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

PHOEBE JOHNSON,

Plaintiff and Appellant,

v.

PACIFIC GAS AND ELECTRIC,

Defendant and Respondent.

F066421

(Super. Ct. No. 11CECG01896)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Phoebe Johnson, in pro. per., for Plaintiff and Appellant.

Little Mendelson, Bren K. Thomas, and Elisabeth F. Tietjen for Defendant and Respondent.

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Plaintiff Phoebe Johnson sued Pacific Gas and Electric Company (PG&E), alleging wrongful termination, discrimination, retaliation and defamation of character.

* Before Cornell, Acting P.J., Detjen, J. and Franson, J.

PG&E filed a motion for summary judgment. The trial court granted the motion and Johnson appealed.

Johnson, a self-representing litigant, did not file a separate statement responding to the material facts PG&E contended were undisputed. Pursuant to Code of Civil Procedure section 437c, subdivision (b)(3), this failure is a discretionary ground for granting a motion for summary judgment. The trial court mentioned this failure as one of the grounds for granting the motion.

The trial court's other basis for granting the motion was that the undisputed facts showed Johnson's employment was terminated for legitimate, nondiscriminatory business reasons and Johnson offered no evidence showing the proffered reasons were untrue or pretextual. The record designated by Johnson for this appeal does not include PG&E's separate statement of undisputed facts or the declarations PG&E filed to provide evidentiary support for its motion. The absence of these documents, which constitute the cornerstones for a court's analysis of any motion for summary judgment, make it extremely difficult for Johnson to carry her burden of showing the trial court erred when it granted PG&E's motion. We must presume that PG&E's moving papers were sufficient to carry its burden and, as a result, the remaining issue is whether Johnson's evidence demonstrated the existence of a triable issue of material fact.

After reviewing the evidence contained in the appellate record, including Johnson's written responses to interrogatories and document production requests, we conclude that Johnson has not demonstrated the existence of a triable issue of fact.

Therefore, the judgment is affirmed.

FACTS AND PROCEEDINGS

On April 16, 2008, PG&E employed Johnson to work as a customer service representative. On September 26, 2008, PG&E terminated her employment. During the time of her employment, Raul Guzman was Johnson's supervisor and Gary Gaither was the call center manager.

Johnson's Complaint

In June 2011, Johnson filed a complaint alleging (1) wrongful termination in violation of public policy and the labor laws; (2) gender, race and color discrimination; (3) retaliation; (4) defamation of character; and (5) unfair dealing.

Johnson alleged that in July and August of 2008 her supervisor began having meetings with her in the evaluation room during Johnson's regularly scheduled lunch break. She described the subject of those meeting as follows:

“ ... Raul Guzman proposed that she enter into the evaluation room on her lunch where he disclosed as experienced as she was she would have his position very soon, and the assistance she gave would be in her favor. Then he would disclose confidential information concerning classmates' evaluations, terminations, calls monitored, absences, and their future with the company. Raul Guzman would after the meeting, advise [her] that he would contact Incharge, to inform them on why she didn't take a lunch or why he was having her go or return at another time other than the set scheduled lunch.”

Johnson alleged that her troubles at work began when, after several occasions of the same routine, she requested to speak with the call center manager. At that point, Raul Guzman began castigating her in front of her coworkers and otherwise subjecting her to cruel and unjust hardship.

Johnson also alleged that “the action PG&E ordered her to engage in would have violated the Sherman Antitrust Act” and the California Cartwright Act. The complaint is not clear about exactly what unlawful action she had been ordered to take. In any event, Johnson alleged she was forced to choose between violating the law and losing her job.

Johnson's claim of gender, race and color discrimination appears to involve her need for time off from work after a July 13, 2008, boating accident that caused “a contusion, bruises, lacerations, open cuts, distress, and wounds.” Guzman advised her that she was being watched very closely and “that he would be unable to assure her that she would have a job to return to.” Johnson alleged that “other co workers in her class of

different race, color, were allotted time off for dentist appointments, flu, last minute appointments, no call no show ups, and were still employed.”

Johnson’s claim of defamation of character is based, in part, on a customer call that she handled on August 19, 2008. We infer from the allegations that Guzman criticized Johnson’s handling of the call on two points. First, she failed to go over certain routine matters with the customer. Second, she responded to an email during the call. As to the first point, Johnson alleged that her class was trained to avoid going over questions a second time when a customer calls back. As for emailing during a customer call, Johnson stated during her evaluation “that it was not an email, that it was a letter she was typing to her cheerleaders.”

PG&E’s Motion for Summary Judgment

On July 25, 2012, PG&E filed (1) a notice of motion for summary judgment and/or summary adjudication of issues, (2) three declarations, (3) a separate statement of undisputed material facts, and (4) a memorandum of points and authorities in support of the motion. Information about these filings is contained in the superior court docket that is part of the appellate record. None of PG&E’s moving papers were designated by Johnson for inclusion in the record on appeal.

