

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOHN NAVARRO,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO,

Defendant and Respondent.

E059429

(Super.Ct.No. CIVDS1203884)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed.

Law Office of Mark N. Strom and Mark N. Strom for Plaintiff and Appellant.

Smith Law Offices, Douglas C. Smith and Karen L. Capasso for Defendant and
Respondent.

I

INTRODUCTION

Plaintiff John Navarro (Navarro) was employed for less than a year by defendant

County of San Bernardino (County) as a probationary animal control officer trainee. In November 2010, Navarro complained about other employees abusing animals at the Devore animal shelter. The County terminated his employment on September 2, 2011. Navarro then filed a complaint for a violation of Labor Code section 1102.5,¹ the whistleblower protection statute, and four other causes of action.

In June 2013, the trial court granted summary judgment on all five causes of action brought by Navarro. However, Navarro's opening brief indicates he is appealing only the grant of summary judgment as to the first cause of action for violation of section 1102.5. Any other issues are therefore waived. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 273, fn. 12; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427-428.)

As discussed below, the issue about exhaustion of administrative remedy has been decided by statute. (§§ 98.7, subd. (g), and 244, subd. (a).) Otherwise, our review of the record finds no disputed issues of material fact. We affirm the judgment.

II

SUMMARY JUDGMENT PRINCIPLES

Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. We independently review the trial court's decision to grant summary judgment. An appellate court is not

¹ All further statutory references are to the Labor Code unless stated otherwise.

bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not the rationale. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 223; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.)

Summary judgment operates more particularly in employment cases: “A defendant seeking summary judgment must bear the initial burden of showing that ‘the action has no merit’ (Code Civ. Proc., § 437c, subd. (a), & former subd. (n)(2) [now subd. (o)(2)], and the plaintiff will not be required to respond unless and until the defendant has borne that burden. [Citations.] In this sense, upon a defendant’s summary judgment motion in an employment discrimination action ‘the burden is reversed’ (*University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1036.)” (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730-1731.) In other words, “to meet an employer’s sufficient showing of a legitimate reason for discharge the discharged employee, to avert summary judgment, must produce ‘substantial responsive evidence’ that the employer’s showing was untrue or pretextual. (*University of Southern California v. Superior Court, supra*, 222 Cal.App.3d at p. 1039.) For this purpose, speculation cannot be regarded as substantial responsive evidence. (Cf. *Burton v. Security Pacific Nat. Bank* (1988) 197 Cal.App.3d 972, 978.)” (*Martin*, at p. 1735.)

III

THE COMBINED SEPARATE STATEMENT OF MATERIAL FACTS

The following material facts are set forth by the parties in the combined separate

statement submitted by Navarro in opposition to the County's summary judgment motion. The facts are undisputed, or not effectively disputed, except where otherwise noted.

The County employed Navarro as an Animal Control Trainee I, a probationary employee, for less than one year from September 25, 2010, until September 2, 2011. Navarro worked at the Devore animal shelter, supervised by Doug Smith and Kelly Papp, who in turn reported to the program director, Greg Beck.

In November 2010, Navarro reported that two employees were abusing animals at the shelter. Beck and Susan Peterson, a human resources officer, conducted an investigation in November and December 2010. After Navarro's abuse allegations were substantiated, both employees resigned in lieu of termination. In December 2010, Navarro's supervisors gave him a favorable performance review that was approved by Beck.

On April 14, 2011, Navarro complained that a male coworker, R.F., had sent him text messages, warning him that "snitches get stitches" and referring to another person being "out for blood." Navarro interpreted these messages as a threat to his physical safety. Beck and Peterson concluded Navarro's allegations could not be substantiated. Beck again approved a favorable performance evaluation for Navarro in April 2011.

In June 2011, R.F. was scheduled to return to work from administrative leave. Navarro then accused R.F. and another employee of drinking alcohol at work, using drugs, and having gang affiliations. Again Navarro's allegations were not substantiated.

