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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CHARLES SMITH,

Plaintiff and Appellant,

v.

JAMES CURTIS & ASSOCIATES et al.,

Defendants and Respondents.

E053292

(Super.Ct.No. RIC510643)

OPINION

APPEAL from the Superior Court of Riverside County. Paulette D. Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Martin L. Stanley, Martin L. Stanley and Jeffrey R. Lamb for Plaintiff and Appellant.

Lubrani & Brown, Michael D. Lubrani and Lawya Rangel for Defendants and Respondents.

This is an appeal from a summary judgment entered against Charles Smith, plaintiff and appellant (plaintiff), on his complaint against James Curtis and James Curtis

& Associates, defendants and respondents (defendants), for damages based on legal malpractice. Plaintiff contends his filings in opposition to defendants' motion for summary judgment were sufficient to raise a triable issue of material fact regarding whether he had a meritorious claim for wrongful employment termination and, therefore, the trial court erred in granting summary judgment in defendants' favor. We disagree, for reasons we explain below.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff filed his complaint against defendants on October 14, 2008, seeking damages based on legal malpractice that allegedly resulted from defendants' representation of him in connection with his termination from employment by Jurupa Community Services District (JCSD). After filing their answer in the form of a general denial to plaintiff's complaint, defendants moved for summary judgment on the ground that their negligence had not caused any damage to plaintiff because he did not have a meritorious claim against JCSD.

More particularly, defendants asserted in their summary judgment motion that JCSD terminated plaintiff's employment as its operations manager on March 2, 2007, after an investigation revealed plaintiff had failed to adequately perform his duties. Plaintiff retained defendants to represent him and in that capacity defendants requested a hearing before JCSD's personnel committee. Defendants represented plaintiff at the personnel committee hearing, which took place on August 1 and August 28, 2007. After taking testimony and reviewing evidence, JCSD's personnel committee upheld the termination of plaintiff's employment. Defendants did not file a timely petition for writ

of administrative mandamus to review the personnel committee's decision. As a result of that oversight, plaintiff sued defendants for negligence.

Defendants asserted in their summary judgment motion that their negligence did not cause any injury to plaintiff because JCSD had cause to terminate plaintiff's employment. Therefore, plaintiff did not have a meritorious claim against JCSD for wrongful employment termination. Because plaintiff did not have a meritorious claim against JCSD, defendants' negligence did not cause any injury to plaintiff, and defendants were entitled to judgment in their favor and against plaintiff.

In his opposition, plaintiff asserted that a triable issue of material fact existed regarding whether he had a meritorious claim against JCSD. In particular, plaintiff asserted, in terminating his employment, that JCSD (1) was retaliating against him for engaging in the protected activity of filing a grievance in May 2006 in which plaintiff claimed a JCSD board member, Cook Barela (Barela), was harassing plaintiff by sending threatening and defamatory emails to him, and in doing so, created a hostile work environment; (2) failed to follow its policy of progressive discipline; (3) did not have cause to terminate plaintiff's employment; and (4) was biased against him as evidenced by the composition of the personnel committee that affirmed the decision to terminate plaintiff's employment.

The trial court found that defendants' showing was sufficient to negate the causation element of plaintiff's legal malpractice claim, and that plaintiff's opposition did not create a triable issue of material fact regarding whether defendants' negligence

caused injury to plaintiff. Therefore, the trial court granted summary judgment in favor of defendants and against plaintiff.

## **DISCUSSION**

### **1.**

#### **STANDARD OF REVIEW**

We review an order granting summary judgment de novo, and we consider all the evidence except that to which objections were made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Our review is guided by the principle that a defendant moving for summary judgment must demonstrate that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*)). If the defendant's moving papers support a finding in the defendant's favor, the burden shifts to the plaintiff to present evidence that creates a triable issue of material fact on the challenged elements or defense. (*Aguilar*, at p. 849.) In order to meet that burden, "[t]he plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Ibid.*, quoting former § 437c, subd. (o)(2), now subd. (p)(2).) Further, the opposing party must produce admissible evidence demonstrating the existence of a triable issue of material fact. (§ 437c, subds. (d), (p).) We review a trial court's evidentiary rulings on summary

judgment for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

“Our review of the summary judgment motion requires that we apply the same three-step process required of the trial court. [Citation.] ‘First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent’s pleading. [Citations.] [¶] Secondly, we determine whether the moving party’s showing has established facts which negate the opponent’s claim and justify a judgment in movant’s favor. [Citations.] . . . [¶] . . . [T]he third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]’ [Citation.]” (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 258.)

