic principles of appellate practice. Moreover, even without forfeiture, we would find against him on the merits. We affirm the order.

## BACKGROUND

Davis's most recent position with the County was Associate Air Pollution Control Engineer with the Vapor Recovery/Chemical Engineering Section of the Air Pollution Control District (the District). In July 2008 the District provided him with a Performance Improvement Plan (PIP) to assist him in correcting several areas of deficiency. Davis did not complete the 2008 PIP, as he took a nine-month leave of absence because of an injury to his upper extremities.

In mid-June 2009 Davis returned to work "with a 25% reduction in keyboarding work restriction." The District accommodated Davis's work restriction, and provided him with a second PIP. Among other goals, he was expected to specifically enumerate his tasks on his daily timesheets. Davis understood the District "generates revenue based upon charging time to projects." Further, he was expected to process at least four applications for a permit to operate (PO) per day and submit them to his supervisor for approval.

Between June 16 and August 4, 2009, Davis reported to work and was paid for a total of 213.7 hours. According to his timesheets for that period, he spent only two hours, or less than 1 percent of his time, working on projects. He submitted no PO's for

approval, and provided no acceptable explanation. In September 2009 the District terminated Davis's employment on the ground he produced "virtually no work" and "failed to demonstrate even the slightest effort . . . to perform."

Davis applied for unemployment compensation benefits. The state Employment Development Department determined he was ineligible for benefits because he was fired for "misconduct" within the meaning of section 1256.<sup>1</sup>

Davis appealed, and an administrative law judge (ALJ) conducted an evidentiary hearing. The ALJ made the following findings of fact:

"The claimant had returned to work after being out on a worker's compensation claim. The claimant was not meeting the requirements of his job. The claimant was given additional training and put on performance improvement plans, but the claimant failed to follow his supervisor's directions with regard to how to do his job and what to do, and the claimant continued to fail to produce work. The discharge was for failing to follow directions and for gross incompetence.

"At the hearing, the claimant asserted that he was a victim of discrimination. The claimant alleged that he was sexually harassed, and that he was being retaliated against because he reported a sexual harassment claim. The claimant maintained that he was being discriminated against because of his ethnicity, his handicap (the claimant has a speech impediment), and for filing a worker's

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<sup>1</sup> Section 1256 prohibits the payment of unemployment compensation benefits to an employee who "has been discharged for misconduct connected with his or her most recent work." Title 22 of the California Code of Regulations, section 1256-30, subdivision (b) provides: "Misconduct connected with his or her most recent work exists for an individual's discharge if all of the following elements are present: [¶] (1) The claimant owes a material duty to the employer . . . . [¶] (2) There is a substantial breach of that duty. [¶] (3) The breach is a willful or wanton disregard of that duty. [¶] (4) The breach disregards the employer's interests and injures or tends to injure the employer's interests."

compensation claim. After . . . weighing the conflicting evidence and the voluminous documents submitted in the file, it is determined by the ALJ that the claimant's claims of sundry acts of discrimination lack adequate evidentiary support.

"In short, the claimant was discharged because he did not do his job, despite being counseled, and he did not follow instructions that he had received, and he failed to correct his performance after being put on performance improvement plans and after receiving additional training."

The ALJ determined Davis was fired for "misconduct" within the meaning of section 1256, and thus he is ineligible for unemployment compensation benefits. Davis filed an appeal with the Board. It denied the appeal and affirmed the ALJ's decision. The Board adopted the ALJ's findings of fact, with the exception of one paragraph. The ruling explains: "The claimant's appeal is largely an attack on the factual conclusions reached by the [ALJ]. In reviewing appeals from decisions of [ALJ's], this Board follows the principle that the findings of the trier of fact who heard the testimony and observed the witnesses in the proceedings below will not be disturbed unless they are against the weight of the evidence. Since we find no material error in this case, we will not substitute our judgment for that of the [ALJ]."<sup>2</sup>

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<sup>2</sup> In March 2010 the California Civil Service Commission affirmed the County's termination of Davis's employment. The Commission determined Davis was guilty of inefficiency, insubordination, and acts incompatible with or inimical to the public service. That action is the subject of a separate appeal.

Davis then filed a petition for writ of administrative mandamus in the Superior Court of San Diego County challenging the Board's decision. The court denied the petition after independently examining the administrative record.<sup>3</sup>

## DISCUSSION

The County asserts Davis has forfeited review because his briefing violates appellate standards. "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and " "all intendments and presumptions are indulged in favor of its correctness." ' [Citation.]' [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. "Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived." [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799.)