In July or August 2011, Navarro complained about another employee, S.S.—a woman he was training—who purportedly made sexual comments to him and “was [] out to get him fired.” Navarro protested to his supervisor, Doug Smith, that S.S. was putting his employment at risk. S.S. was interviewed and denied making the comments attributed to her by Navarro. According to Navarro’s declaration opposing summary judgment, two shelter workers who were not County employees, Ryan McAlmond and Nola Buyak, had approached him and stated that S.S. “was saying to employees at the shelter that she was going to do whatever she could to get rid of [Navarro].” On the morning of September 2, 2011, Navarro and his coworker, Abraham Rivera, another county employee, met with Beck and told him what McAlmond and Buyak had said about S.S. threatening Navarro. However, McAlmond and Buyak both denied having made these statements.

Beck concluded that Navarro was “fabricating evidence and witnesses in order to support his complaint” against S.S. Beck concluded Navarro should be released from his probationary employment for dishonesty. Navarro was terminated, effective September 2, 2011.

IV

DISCUSSION

The only issues on appeal are: (1) whether Navarro exhausted his administrative remedies by filing a claim with the Labor Commissioner; and (2) whether Navarro offered evidence of pretext sufficient to overcome the County’s showing of a legitimate

nonretaliatory reason for the termination of his employment.

A. Exhaustion of Administrative Remedy

The first issue has been rendered moot. Since the trial court granted summary judgment in June 2013, the California Legislature enacted section 244, subdivision (a), and amended section 98.7. Section 244, subdivision (a), now states in pertinent part: “An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy.” Section 98.7, subdivision (g), now states, “In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.”

These statutory amendments apply retroactively because they serve to clarify existing law. (*Reynolds v. City and County of San Francisco* (9th Cir. 2014) 576 Fed.Appx. 698, 700-701, citing *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 and *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828.) Senate Bill 666, the bill which enacted section 244, described the bill as “‘clarif[ying] that an employee or job applicant is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of the Labor Code, unless the provision under which the action is brought expressly requires exhaustion of an administrative remedy.’ In light of the divergent interpretations of lower courts, we give this legislative declaration weight.” (*Reynolds*, at p. 701.)

In *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321, the California Supreme Court spoke broadly about the general exhaustion requirement without specifically addressing the procedures described in Labor Code section 98.7. Because *Campbell* did not finally and definitively interpret whether exhaustion under section 98.7 is a prerequisite to litigating claims under section 1102.5, the statutory amendments did not overrule the judicial function of interpreting the law. (*McClung v. Employment Development Dept.*, *supra*, 34 Cal.4th at p. 473.)

Although California appellate courts have not yet addressed the issue since the legislative enactments of January 1, 2014, other federal district courts have followed the Ninth Circuit. (*Stein v. Tri-City Healthcare Dist.* (S.D. Cal., Aug. 27, 2014, 3:12-CV-2524-BTM-BGS) 2014 WL 4277213; *Layton v. Terremark North America, LLC* (N.D. Cal., June 5, 2014, 5:13-CV-03093-PSG) 2014 WL 2538679.) Accordingly, we hold that sections 98.7, subdivision (g), and 244, subdivision (a), apply retroactively to Navarro's claim and he was not required to exhaust an administrative remedy before filing suit. Nevertheless, Navarro's cause of action fails because the County demonstrated a legitimate nonretaliatory reason for his termination which he did not rebut successfully.

B. Nonretaliatory Reason for Termination

The only cause of action now being asserted by Navarro is a violation of the whistleblower statute based on his report in November 2010 of criminal animal abuse. Section 1102.5, subdivision (b), states, “[a]n employer may not retaliate against an

employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.” Section 1102.5, subdivision (d), states that an employer may not retaliate against an employee for having exercised his rights under subdivision (a), (b), or (c) in any former employment. “The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation.” (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384.)