## 2.

### ANALYSIS

The elements of a cause of action for legal malpractice are ““(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. . . .”” (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536.) Such actions are tried as a “case-within-a-case” or “trial-within-a-trial.” (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832-834 [recounting the “long line of cases adopting the trial-within-a-trial method of proof when an attorney is accused of losing a client’s legal claim or

defense” (*id.* at p. 832) and noting that “[c]ertainly to date, no other approach has been accepted by the courts” (*id.* at p. 834)].) The case-within-a-case approach “simply requires that to prove damages in certain types of legal malpractice lawsuits, the underlying case in which the malpractice allegedly occurred must be tried as part of the malpractice claim in order for the plaintiff to establish the amount of the damages caused by the malpractice.” (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 740.)

#### **A. Defendants’ Showing in Support of Summary Judgment**

In this case, plaintiff alleged in his initial pleading, a Judicial Council form complaint for damages based on negligence, that defendants were licensed attorneys whom plaintiff hired “to represent him regarding his action against Jurupa Community Services District.” Plaintiff alleged that defendants failed to exercise reasonable skill and care in representing him and, as a result, he “lost good and valuable claims and/or incurred attorneys fees and costs, and/or suffered a negative result,” all to plaintiff’s damage “in an amount to be determined according to proof.”

As previously noted, defendants generally denied the allegations of plaintiff’s complaint and asserted numerous affirmative defenses, including their second affirmative defense that plaintiff failed to allege facts to establish a causal link between defendants’ conduct and plaintiff’s alleged injury, and their eighth affirmative defense that plaintiff’s underlying claim lacked merit and would not have resulted in a judgment for plaintiff.

Consistent with the noted affirmative defenses, defendants asserted in their motion for summary judgment that it was undisputed JCSD terminated plaintiff’s employment for cause, as set out in JCSD’s notice of proposed termination dated February 21, 2007,

and its notice of determination of proposed termination, dated March 2, 2007.

Defendants also asserted it was undisputed that JCSD's personnel committee voted unanimously to terminate plaintiff's employment.

In the notice of proposed termination, JCSD interim general manager, Eldon Horst, stated that he had hired an independent investigator to investigate the circumstances under which the California Department of Health Services (DHS) issued a notice of violation on December 26, 2006, to JCSD for failing to perform water sampling mandated under JCSD's water supply permit. The permit requires, among other things, that when nitrates in JCSD's water supply exceed 35 mg/L (milligrams per liter), JCSD's laboratory, E.S. Babcock & Sons (Babcock), must notify JCSD's water quality contact person, and a confirmation sample must be taken by JCSD within 24 hours. Plaintiff, as JCSD's operations manager, is the designated contact person to whom Babcock should have sent all correspondence. JCSD asserted that plaintiff had failed to advise Babcock of this requirement, as well as other requirements of JCSD's water supply permit.

On December 5, 2006, Lee Rivero, a JCSD water quality technician, drew a water sample from a water blend point. The nitrate level in that sample measured 41.8 mg/L. In accordance with the pertinent procedure, the technician drew a second water sample that he sent to Babcock for analysis. Plaintiff, as operations manager, was responsible for training Rivero on the requirements of JCSD's water supply permit and the so-called "980 blend plan." The notice of proposed termination stated that plaintiff did not adequately train Rivero. Instead, plaintiff gave Rivero a copy of the blend plan permit and told him to read it. As a result, Rivero "was not advised of the importance of

[JCSD's] compliance with the testing requirements for water samples with nitrate levels exceeding 35 mg/L and was not aware of [JCSD's] duty to perform a confirmatory test within 24 hours of the December 5, 2006, sample.”

