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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LAURA MORALES,

Plaintiff and Appellant,

v.

DELANO DISTRICT SKILLED NURSING
FACILITY et al.,

Defendants and Respondents.

F068851

(Kern Super. Ct. No. CV-277757)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Gleason & Favarote, Paul M. Gleason and Torey J. Favarote for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza and Tammy C. Weaver for Defendants and Respondents.

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INTRODUCTION

After she was terminated, plaintiff and appellant Laura Morales sued her former employers, respondents Delano District Skilled Nursing Facility and North Kern South Tulare Hospital District (collectively, the “District”). She alleged causes of action for pregnancy discrimination and retaliation for requesting protected leave, among other claims.

The trial court granted the District’s motion for summary adjudication as to several of Morales’s claims. Because we conclude Morales failed to raise a triable issue of fact as to those claims, we affirm the trial court’s order.

FACTS

The District operates a skilled nursing facility. Skilled nursing facilities “provide[] skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis.” (Health & Saf. Code, § 1250, subd. (c)(1).)

Morales’s Employment with the District

The District hired Morales in September 2011 for a temporary, part-time position helping coordinate patients’ healthcare needs. In December 2011, Morales informed the District she was pregnant. The next month, the District transferred Morales to a temporary position in the admissions department.

On January 30, 2012, Morales applied for a job with the admissions department as admissions coordinator. The District hired Morales for the full-time position. The District’s written offer of employment indicated that Morales would begin at the position with a three-month “introductory period.” The District also had a general policy providing for a 90-day introductory period for employees beginning a new position.¹ The

¹ According to Morales, her probationary period should have extended to May 15, 2012, pursuant to the District’s policies. But she cites no law indicating that she could

District's offer to Morales also indicated the "assignment is planned for an unlimited duration, but no guarantee of continuous employment is made, written or otherwise." When the District hired Morales for the full-time position, it knew she was pregnant.

Morales's Responsibilities as Admissions Coordinator

The skilled nursing facility's main source of patient referrals is the Delano Regional Medical Center ("DRMC"). As admissions coordinator, Morales's job responsibilities required her to interact with DRMC staff on several issues. Morales was to communicate with "discharge planners" at DRMC to determine whether they had patients that could be transferred to the District's skilled nursing facility. Morales was also tasked with checking on patients from the skilled nursing facility who were admitted to DRMC.

Complaints About Morales's Behavior

In March 2012, a supervisor and multiple discharge planners at DRMC requested a meeting with the District regarding Morales's "increasingly rude, nonresponsive, and generally unprofessional" behavior. At the meeting, three discharge planners at DRMC "expressed their opinion that the business relationship between DRMC and the District may not be worth dealing with Ms. Morales' behavior."²

According to Morales, her supervisor, Janice Calzo, told her to "kind of tone it down a little bit" and "not to be so strong" when requesting paperwork from DRMC discharge planners.

not be terminated during the introductory period referenced in the District's initial job offer.

² Morales attempts to raise a dispute on this issue by claiming that no discharge planners ever told Lidia Albiar that they were not sending patients to the District because of Morales's behavior. Assuming Morales's claim is true, it does not raise a dispute as to whether three discharge planners expressed their opinion that the business relationship between DRMC and the District "may" not be worth dealing with Morales's behavior.

During Morales's tenure as admissions coordinator, Calzo received complaints that Morales would not return calls from physicians' offices, failed to explain the billing process to the families of patients, and was rude to nurses.³

Morales's Medical Leave

Beginning on or around March 28, 2012, Morales took a week long medical leave because she was experiencing pain in her back and was not sleeping well. On March 28, 2012, a human resources specialist with the district named Veronica Perez told Morales she did not know if her position would be held open because Morales had not accumulated many working hours. Morales said she was willing to return to the position after her leave. The conversation was "left ... at that."

³ Morales endeavored to raise a dispute as to these facts, but failed. In her opposition to the summary judgment motion, Morales claimed that "Calzo did not *testify* about any complaints that Plaintiff failed to explain the billing process to residents and their family members." (Italics added.) But the District's motion did not rely on Calzo's *testimony* to show that the complaints concerned billing information. Instead, they relied on Calzo's *declaration*, in which she described receiving "complaints from residents' families and from physicians' offices that Ms. Morales did not return their calls, and that Ms. Morales failed to explain the billing process to the residents' families." The fact that Calzo did not *testify* that the complaints concerned billing is irrelevant given that she did execute a declaration to that effect. (See Code Civ. Proc., § 437c, subd. (b)(1) [motion may be supported by declarations].)