On September 19, 2012, Johnson filed a three-page “Objection And Opposition to Motion For Summary Judgment For Defendant And Motion To Continue To Trial.” The opposition asserted that Johnson’s two causes of action for wrongful termination met the statute of limitations in Code of Civil Procedure sections 335.1 and 336. The opposition also asserted that “Plaintiff has evidence of discriminatory intent and motive that is sufficient to prove the case for wrongful termination in violation of public policy. (see

separate statement of disputed facts, on pages 1-4).”¹ Johnson’s opposition made parallel assertions about having evidence for her other claims.

Attached to Johnson’s opposition were her answers to certain of PG&E’s interrogatories and requests for production of documents. For example, one interrogatory response stated that she had given the names of “all PG&E employees that witnessed Raul Guzman discriminate, harass, and intimidate me.” Another response stated that those employees “also witnessed Gary Gaither’s demeanor change toward me from the hire date to just before termination date.” The documents attached to Johnson’s response to PG&E’s request for production of documents included her resume and emails to and from defense counsel regarding discovery and other matters.

On October 9, 2012, Johnson filed a reply memorandum supporting her objection and opposition to the motion for summary judgment. Again, Johnson asserted she had evidence of discriminatory intent and motive and had sufficient proof of her claims for wrongful termination, discrimination and retaliation.

Trial Court’s Rulings

On October 10, 2012, the trial court issued a tentative ruling to grant the motion for summary judgment. The next day, Johnson filed papers contesting the tentative ruling. Johnson’s papers reiterated her earlier position: “Plaintiff has evidence of discriminatory intent and motive that is sufficient to prove the case for wrongful termination in violation of public policy. (see separate statement of disputed facts, on

¹ This reference to a separate statement of disputed facts cannot be evaluated on the record before this court. No such document is contained in the appellate record. If the reference means a document prepared by Johnson (it refers to *disputed* facts), we must conclude that the document was never filed because (1) the trial court’s order states that Johnson did not file a separate statement and (2) none of the entries in the superior court’s docket show that Johnson filed a separate statement of disputed facts.

pages 1-4).” Johnson made parallel assertions about having evidence for her other causes of action.

On October 19, 2012, the trial court filed an order granting PG&E’s motion for summary judgment and dismissing, with prejudice, Johnson’s complaint in its entirety. The court stated that “the undisputed facts showed that [Johnson] was terminated for legitimate nondiscriminatory business reasons, the Plaintiff submitted no evidence showing that the proffered reasons for termination were untrue or pretextual, and the Plaintiff failed to file a separate statement.”

In December 2012, Johnson filed a notice of appeal.

DISCUSSION

I. STANDARD OF REVIEW

A. Motions for Summary Judgment

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).)²

Appellate courts independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing this independent review, appellate courts apply the same three-step analysis as the trial court. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607 (*Brantley*).) First, the court identifies the issues framed by the pleadings. Second, the court determines whether the moving party has established facts justifying judgment in its favor. This second step requires the court to review the moving party’s separate statement of undisputed facts and the evidence referenced in the separate statement. (§ 437c, subd. (b)(1); Cal. Rules of Court, rule

² All further statutory references are to the Code of Civil Procedure unless noted otherwise.

3.1350.) Finally, if the moving party has carried its initial burden, the court will proceed to the third step and decide whether the opposing party has demonstrated the existence of a triable issue of material fact. (*Brantley, supra*, at p. 1602; see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013), ¶ 8:166, p. 8-134.7 (rev. # 1, 2013) [three-step analysis].)

Ordinarily, appellate courts determine whether a triable issue of material fact exists by considering all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (§ 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

B. Appellant's Burden to Establish Reversible Error

It is a well-established principle of appellate procedure that the order of the lower court is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To overcome this presumption, an appellant challenging that order must affirmatively demonstrate prejudicial error. (*Ibid.*)

To demonstrate prejudicial error, an appellant needs to provide the appellate court with an adequate record of the lower court's proceedings. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [appellate record, which failed to include relevant portion of trial transcript, was inadequate to demonstrate error on the issue of damages].) Simply put, an appellate court cannot identify errors in the proceedings below if the appellate record does not fully disclose what those proceedings were and what decisions the trial court made.

This fundamental aspect of appellate review is reflected in the rule that the appellant's opening brief must support its assertions about what occurred during the trial court's proceedings by providing citations to the record. This rule was one of the subjects of this court's August 27, 2013, order to Johnson concerning her opening brief. The order advised her:

“With regard to the requirement that the opening brief support any reference [to a matter] in the record by a record citation, appellant must refer the court to the portions of the record (by record page number) that support her position as set forth in the statement of case, the statement of facts, and the argument portions of the brief. (*Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804, 808, fn. 4; *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835.)”