Further, "[a]ny statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—*must be supported by a citation to the record.*" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 9:36, p. 9-12; Cal. Rules of

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<sup>3</sup> Davis has not included the petition or a reporter's transcript from the trial court's hearing.

Court, rule 8.204(a)(1)(C).) " 'It is neither practical nor appropriate for us to comb the record on [the appellant's] behalf.' " (*Schmidlin v. City of Palo Alto* (2007)

157 Cal.App.4th 728, 738.) The lack of record citations allows us to deem points raised as forfeited. (Eisenberg, *supra*, ¶ 9:36, p. 9-12; *Dietz v. Meisenheimer & Herron, supra*, 177 Cal.App.4th at p. 798.)

Moreover, when a substantial evidence standard of review applies, as here, the appellant is required to set forth in his or her brief " 'all the material evidence on the point and *not merely* [his or her] own evidence. Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; Cal. Rules of Court, rule 8.204(a)(2)(C).)

Davis's briefing is largely unintelligible. The 24-page factual statement in the opening brief does not discuss the Board's findings, and ignores the evidence supporting its ruling. Rather, the factual statement focuses only on evidence Davis deems favorable to himself. The brief also pervasively omits record citations, even after we struck the original opening brief for this reason.

Additionally, the argument section of the opening brief consists of a mere two pages, and it does not challenge the sufficiency of the evidence to support the Board's ruling. It does not cite section 1256, its implementing regulation, or judicial opinions interpreting the statute. Without any citation to the record or legal authority, the argument section cursorily asserts "spoliation of evidence is proven in this case, regarding the 'smoking gun' memo of June 9, 2009 which was withheld from the [Board] hearing." We denied Davis's motion to augment the record with this memorandum,

however, because it was submitted for the first time on appeal. "An appellate court ordinarily will not consider arguments made for the first time on appeal."

(*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1491.)

Davis's reply brief is similarly unhelpful. It lists 23 issues that are ostensibly on review. An appellant, however, "abandons an issue by failing to raise it in the opening brief." (*H.N. & Frances C. Berger Foundation v. City of Escondido* (2005)

127 Cal.App.4th 1, 15.) " 'Obvious considerations of fairness in argument demand that the appellant present all of his or her points in the opening brief.' " (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18.) "An appellant cannot salvage a forfeited argument by belatedly addressing the argument in [the] reply brief." (*Ibid.*)

We agree that Davis has forfeited his challenge to the sufficiency of the evidence to support the Board's ruling. His briefing provides no assistance to this court. A party appearing in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) "[M]ere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.) Even without forfeiture, however, we would decide against Davis because the evidence amply supports the Board's ruling.

## II

### *Merits*

#### A

"On a properly filed petition for writ of mandate under Code of Civil Procedure section 1094.5, a court sitting without a jury is empowered to 'inquir[e] into the validity of any [discretionary] final administrative order or decision' made after an evidentiary hearing. [Citations.] In such a case, the scope of the court's review is limited to determining, inter alia, 'whether there was a fair trial; and whether there was any prejudicial abuse of discretion.' [Citations.] An abuse of discretion is established if an administrative agency or officer ' "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." ' " (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1370.)

"On appeal, this court reviews not the *trial court's* ruling, but the *hearing officer's* final administrative decision." (*TG Oceanside, L.P. v. City of Oceanside, supra*, 156 Cal.App.4th at p. 1370.) "[T]his court exercises the same function as the trial court and must decide if the agency's findings were based on substantial evidence." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.*, (1990) 218 Cal.App.3d 517, 531.) In doing so, we consider all relevant evidence in the administrative record, beginning with the presumption that the record contains evidence to sustain the hearing officer's findings of fact. "Neither court may reweigh the evidence, and both courts must view the evidence in the light most favorable to the [hearing officer's] findings and

indulge in all reasonable inferences in support thereof." (*Ibid.*) "Evidence is 'substantial' for purposes of this standard of review if it is of ponderable legal significance, reasonable in nature, credible, and of solid value." (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201.)