The notice of proposed termination stated that plaintiff had directed Babcock to send nitrate test results to plaintiff's administrative assistant, Denise Waldie, but that plaintiff had not trained Waldie about the nitrate compliance requirements of JCSD's water supply permit or the 980 blend plan. Consequently, she did not know about the retesting requirement when a water sample exceeds 35 mg/L. The notice of proposed termination also stated that although plaintiff was provided with the results of Rivero's water sample and Babcock's test on December 7, 2006, he did not address the issue until December 12, 2006. At that point, plaintiff directed Rivero to take the second sample that should have been taken on December 7. Plaintiff also directed Rivero to notify the DHS that JCSD had failed to conduct the confirmatory retest within the mandated 24 hours. As a result, on December 26, 2006, DHS issued a notice of violation to JCSD for not complying with the terms of its permit. On December 28, 2006, plaintiff advised JCSD's interim general manager about the notice of violation and the failure to conduct a confirmatory test within 24 hours.

The notice of proposed termination stated that the previously noted errors and oversights are “indicative of a larger problem [plaintiff has] exhibited in [his] communication with [JCSD] staff and with staff of the agencies with which [JCSD] works. [Plaintiff has] repeatedly failed to provide clear communications, which has led to confusion among the employees [plaintiff] supervise[s] and with outside agencies.”

The notice of proposed violation set out six instances from October and November 2006 in which plaintiff failed to respond to a request for information, failed to communicate clearly, or responded inappropriately. In October 2006, plaintiff was suspended without pay for two days as a result of inappropriate comments he made in an email sent to subordinates, and his failure to respond to questions from JCSD's interim general manager. The notice of proposed termination concluded by stating that plaintiff's conduct violated JCSD's personnel manual in eight specific ways.

Defendants showing in support of their summary judgment motion included plaintiff's written response to the notice of proposed termination in which he purported to identify facts that refuted the claims against him. For example, in what plaintiff designated "1st Fact," he asserted that the people who conducted the investigation of the circumstances surrounding the December 26, 2006, notice of violation were friends of the interim general manager, Eldon Horst; that JCSD violated its personnel policy regarding disciplinary actions because it did not give plaintiff any written or oral notices of failure to perform his duties; and that the notice of proposed termination did not follow proper dates and times for a response. Plaintiff also claimed that in proposing to terminate his employment, JCSD was violating its own personnel manual, which calls for progressive discipline; that JCSD's proposed termination of plaintiff's employment was not for cause but rather was in retaliation for his filing a grievance in July 2006; and that termination of his employment was inconsistent with past practices of JCSD in dealing with "minor infractions" and is also inconsistent with plaintiff's past performance reviews.

After reviewing plaintiff's response, JCSD issued its "notice of determination of proposed termination" on March 2, 2007. In that notice, JCSD terminated plaintiff's employment based on the reasons set out in the notice of proposed termination, and reiterated in the notice of determination.

On March 12, 2007, defendants, acting on plaintiff's behalf, requested a hearing before JCSD's personnel committee. The personnel committee conducted that hearing in August, and on November 2, 2007, issued its decision terminating plaintiff's employment. The factual findings supporting that decision are set out in the written decision and include plaintiff's failure to adequately train his staff regarding the compliance requirements of JCSD's water supply permit, JCSD's 980 blend plan, and the significance of a water sample in which the nitrate level exceeds 35mg/L, as a result of which the DHS issued a notice of violation to JCSD in December 2006.

Defendants acknowledged in their summary judgment motion that they missed the 180-day deadline for filing a petition for writ of administrative mandamus to review the personnel committee's decision terminating plaintiff's employment.

