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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DEL CAMARA,

Plaintiff and Appellant,

v.

COUNTY OF STANISLAUS et al.,

Defendants and Respondents.

F061912

(Super. Ct. No. 631147)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County.

William A. Mayhew, Judge.

Law Offices of Daniel L. Mitchell and Daniel L. Mitchell for Plaintiff and Appellant.

Porter Scott, Michael W. Pott and Thomas L. Riordan for Defendants and Respondents.

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Appellant, Del Camara, was employed as a reserve deputy sheriff for the Stanislaus County Sheriff's Department. After being removed from his job at the Sheriff's Department Statewide Transportation Unit (STU), Camara filed a complaint

against respondents, the County of Stanislaus (County) and his two former supervisors, Sergeant McEntire and Lieutenant Harper. Camara asserted claims for age discrimination, age harassment, and retaliation.

Following Camara's presentation of his case, the trial court granted respondents' motion for judgment of nonsuit. The court found that Camara failed to establish any illegal or unconstitutional discrimination, retaliation or harassment against him. The court further concluded that Camara failed to prove that he is a member of a protected class for purposes of his claims in that he was under 40 years old at the time of the alleged discrimination.

Camara argues that he was subjected to discrimination and harassment because of filing a grievance and was retaliated against in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), title VII of the Civil Rights Act, and 42 United States Code sections 1981, 1983 and 1988. Camara asserts that he was subjected to a hostile work environment and that reporting misconduct is a sufficient protected activity.

The trial court properly granted the nonsuit motion. Camara has not demonstrated that the alleged discrimination, harassment or retaliation resulted from his status as a member of a protected class. Therefore, the judgment will be affirmed.

BACKGROUND

Camara was born on August 14, 1970. He began working for the Stanislaus County Sheriff's Department in 1996 as a part-time reserve deputy and continued working as a part-time reserve deputy until 2010. Reserve deputies are ancillary at-will employees who have on-call status to fill in short-term assignments when needed. They receive no benefits from the County and are not guaranteed any particular number of hours in any given week.

From 2000 to 2007, Camara worked consistently in the STU. The STU's role is to transport prisoners around the state. Camara took care of all of the scheduling and

procedural requirements for the STU. After completing the paperwork, Camara would typically spend the rest of his shift on the road.

In late 2005, Deputy De Los Santos was assigned to the STU and was partnered with Camara. Camara trained De Los Santos. Shortly thereafter, interpersonal friction developed between Camara and De Los Santos.

In October 2006, De Los Santos complained to Sergeant McEntire, Camara's direct supervisor, about Camara's behavior. De Los Santos objected to how Camara would point out De Los Santos's mistakes to other deputies. Further, De Los Santos explained, after they had an argument, Camara would refuse to speak to De Los Santos for long periods of time. De Los Santos told McEntire that he could not work with Camara and asked if he could go back to working at the jail.

Thereafter two more deputies were assigned to the STU, Payne and Peterson. De Los Santos was partnered with Payne and Camara was partnered with Peterson. Camara was responsible for Peterson's training.

In early 2007, McEntire asked Camara why De Los Santos and Payne were working overtime. Camara looked into it and determined that De Los Santos and Payne were going too far off their route to have lunch and thereby increasing their time away from the office. Camara reported this to McEntire and McEntire said that he would take care of it. Nevertheless, De Los Santos and Payne did not change their behavior.

Camara also had interpersonal difficulties with Peterson. On an overnight trip, Peterson told Camara that he was on antidepressants. This, in conjunction with Peterson's having relayed weird dreams about crashing their vehicle, caused Camara concern because Peterson was driving a county vehicle and carrying a gun. In July or August 2007, Camara reported this incident to McEntire.

Two or three times during the course of their partnership, Peterson complained to McEntire that Camara was not training him. Camara responded that Peterson had not

learned the preliminary steps and therefore could not move on. McEntire's reaction was to tell Camara that "[y]ou guys need to get along."

On October 22, 2007, Peterson accused Camara of talking about him. According to Peterson, Camara was telling others that Peterson had filed a grievance about reserve deputies working full-time and that Peterson was trying to get Camara's job. After a somewhat heated exchange, Peterson told Camara " 'You know what, you better just watch out or I'll get you and get your job.' "

Camara immediately went to McEntire's office. Camara first said " 'I quit. I don't want to deal with this. I'm tired of all of these guys complaining about doing their job, and so I'm done.' " McEntire responded by talking Camara out of quitting. Camara then reported what had happened. He told McEntire that Peterson had threatened him and that he was scared Peterson might do something. Camara stated " 'It's getting physical, and it's a hostile work environment.' "

At a meeting with McEntire the next morning, Camara explained to McEntire that, by threatening him, Peterson was creating a hostile work environment and that he was not going to be subjected to that. McEntire stated that he could not change the work schedule without giving 14 days notice. When Camara asked whether he should get an attorney McEntire said that he would talk to his supervisor, Lieutenant Harper, and get back to Camara.