## B

Paul C. Murphy, M.D., was the parties' agreed medical examiner. His report states Davis sustained an industrial injury consistent with "[m]usculoligamentous sprain/strain, bilateral upper extremities." The report describes Davis's pain "as being intermittent and slight in nature," with occasional worsening "to slight to moderate." It also states, "It is my medical opinion the patient should be precluded from fine manipulation, contemplating 25% loss of pre-injured capacity for activities requiring finger dexterity and fine manipulation."

The District's human resource officer, Trish McElhaney, testified that after Davis returned from medical leave the District accommodated his work restriction by "limit[ing] his duties to just issuing permits which is the least amount of keyboarding necessary for the job." It took on average 400 keystrokes to process a PO, and the expectation of four per day from Davis was reasonable. Further, the District allowed him to write, rather than type, a portion of his work. He and the District agreed there were numerous tasks he could perform that did not involve typing, such as "phone calls, reviewing files, attending meetings, and conducting inspections."

McElhaney testified Davis was fired because after he returned from medical leave he failed to complete any work. He submitted no PO's for approval. On his timesheets,

he attributed the majority of his time to "interactive process" and "personnel matters."

McElhaney was not aware of any such category of work, and when she questioned Davis he told her "interactive process" meant reviewing correspondence and responding to memos. The District submitted Davis's timesheets during this period, which corroborate McElhaney's testimony. He reported spending less than 1 percent of his time at work on project-related pursuits.

McElhaney also testified that Davis's supervisor and the chief of the division met weekly with Davis concerning the 2009 PIP, and she sometimes joined the meetings. At one point, Davis asked for additional training on the processing of PO's. McElhaney was surprised because the process had not changed and an employee in his position should not have required additional training. The District provided him with more training, but he still submitted no PO's for approval.

McElhaney testified Davis complained about the inability to type because of his industrial injury. McElhaney doubted he was unable to type, however, because his e-mail account showed "hundreds of pages of e-mails sent to various people."

Davis claimed he was entitled to the accommodation of only 30 minutes of typing per hour. He relied, however, on the recommendation in a report by Richard M. Braun, M.D., which predated the report by the parties' agreed medical examiner, Dr. Murphy. Dr. Murphy did not recommend such a restriction. In any event, the type of accommodation to which Davis was entitled is a red herring. He was not fired for not typing enough or producing an insufficient amount of work, he was fired for producing

*no* work. He points to no evidence of a nexus between his lack of work and the accommodation he was provided.

Indeed, Davis's stated excuse for the lack of project-related entries on his timesheets was unrelated to accommodation. He testified he worked on and submitted PO's, but he chose not to record the time because he believed his supervisor would not approve them. He explained he had "a track record of good customer service," and "it's not fair to the applicant to charge up all of his time if my supervisor isn't approving my work." Other evidence, however, shows that Davis failed to submit any PO's for approval, and the resolution of conflicting evidence is for the trier of fact. Moreover, an employee cannot reasonably refuse to accurately fill out timesheets. Davis's practice deprived the District of income.

Further, Davis asserts "[t]here is an underlying racial tone that [he] is lazy because he is an African Male, is [sic] a stereotype perpetuated by the County." As the Board found, however, he adduced no evidence of discrimination. The administrative record includes a cryptic e-mail Davis received from a former supervisor more than two years before Davis was fired, which states: "I still want to keep this on the positive side at the District. The less I come up the better. However, if any facts need to be clarified I understand. It was never clear to me why Tom seemed to have it in for you. Of course he was a bit the same way with me. I tried to shake it off but the discrimination word kept coming to mind. *However, I have nothing to substantiate that.*" (Italics added.)

In 2009 Davis filed a complaint of racial discrimination under the California Fair Employment and Housing Act (FEHA), and in 2008 he filed a FEHA complaint for sex

discrimination and retaliation. The record does not indicate, however, how either matter was resolved, or any nexus between those matters and his termination. Davis conceded that nothing came of the sexual harassment claim. There is no indication the District's stated reasons for firing Davis were pretextual. Davis's theory is sheer speculation.

We conclude substantial evidence supports the Board's ruling. "Courts have limited 'misconduct,' as used in [section 1256], to ' " 'conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.' " ' " (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 59, citing *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 678.) In blatant disregard of the District's interests, Davis intentionally refused to perform or submit any work. Because his employment was terminated for "misconduct" within the meaning of section 1256, he is ineligible for employment compensation benefits.

DISPOSITION

The order is affirmed. The Board is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

McINTYRE, J.