### **B. Plaintiff's Showing in Opposition to Summary Judgment**

Because defendants showed in their moving papers that JCSD terminated plaintiff's employment based on his failure to perform his job duties, in order to raise a triable issue of material fact, plaintiff had to demonstrate that JCSD improperly terminated his employment either because it did not follow the correct procedure, or because it did not have cause to terminate his employment, or the reason offered was a

pretext to conceal a discriminatory motive. (See, e.g., *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356.)

As previously noted, plaintiff asserted in his opposition to defendants' summary judgment motion, that JCSD's termination of his employment was wrongful because (1) JCSD did not have cause to terminate plaintiff's employment; (2) JCSD terminated his employment to retaliate against him for engaging in the protected activity of filing a grievance in May 2006 in which plaintiff claimed Barela was harassing plaintiff by sending threatening and defamatory emails to him and, in doing so, created a hostile work environment; (3) JCSD failed to follow its policy of progressive discipline; and (4) JCSD was biased against him as evidenced by the composition of the personnel committee that affirmed the decision to terminate plaintiff's employment.<sup>1</sup>

### **(1.) Cause to Terminate Plaintiff's Employment**

In his opposition to defendants' summary judgment motion, plaintiff asserted that a triable issue of material fact existed with regard to whether JCSD had cause to terminate his employment. Plaintiff argued that Rivero was trained in the proper procedure for handling water samples; Babcock, the lab to which JCSD sent water samples to be tested, had been instructed to telephone plaintiff with any test results that exceeded the threshold of 35 mg/L but did not do that with the sample taken on December 5, 2006; and plaintiff complied with the water permit obligation to retest

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<sup>1</sup> Plaintiff asserted other claims that are irrelevant. For example, he claimed that his performance evaluations had all been positive, but those evaluations all preceded the incident that resulted in termination of his employment.

within 24 hours of being informed that a water sample exceeds the specified nitrate threshold because when he was informed on December 12, 2006, about the test result he immediately directed Rivero to conduct the retest.

Plaintiff does not dispute that Babcock sent an email to him on December 7, 2006, at 10:01 a.m., with the pertinent test results attached. In arguing that he was not informed of the test results until December 12, 2006, plaintiff means that he did not actually learn of those results until that date. In other words, plaintiff does not dispute that Babcock sent the test results to him by email on December 7, 2006. Instead, he argues that Babcock should have notified him by telephone,<sup>2</sup> and because it did not do that, plaintiff did not actually learn of the results until he saw them on December 12, 2006, when he reviewed a spreadsheet prepared by his assistant, Waldie.

Plaintiff's showing does not create a triable issue of material fact with regard to whether JCSD had cause to terminate his employment. The retest requirement in JCSD's permit is triggered when JCSD is informed of a sample that exceeds the specified nitrate level. Babcock's email to plaintiff on December 7, 2006, served to inform JCSD that the December 5, 2006, sample exceeded the specified level. Plaintiff's apparent failure to read that email does not negate the fact that JCSD was informed. That email triggered the duty to retest within 24 hours. Plaintiff, in arguing otherwise, claims in effect that the

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<sup>2</sup> A letter dated December 15, 2004, from Waldie to Babcock contains the instruction to contact three people, one of whom is plaintiff, by telephone if "the District is in violation or an MCL has been exceeded."

oversight was not his fault, and that either Rivero (the technician who took the sample) or Horst (JCSD's interim general manager) is responsible.

There are two reasons that argument is not persuasive. First, Rivero testified at the personnel committee hearing in this case that he did not know until after the December 2006 violation occurred that JCSD's water permit required a second sample and retest be taken within 24 hours after being informed that a sample exceeded 35mg/L. Although plaintiff argued Rivero's testimony is not plausible, he does not cite any admissible evidence to support that claim. Second, and more importantly, because plaintiff was the operations manager, the person in charge of insuring that proper sampling and testing occurred, JCSD could properly hold him responsible for the error and resulting notice of violation from DHS. In other words, defendants showed JCSD terminated plaintiff's employment because of the December 2006 notice of violation from DHS, and plaintiff did not refute that showing.