Navarro does not argue that the County has not presented evidence of a legitimate business reason for his termination. Instead, he contends he presented sufficient evidence of pretext to preclude the granting of summary judgment.

A retaliation claim may be proved by circumstantial or direct evidence: “[A] plaintiff may prove retaliation by circumstantial evidence. In these cases, the plaintiff is required to first establish a prima facie case of retaliation. Once established, the defendant must counter with evidence of a legitimate, nonretaliatory explanation for its acts. If the defendant meets this requirement, the plaintiff must then show the explanation is merely a pretext for retaliation.” (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138, citing *Patten v. Grant Joint Union High School Dist.*, *supra*, 134 Cal.App.4th at 1384.) “An employer’s burden can be met by producing evidence of one

or more reasons for the adverse employment action that were ‘unrelated to unlawful discrimination.’” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1524, citing *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.App.4th 317, 360.)

An at-will employee is subject to termination by his employer for no reason or any reason, except one that violates a fundamental public policy recognized in a constitutional or statutory provision. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.App.4th at p. 335; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170, 172-174; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79, 78.) The Legislature has indicated a strong public policy against having dishonest employees in government service. (*Department of Corrections & Rehabilitation v. California State Personnel Bd.* (2007) 147 Cal.App.4th 797, 808.) “[L]ying or withholding information during an employer’s internal investigation” is proper grounds for termination or lesser discipline; “[s]uch conduct is a legitimate reason to terminate an at-will employee” such as Navarro. (*McGrory v. Applied Signal Technology, Inc.*, *supra*, 212 Cal.App.4th at p. 1528.)

Based on Beck’s investigation, the County concluded that Navarro had fabricated evidence and witnesses to support his complaints against S.S. The record does not show the County acted with retaliatory intent or animus in its decision to release Navarro. There is no causal link between Navarro’s protected activity reporting animal abuse in November 2010 and his termination on September 2, 2011. The County’s rationale for terminating Navarro’s employment because of dishonest conduct during an investigation

was a legitimate business decision the courts should not second-guess. (*McGrory v. Applied Signal Technology, Inc.*, *supra*, 212 Cal.App.4th at pp. 1527-1528; *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1224-1225.)

In order to contradict an employer's showing of a legitimate reason for the employment action taken and avert summary judgment, a plaintiff must produce "substantial responsive evidence"—and not speculation—that the employer's showing was untrue or pretextual. (*Martin v. Lockheed Missiles & Space Co.*, *supra*, 29 Cal.App.4th at p. 1735; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864.) Plaintiff must produce specific evidence creating a triable issue of fact. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67-69.)

Navarro has not presented evidence supporting a reasonable inference of unlawful retaliation. The *Aguilar* court repeatedly states that an inference is reasonable "if, and only if" it implies unlawful conduct is "*more likely than*" permissible conduct. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 857.) Inferences drawn from ambiguous evidence are insufficient to defeat summary judgment. (*Id.* at pp. 846-847, 862.) Furthermore, the *Aguilar* court emphasizes that, while it may not "weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as a trier of fact," "it must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Id.* at p. 856.)

Navarro contends Beck's stated reason for releasing him based on dishonesty is pretextual. Based on his own subjective characterization of Beck's conduct toward him,

Navarro wants the court to infer that Beck wanted “to get rid of the person who can’t get along with others,” Navarro declares that Beck initially treated him with “courtesy and respect” but, when Navarro reported the animal abuse, Beck was “visibly upset” and demanded ““when did you decide to get a conscience?”” Beck stopped being “courteous or respectful.” Beck stared at Navarro but also ignored him and once became “enraged.” However, Navarro’s speculations about the reason for Beck’s demeanor and behavior contradicts the fact that Beck approved two favorable performance evaluations for Navarro. If Beck had wanted to retaliate against Navarro for his November 2010 complaints, approving Navarro’s favorable performance evaluations does not prove a desire to “get rid of” Navarro.