Approximately 20 minutes later, McEntire told Camara that Payne would be his new partner starting in a few days. Camara worked with Payne for seven days and then went on vacation.

When Camara returned from vacation on November 13, McEntire informed him that he and Harper had decided that Camara could no longer work in the STU. McEntire explained to Camara that he was not a team player, could not get along with the other deputies, and could not communicate with others. Camara was 37 years old at this time.

Thereafter, Camara continued to work as a reserve deputy sheriff in other departments but with fewer hours and lower pay.

In September 2008, Camara filed the underlying complaint for damages against the County, McEntire and Harper. Camara alleged causes of action for employment discrimination against the County, retaliation against the County, harassment against all defendants, and deprivation of federal civil rights against all defendants. According to Camara, he was subjected to discrimination and harassment because of his age, association, and having filed a grievance and was retaliated against.

The matter went to trial before a jury. After Camara put on his evidence and rested his case, respondents moved for a nonsuit.

The trial court granted the motion. The court noted that, in reaching its decision, it neither weighed the evidence nor considered the credibility of witnesses and interpreted the facts most favorably to Camara. Applying this standard, the court concluded that Camara could not establish a claim for age discrimination and age harassment as a matter of law because he was less than 40 years old at the time of the alleged discrimination and harassment. The court further found that Camara could not state a claim for retaliation because he did not show that he engaged in protected conduct under the FEHA. Similarly, the court determined that Camara could not demonstrate a violation of his federal civil rights because he did not demonstrate that he was discriminated against based on race or age.

DISCUSSION

1. *Standard of review.*

A nonsuit motion tests the sufficiency of the plaintiff's evidence before the defense is presented. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838.) The granting of a nonsuit motion is warranted when, disregarding conflicting evidence, giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, the trial court

determines that there is no sufficiently substantial evidence to support a verdict in plaintiff's favor. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.) In other words, the function of the trial court is analogous to, and practically the same as, that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. (*CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1051.)

Similarly, on appeal from the granting of a nonsuit, the reviewing court must resolve every conflict in the testimony in favor of the plaintiff and at the same time indulge in every presumption and inference that could reasonably support the plaintiff's case. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.) Nevertheless, the plaintiff is not relieved of the burden of establishing the elements of his or her case. (*Ibid.*) Accordingly, a nonsuit must be affirmed if a judgment for the defendant is required as a matter of law. (*Carson v. Facilities Development Co., supra*, 36 Cal.3d at p. 839.)

2. *Camara has failed to establish the elements of his discrimination claim.*

Camara argues that he has established a claim for disparate treatment discrimination under the FEHA, title VII of the Civil Rights Act and 42 United States Code sections 1981, 1983 and 1988 in that respondents "treated some employees less favorably than others because of a protected characteristic." Camara states that he seeks to recover damages for being subjected to discrimination and harassment because of filing a grievance.

a. The FEHA claim.

The FEHA makes it unlawful "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, ... to bar or to discharge the person from employment ... or to discriminate against the person in compensation or in terms,

conditions, or privileges of employment.” (Gov. Code, § 12940, subd. (a).) Where, as here, the plaintiff is claiming disparate treatment discrimination, he must establish intentional discrimination on one of the specified prohibited grounds. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549, fn. 10.)

To state a prima facie case under the FEHA, a plaintiff must at least show “ ‘actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion’ [Citation].” [Citation.]’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).) Although the specific elements of a prima facie case may vary depending on the particular facts, the plaintiff must generally provide evidence that (1) he was a member of a protected class; (2) he was qualified for the position he sought or was performing competently in the position he held; (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) some other circumstance suggests discriminatory motive. (*Ibid.*)

Here, Camara’s complaint asserted claims based on age discrimination. However, the FEHA’s age discrimination prohibition applies only to employees who have reached the age of 40. (Gov. Code, § 12926, subd. (b); *Guz, supra*, 24 Cal.4th at p. 353, fn. 19.) At the time of the alleged discrimination, Camara was 37 years old. Accordingly, Camara cannot meet the element of being a member of a protected class based on age.

On appeal, Camara does not specify a protected class to which he belonged. Rather, Camara argues that he was discriminated against because he spoke out or filed reports about misconduct in his department. However, a person who files such a grievance is not a member of a protected class under the FEHA. Because Camara did not establish that he was a member of a protected class, he did not state a prima facie case for disparate treatment discrimination. Therefore, the trial court properly entered a nonsuit judgment on Camara’s FEHA discrimination claim.

b. The federal civil rights claims.