## **(2.) Retaliation or Pretext**

To support his claim that JCSD terminated his employment in retaliation for his having filed a grievance claiming harassment by Barela, plaintiff submitted his own declaration and that of Carole McGreevy, the general manager of JCSD from 1999 to September 2006. McGreevy acknowledged in her declaration that she did not have firsthand knowledge of the events that lead up to the termination of plaintiff's employment. Ms. McGreevy among other things purported to relate the policies and procedures in place at JCSD during the time she was general manager, including the purported progressive discipline policy. Defendants objected to all of McGreevy's

declaration on the ground that it was hearsay and lacked foundation as a result of which it was irrelevant.<sup>3</sup> The trial court sustained that objection.

Plaintiff's own declaration is the only other evidence plaintiff offered to support his claim that JCSD terminated his employment in retaliation for filing a grievance in which plaintiff charged Barela with harassment and creating a hostile work environment. Plaintiff claimed in that declaration that Barela harassed him by sending him "threatening and harassing" emails that used "bold and capital letters to indicate a shouting voice."

Plaintiff's declaration does not establish legally cognizable harassment. To be actionable, an employer's harassment of an employee must be based on a protected characteristic such as sex, race, religion, etc. (Gov. Code, § 12940, subs. (a), (h); *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475.)<sup>4</sup> Plaintiff did not present any evidence to show he was being harassed because of his race, sex, religion, or other protected characteristic.

But even if plaintiff had set out facts in his declaration sufficient to establish a harassment claim, he did not present any evidence to connect his filing a grievance about that purported harassment to JCSD's act of terminating his employment. The only evidence plaintiff offered to support his assertion that JCSD terminated his employment

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<sup>3</sup> Plaintiff complains that defendants were negligent because they did not call Carole McGreevy to testify at the personnel committee hearing. The fact that her testimony was hearsay and irrelevant explains why defendants did not comply with plaintiff's request to call McGreevy as a witness.

<sup>4</sup> As quoted in plaintiff's grievance, JCSD's policy against harassment prohibits "unlawful harassment."

in retaliation for plaintiff engaging in protected activity is the fact that he filed the grievance in May 2006, and the fact that JCSD terminated his employment in March 2007. Because nearly a year transpired between the two events, we cannot reasonably infer any connection between them. (See *Flait v. North American Watch Corp.*, *supra*, 3 Cal.App.4th at p. 479 [“Pretext may also be inferred from the timing of the company’s termination decision, by the identity of the person making the decision, and by the terminated employee’s job performance before termination”].)

### **(3.) Progressive Discipline**

To support his claim that termination of his employment violated JCSD’s progressive discipline policy, plaintiff submitted the declaration of Carol McGreevy, in which she recounted her understanding of JCSD’s discipline policy. As previously noted, the trial court sustained defendants’ objections to that evidence. Because plaintiff did not present any admissible evidence, such as the actual employment policy or manual, to support his assertion, he failed to create a triable issue of material fact with respect to the merit of this claim.

### **(4.) Bias**

Plaintiff’s final claim is that the personnel committee was biased against him because Barela, the board member identified in plaintiff’s grievance, was one of the two committee members who presided at his personnel committee hearing. Plaintiff does not offer any evidence to show actual bias, i.e., that as a result of Barela’s participation in the personnel committee hearing, JCSD wrongfully terminated plaintiff’s employment. Absent such a showing, plaintiff failed to create a triable issue of material fact.

3.

**CONCLUSION**

Defendants' showing in support of its summary judgment motion demonstrated that plaintiff did not have a meritorious claim against JCSD for wrongful termination of his employment. That showing negated the causation element of plaintiff's legal malpractice cause of action against defendants. Plaintiff's showing in opposition did not create a triable issue of material fact on the causation element of his legal malpractice action. Therefore, defendants were entitled to judgment in their favor.

**DISPOSITION**

The summary judgment entered in favor of defendants and respondents, James Curtis and James Curtis & Associates, and against plaintiff and appellant, Charles Smith, is affirmed.

Respondents to recover costs on appeal.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.