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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUAN TECUN,

Plaintiff and Appellant,

v.

JURUPA UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

E054002

(Super.Ct.No. RIC515765)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed.

Juan Tecun, in pro. per.; Reid & Hellyer, Michael G. Kerbs, Jenna L. Acuff for Plaintiff and Appellant.

Thompson & Colegate, Susan Knock Brennecke, and Michael J. Marlatt for Defendant and Respondent.

The Jurupa Unified School District (the District) hired Juan Tecun as a classified employee. Just 126 working days later, it fired him.

Under the District’s express written policy, a new classified employee remains on probation for “130 regularly assigned consecutive working days, including paid holidays,” but excluding any “leave of absence or vacation.”

When Tecun filed this mandate proceeding, he was apparently under three misconceptions. First, he believed the District was subject to Education Code section 45301, which has been construed to require that vacation days must be counted as part of a classified employee’s probationary period. The District, however, is not subject to Education Code section 45301. In this appeal, Tecun does not argue otherwise.

Second, Tecun believed he could add all of his accrued vacation time (6.5 days) to the total duration of his employment (126 days), which would put him over the 130-day minimum. He overlooked the fact, however, that he *used* 3 vacation days *during* the 126 days. Thus, he was double-counting. Even if he were entitled to the 3.5 days of *unused* vacation time, as well as to all of the 126 days, that would put him at only 129.5 days. Again, Tecun does not argue otherwise.

Third, Tecun believed he was entitled to credit for all of the 126 working days, even though he spent some of them (as noted) on vacation, some on sick leave, and some simply AWOL. The trial court, however, ruled that vacation, sick leave, and unexcused absences simply did not count.

With respect to this last point, Tecun argues otherwise — vigorously. He now claims that he is entitled to credit for the entire 126 days, plus the 3.5 days of unused vacation, *plus 4.75 hours of overtime*. This would give him a total of 130.1 days.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

The following facts were shown by the testimony and exhibits¹ introduced at trial.

The District's "Policy 4206" provided:

"Each new classified employee . . . shall be required to serve a probationary period of 130 regularly assigned consecutive working days, including paid holidays, . . . before attaining permanency

"At any time during this 130-day period, new employees are subject to summary dismissal. The right of hearing is not available to an employee who has not earned permanent status [¶] . . . [¶]

"Time spent on leave of absence or vacation shall not apply toward completion of the probationary period."

The District hired Tecun as a computer support technician on January 15, 2008. In April and again in June 2008, he received favorable evaluations. On July 8, 2008, the District fired him. This is a total period of 126 weekdays.

During this period, Tecun enjoyed five paid holidays.

¹ Tecun asked the clerk to transmit the original exhibits. However, they had already been returned to the parties. The parties were therefore required to deliver the originals to this court (Cal. Rules of Court, rule 8.224(b)(2)), but they failed to do so.

Ordinarily, this would mean that we would not consider the exhibits. The record, however, does include the parties' exhibit lists, which, in turn, include copies of the proffered exhibits. We will assume that these are correct copies of the trial exhibits.

He took six days of sick leave (January 17 and January 28-February 1).

He accrued a total of 6.5 days of vacation time, of which he actually used three days (January 18, May 22, and May 23).

He was paid for a total of 4.75 overtime hours.

After he failed to show up for two days in a row (July 7-8), without explanation, he was fired. He was paid for the first of these two days, but not for the second.

Following Tecun's termination, the District paid him for his remaining 3.5 days of accrued but unused vacation time.

Actual days	Worked	110
	Holidays	5
	Used vacation	3
	Sick leave	6
	Unexcused	2
	Subtotal	126
Add-ons	Overtime	0.6
	Unused vacation	3.5
	Subtotal	4.1
Total		130.1

II

PROCEDURAL BACKGROUND

In 2008, Tecun filed this mandate proceeding against the District.

Tecun took the position that Education Code section 45301 applied. Unlike Policy 4206, Education Code section 45301 provides that a classified employee must serve a probationary period consisting of 130 days of “paid service.” This has been construed to include paid vacation time. (*California School Employees Assn. v. Compton Unified School Dist.* (1985) 165 Cal.App.3d 694, 701.)

The District argued that, even if Education Code section 45301 applied, Tecun did not have 130 days of paid service. However, it also argued that, because it was not a “merit system” district (see Ed. Code, §§ 45240-45320), Education Code section 45301 did not apply; rather, under Education Code section 45113, it was entitled to adopt its own probationary period policy for classified employees.

In 2011, after a trial, the trial court denied the petition. It found that the District had not adopted a merit system, and therefore Policy 4206 was controlling. Accordingly, it also found that Tecun was not entitled to credit for any vacation time or for any days he did not show up to work (i.e., sick leave and unexcused absences). It did not make any findings regarding overtime.

The trial court concluded that Tecun had not worked “130 ‘regularly assigned consecutive working days’ [The District] was within its rights in terminating his employment during the probationary period.”

III

THE CALCULATION OF THE PROBATIONARY PERIOD

To prevail, Tecun would have to show that he is entitled to credit for *all* of the 126 working days during his employment (including used vacation, sick leave, and unexcused absences) plus *all* of the 4.1 “add-on” days that he is claiming (consisting of unused vacation and overtime). If any *one* category is excluded, the remaining categories add up to less than the required 130 days.

We will hold, however, that multiple categories must be excluded.