Regarding his federal civil rights claims, Camara makes vague references to title VII of the Civil Rights Act and asserts that he was protected from discrimination by 42 United States Code sections 1981, 1983 and 1988.

“Since 1964, Title VII has made it an ‘unlawful employment practice for an employer ... to discriminate against any individual ... *because of* such individual’s race, color, religion, sex, or national origin.’ ” (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 92-93.) To prevail on such a claim, a plaintiff must present sufficient evidence that “ ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’ ” (*Id.* at p. 101.)

Here, Camara is not asserting that “race, color, religion, sex, or national origin” was involved in the County’s decision to exclude Camara from working in the STU. Accordingly, Camara cannot state a claim under title VII of the Civil Rights Act.

Similarly, Camara cannot state a claim under 42 United States Code section 1981. Under that section, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens” (42 U.S.C. § 1981(a).) This provision was meant “ ‘to proscribe discrimination in the making or enforcement of contracts against, or in favor of, *any race.*’ ” (*Gratz v. Bollinger* (2003) 539 U.S. 244, 276, fn. 23, italics added.) Since Camara is not asserting discrimination based on race, 42 United States Code section 1981 is inapplicable.

42 United States Code section 1983 provides a cause of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” The purpose of this section “is to deter state actors from using the badge of

their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” (*Wyatt v. Cole* (1992) 504 U.S. 158, 161.)

Camara asserts that the trial court erred in concluding that 42 United States Code section 1983 cannot address age discrimination. However, aside from making this statement, Camara provides no argument or citation to authority to support his contention. Accordingly, we deem this contention to be without foundation and abandoned. (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.)

Moreover, Camara has not presented any evidence that he was discriminated against based on age. As noted above, Camara was only 37 years old when the alleged discrimination occurred.

Finally, Camara asserts that he has a claim under 42 United States Code section 1988. However, this section pertains only to attorney fees. It provides that a prevailing party in certain civil rights actions, including under 42 United States Code sections 1981 and 1983, may recover “ ‘a reasonable attorney’s fee as part of the costs.’ ” (*Perdue v. Kenny A. ex rel. Winn* (2010) ___ U.S. ___ [130 S.Ct. 1662, 1671].) The purpose of 42 United States Code section 1988 is to make it possible for persons without means to bring suit to vindicate their rights. (*Perdue, supra*, at p. 1676.) Since Camara cannot state a claim under either 42 United States Code section 1981 or 1983, section 1988 is inapplicable.

3. *Camara has failed to state a claim for retaliation in violation of the FEHA.*

The FEHA makes it an unlawful employment practice for an employer to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under the FEHA or filed a complaint under the FEHA. (Gov. Code, § 12940, subd. (h).) In order to establish a prima facie case of such retaliation, “a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (*Yanowitz v. L’Oreal*

USA, Inc. (2005) 36 Cal.4th 1028, 1042.) An employee's conduct constitutes protected activity for purposes of the anti-retaliation provision of the FEHA when the employee opposes conduct that is determined to be unlawfully discriminatory under the FEHA or when the employee reasonably and in good faith believes it to be discriminatory. (*Id.* at p. 1043.)

Camara argues that he met the "protected activity" element of a FEHA retaliation claim when he reported misconduct on the part of other deputies in the STU. Camara further contends that his threat to file a harassment charge based on Peterson's alleged threats qualifies as "protected activity."

However, in making his complaints about the other deputies, Camara did not oppose any practices that are forbidden under the FEHA. None of his reports to McEntire had anything to do with discriminatory conduct. Similarly, Camara did not contend that Peterson's alleged threats were connected to some protected characteristic and therefore prohibited under the FEHA. Rather, these threats were directed at Camara's supposed role in spreading rumors about Peterson. Accordingly, Camara did not establish that he engaged in a protected activity. Therefore, the trial court properly entered a nonsuit judgment on Camara's retaliation claim.

4. *Camara has failed to state a claim for harassment under the FEHA.*

It is an unlawful employment practice for an employer, or any other person, to harass an employee because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation." (Gov. Code, § 12940, subd. (j)(1).) Whereas discrimination refers to bias in the exercise of official actions on behalf of the employer, harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) Nevertheless, both require violations of FEHA prohibitions. (*Id.* at p. 709.)

Camara argues he was subjected to hostile work environment harassment in violation of the FEHA. However, as with his discrimination claim, Camara has not specified any prohibited grounds upon which the alleged harassment was based. To give rise to liability, the workplace must be permeated with discriminatory intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279.) Since Camara has not established that he was subjected to harassment based on grounds prohibited under the FEHA, the trial court properly granted a nonsuit judgment on his harassment claims.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

LEVY, J.

WE CONCUR:

HILL, P.J.

KANE, J.