These requirements about providing both an adequate record and supporting citations to that record in the appellate briefs is the foundation for the principle that an appellant’s assertions of facts and matters that are not in the appellate record cannot carry the appellant’s burden of demonstrating prejudicial error.³

C. Standards Applicable to Self-Representing Litigants

An appellant’s burden to establish reversible error is not changed or lessened by the fact that the appellant is proceeding without an attorney. Self-representing litigants are subject to the standards generally applied by California courts in civil litigation. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284-1285 [self-representing litigants not exempt from statutes or court rules governing procedure].) The United States Supreme Court has interpreted the federal due process clause to reach the same result: “[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” (*McNeil v. United States* (1993) 508 U.S. 106, 113 [in ordinary civil litigation, federal procedural rules not interpreted more leniently for parties who proceed without counsel].)

³ In *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, the appellate court stated: “But this de novo [i.e., independent] review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant’s responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed. [Citations.]” (*Id.* at p. 116.)

The same approach applies in this case. The California Courts of Appeal treat self-representing litigants like any other party. Therefore, self-representing litigants are subject to the same rules of appellate procedure as parties represented by an attorney. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247 [appellant representing self on appeal must follow correct rules of procedure]; see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 [“self-representation is not a ground for exceptionally lenient treatment”].)

II. ADEQUACY OF THE APPELLATE RECORD

A. PG&E’s Showing

The record designated by Johnson in this appeal does not contain PG&E’s separate statement of undisputed facts or the declarations PG&E submitted to support the facts asserted in its separate statement.

As a result of this omission, this court is unable to independently examine those documents and determine whether PG&E, as the moving party, made “a prima facie showing of the nonexistence of any triable issue of material fact” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Due to the inadequate record, Johnson has not carried her burden on appeal of showing that the trial court committed an error in the first two steps of its summary judgment analysis. (See part I.A., *ante*; see also, *Ballard v. Uribe, supra*, 41 Cal.3d at p. 574 [adequate record is needed to establish reversible error].) In completing those steps (which concern the moving party’s showing), the trial court determined that the undisputed facts presented by PG&E showed Johnson’s employment was terminated for legitimate nondiscriminatory business reasons.

Because we must presume the trial court correctly completed those two steps of the summary judgment analysis, the remaining question in this appeal concerns the third step of the analysis and whether Johnson carried her burden of demonstrating a triable issue of material fact.

B. Johnson's Failure to File a Separate Statement

Section 437c, subdivision (b)(3) states that the opposition papers to a motion for summary judgment “shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed” The last sentence of subdivision (b)(3) states: “Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court’s discretion, for granting the motion.”

The trial court’s order granting PG&E’s motion for summary judgment was based, in part, on Johnson’s failure to file a separate statement.

Aside from stating that she is representing herself in this litigation without the aid of counsel, Johnson has identified no ground or theory for concluding that the trial court abused its discretion when it listed the failure to file a separate statement as a basis for granting the motion. It is a well-established principle of law that self-representing litigants are not excused from complying with the procedural rules applicable to all civil litigants. (*Nwosu v. Uba, supra*, 122 Cal.App.4th at pp. 1246-1247.) Therefore, the only argument Johnson presented regarding her failure to file a separate statement does not demonstrate the trial court misapplied the law or otherwise abused its discretion.

C. Johnson's Evidentiary Showing

With respect to the third step of the summary judgment analysis and whether Johnson demonstrated the existence of a triable issue of material fact, the only evidence in the appellate record is the written discovery responses included by Johnson in her opposition to the motion. In reviewing these responses, we are unable to locate information that identifies the reasons that PG&E gave for terminating Johnson’s employment and, therefore, are unable to identify any evidence that challenges the validity of these reasons and thereby creates a triable issue of fact.

In this regard, we note that PG&E might have terminated Johnson for conducting personal business during work hours. If so, Johnson’s own complaint supports this

ground by alleging that during one customer call Johnson was typing a letter to her cheerleaders.

In summary, Johnson has not shown that the trial court erred when it granted PG&E's motion for summary judgment.

III. FAILURE TO HOLD A HEARING

Johnson contends that the "superior court abused its discretion by failing to hold an evidentiary hearing to determine the rightful judgment" in her wrongful termination case. This argument is not supported by any legal authority that would have required such a hearing. Consequently, like the court in *Conley v. Lieber* (1979) 97 Cal.App.3d 646, we conclude this contention does not establish reversible error. In that case, the court stated: "Based on plaintiffs' failure specifically to articulate how the trial court abused its discretion, we hold that the court did not abuse its discretion in denying plaintiffs' motion for a hearing to consider objections" (*Id.* at p. 660.)

DISPOSITION

The trial court's order granting summary judgment in favor of defendant is affirmed. Defendants shall recover their costs on appeal.