Furthermore, 10 months elapsed after Navarro’s complaint and before his employment was terminated. An inference of causation is not supported where there is no direct or circumstantial evidence of causation and many months pass between protected conduct and allegedly retaliatory action. (*Manatt v. Bank of America, N.A.* (9th Cir. 2003) 339 F.3d 792, 802.) Here, the legitimate basis for Navarro’s termination is documented in Beck’s email, dated September 2, 2011, which does not make any reference to Navarro’s November 2010 complaint. Instead, Beck explains in detail how his investigation led to the reasonable conclusion that Navarro was fabricating evidence to support his complaint against S.S., which, is why Navarro was released.

Navarro also presents no evidence that the two witnesses Beck interviewed were not credible in denying they had information regarding his complaint against S.S. It is

undisputed that two non-County employees, in separate interviews with Beck, refused to corroborate Navarro's complaint. Although Rivera corroborated Navarro's version of what McAlmond and Buyak purportedly said, Beck was certainly authorized as the program director to assess all the witnesses' credibility. Navarro has not presented any actual evidence that Beck's assessment was wrong or retaliatory.

To defeat summary judgment, Navarro “““must do more than establish a prima facie case and deny the credibility of the [County's] witnesses.””” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 817; *Morgan v. Regents of University of California.*, *supra*, 88 Cal.App.4th at p. 76.) Although Beck may have commented on the need to “get rid of” or deal with Navarro, his statement does not support an inference of pretext. Instead, it shows he intended to do his job as program director by taking appropriate action regarding a personnel issue.

Additionally, we reject Navarro's argument that Beck should have fired Rivera, who never lodged a complaint against S.S. and who was not a probationary employee like Navarro. Other legitimate reasons for terminating Navarro are in the record, demonstrating he was not a congenial employee. After the County responded appropriately to his complaints about animal abuse, he continued to make unsubstantiated accusations against fellow employees. Even if Beck had believed Rivera, there were reasons for Beck not to believe Navarro and for there to be legitimate justifications for termination.

As a final note, we are wholly unpersuaded by Navarro’s reliance on *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, in which Flait was terminated in retaliation for stopping his supervisor’s sexual harassment of a coworker. In that case, Flait had worked successfully for several years as a sales representative. He was not a probationary employee. When the coworker complained about vulgar comments made to her by Flait’s supervisor, Flait confronted the supervisor who terminated him in spite of his excellent performance because he was not a “company man.” (*Id.* at p. 472.)

The appellate court reversed a grant of summary judgment, holding: “. . . there is sufficient circumstantial evidence from which a trier of fact could conclude that there is a causal link between Flait’s attempt to perform his duties under Government Code section 12940 and his termination. The evidence showed that the same highly placed corporate officer who made the offending comments was also responsible for Flait’s termination, which is probative of NAWC’s knowledge that Flait had engaged in protected activity. The evidence also showed that Flait was terminated only a few months after he last confronted Pistner, though he had worked for the company for four years. This evidence is sufficient to withstand summary judgment on the issue of NAWC’s retaliatory motives. [Citations.] Flait is not required to submit direct evidence of NAWC’s intent so long as improper motive can be inferred from circumstantial evidence. [Citation.]” (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 478.)

Navarro’s circumstances are not analogous to *Flait*. Beck did not make offending comments to S.S. and then terminate Navarro for objecting. S.S. purportedly made

offending comments to Navarro but Beck concluded Navarro was dishonest about what had happened. Furthermore, this is not a case about sexual harassment. Navarro has persistently argued he was terminated for complaining about animals being abused not because, months later, he complained about a coworker sexually harassing him. As Navarro is unable to create a triable issue as to pretext, summary judgment was properly granted.

V

DISPOSITION

As a matter of law, the County proved it had a legitimate reason for Navarro's termination and Navarro failed to prove the existence of a triable issue of fact as to pretext. The trial court correctly granted summary judgment for County. We affirm the judgment.

The County, as the prevailing party, shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.