A. *Standard of Review.*

“In reviewing a trial court’s decision on a petition for writ of mandate, we uphold the trial court’s factual findings if supported by substantial evidence. [Citation.] We, however, independently review the court’s decisions on questions of law, including the trial court’s interpretation of statutory language [Citations.]” (*Barber v. California Dept. of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 638, 644 [Fourth Dist., Div. Two].)

B. *Used Vacation Days.*

The District’s express written policy provided that the 130-day probationary period did not include time spent on vacation. Accordingly, used vacation time must be excluded.

Tecun claims that the District conceded below that used vacation time should be included. Not so. It merely conceded that, *if Education Code section 45301 applied,*

used vacation time would be included. However, it also argued that Education Code section 45301 did not apply. In any event, even if the District made such a concession, it would not be binding on us. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 729.)

Tecun also argues that vacation time should be included for policy reasons. Even if we were convinced (and we are not), we would have no power to rewrite the District's stated policy simply because we disagreed with it.

C. *Unused Vacation Days.*

The District's policy must also be construed as excluding unused vacation days, for two reasons. First, the policy required a classified employee to “*serve* a probationary period of 130 regularly assigned consecutive *working* days” (Italics added.) This implicitly but necessarily excluded vacation days that the employee never actually took. Holidays were included, even though they were not working days, but only because the policy expressly so provided.

Second, this interpretation is reinforced by the fact that the policy also expressly excluded “[t]ime spent . . . on vacation” Admittedly, unused vacation time has not yet been actually “spent.” Nevertheless, it would make no sense to *exclude used* vacation time, yet *include unused* vacation time.

D. *Sick Leave.*

Sick leave must also be excluded. The District's policy expressly excluded “[t]ime spent on leave of absence” The Education Code provides that classified employees

are entitled to a “leave of absence for illness or injury” (Ed. Code, § 45191.) Thus, as Tecun concedes, sick leave constitutes a “leave of absence.”

Tecun argues, however, that the District’s policy violated the Education Code. His argument has two premises:

1. Education Code section 44975 provides that, with respect to *certificated* employees, “[n]o leave of absence when granted to a probationary employee shall be construed as a break in the continuity of service required for the classification of the employee as permanent.”

2. A 1955 opinion of the California Attorney General concluded that *classified* employees “are entitled to the same minimum leave rights as are provided by law for certificated employees.” (26 Ops.Cal.Atty.Gen. 275 (1955).)

The first premise is irrelevant. The fact that a leave of absence is not “a break in the continuity of service” does not mean that it must be counted as part of an employee’s probationary period. It simply means that it does not prevent the workdays before and after the leave of absence from being deemed “consecutive.” (See *Griego v. Los Angeles Unified School Dist.* (1994) 28 Cal.App.4th 515, 519-521.) We are assuming, for purposes of our opinion, that all of Tecun’s workdays were consecutive within the meaning of Policy 4206.

The second premise is obsolete. The Attorney General’s opinion was based on former Education Code section 14701, which specifically required that leaves of absence be granted to classified employees ““in the same manner as”” provided by statute for

certificated employees. (26 Ops.Cal.Atty.Gen. 275 (1955).) That section, however, has long since been repealed and replaced by Education Code section 45190 (see Historical and Statutory Notes, 27C West’s Ann. Ed. Code (2006 ed.) foll. § 45190, p. 85), which contains no similar requirement.

We conclude that Tecun has not shown that the District was required to give him credit for sick leave.

E. *Overtime.*

The District’s policy also excludes overtime. Again, it allows credit only for “*regularly assigned* consecutive working *days . . .*” (Italics added.) Overtime, by definition, is not regularly assigned. Moreover, the District evidently contemplated counting only entire days.

Once again, Tecun argues that overtime should be included for policy reasons. We decline to rewrite the District’s policy.

IV

GOOD CAUSE

Tecun also contends that, even if he was only a probationary employee, his termination was arbitrary and capricious.

He forfeited this contention by failing to raise it below. Precisely because he did not raise it, the District did not have the opportunity to present evidence on it, and the trial court made no findings on it.

Even if not forfeited, however, it lacks merit. Tecun fails to show that, legally, he could not be terminated without good cause. Ordinarily, a probationary classified employee can be terminated without good cause, notice, or a hearing. (*California School Employees Assn. v. Governing Bd. of East Side Union High School Dist.* (2011) 193 Cal.App.4th 540, 543, fn. 2; see also *Phillips v. Civil Service Com.* (1987) 192 Cal.App.3d 996, 1000 [“[a] probationary employee of a public agency may be dismissed without a hearing and without judicially cognizable good cause”].) Indeed, that is what “probationary” means.

Tecun relies on *Fugitt v. City of Placentia* (1977) 70 Cal.App.3d 868 [Fourth Dist., Div. Two]. The probationary employees in that case, however, were entitled under a memorandum of understanding to challenge their terminations as arbitrary or capricious in a grievance procedure. (*Id.* at pp. 870, 873.) There is no evidence of any similar memorandum of understanding in this case.

Separately and alternatively, there is sufficient evidence that the termination was not arbitrary and capricious. Tecun points to the fact that he had received generally favorable evaluations. Thereafter, however, he failed to show up for work for two days in a row without any explanation. This would be a nonarbitrary, noncapricious reason to terminate him.

V

DISPOSITION

The judgment is affirmed. The District is awarded costs on appeal against Tecun.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.