Morales also unsuccessfully tried to raise a dispute of fact regarding the complaints she was rude to nurses. In support of the motion, the District asserted that it had "received complaints about [Morales's] attitude." In response, Morales claimed that Calzo testified at her deposition that no nurses complained directly, and that Calzo had actually learned of the complaints from the Director of Nursing.

First, the undisputed material fact as formulated by the District simply indicates that complaints were received about Morales's attitude; it does not claim those complaints came from nurses directly. Second, both Calzo's declaration and her deposition testimony make clear that the complaints did come through the director of nursing, rather than the individual nurses. In other words, there is no dispute on this issue.

Two days later, Perez told Morales her position would, in fact, be held open for up to four months.⁴ The District did hold the position open, and Morales returned to work on April 5, 2012.

Morales's Requests for Accommodation

At some point, Morales asked if she could stop wearing heels because she was tired. The request was apparently granted.⁵

Morales also contends she requested to be relieved of certain duties involving pushing patients in wheelchairs, and that request was denied.⁶

By April 30, 2012, Morales was handling some social services responsibilities in addition to her admissions department responsibilities. On April 30, 2012 (a Monday), Morales sent Calzo an e-mail saying her doctor had advised her to get more rest. Morales proposed modifying her work schedule to five to six hours per day. Calzo responded to the e-mail and directed that, beginning on Wednesday, Morales's hours would be 7:00 a.m. to 12:30 p.m.

Morales's Termination

At a meeting in early May 2012, the District's management decided to terminate Morales.⁷ Lidia Albiar (Albiar), the District's administrator, claimed the decision to let Morales go was based on her "performance issues."

⁴ The District contends Perez called Morales one day later, rather than two, but we view the evidence in the light most favorable to Morales.

⁵ At her deposition, Morales was asked if she stopped wearing heels after making the accommodation request to Calzo. Morales testified: "Well, smaller, yeah, pretty much." She was then asked if that helped her back pain to which she responded affirmatively. In any event, there is no evidence the request was denied.

⁶ This evidence led the trial court to deny the District's motion for summary adjudication as to the failure to accommodate claims.

⁷ Morales claims the District identified the wrong date as the end of her probationary period.

On May 4, 2012 the District terminated Morales. Morales was replaced by a man. Morales had been late to work on 22 out of the 56 days she worked as the admissions coordinator.⁸

Morales Present Lawsuit

Months later, Morales sued the District alleging pregnancy discrimination, among other claims. Morales alleged that the District terminated her before she could take maternity leave, failed to accommodate her physical limitations arising from her pregnancy, failed to communicate with her regarding accommodations (Gov. Code, § 12940, subd. (n)), retaliated against her for requesting protected medical leave, and failed to prevent discrimination against her. These primary allegations formed the basis of eight causes of action: pregnancy discrimination (first cause of action); failure to provide reasonable accommodation of pregnancy (second cause of action); disability discrimination (third cause of action); failure to provide reasonable accommodation of disability (fourth cause of action); failure to engage in the interactive process (fifth cause of action); unlawful retaliation (sixth cause of action); wrongful termination in violation of public policy (seventh cause of action); failure to prevent discrimination (eighth cause of action). The complaint also sought punitive damages.

The District moved for summary judgment or, in the alternative, for summary adjudication on each of the complaint's eight causes of action and its prayer for punitive damages. (See generally Code Civ. Proc., § 437c.)⁹ The court denied the motion for summary judgment and the alternative motion for summary adjudication as to Morales's causes of action for failure to accommodate and failure to engage in the interactive process required by the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.)

⁸ Albiar did not believe Morales's tardiness was discussed at the meeting where the District decided to terminate Morales.

⁹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

(i.e., the second, fourth and fifth causes of action). The court granted the alternative motion for summary adjudication as to the prayer for punitive damages and the causes of action for pregnancy and disability discrimination, unlawful retaliation, wrongful termination and failure to prevent discrimination (i.e., the first, third, sixth, seventh and eighth causes of action). The court also overruled all of the evidentiary objections submitted by the parties.

Morales dismissed the second, fourth and fifth causes of action and appealed.¹⁰ She challenges the court's ruling insofar as it granted summary adjudication on the first, third, sixth, seventh and eighth causes of action.

DISCUSSION

I. The District was Entitled to Summary Adjudication of the First and Third Causes of Action for Discrimination

Morales contends the court erred in granting summary adjudication on the disability and pregnancy discrimination causes of action (i.e., first and third causes of action). Specifically, she contends that the court “refused to consider any evidence of discrimination other than Perez’s initial statement that [she] was not eligible for a protected pregnancy leave.”

¹⁰ Usually, a trial court’s order granting summary adjudication as to some, but not all, causes of action in a complaint is not appealable because it is not a final judgment. (*Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 503.) However, a plaintiff may remove this impediment to appealability by voluntarily dismissing the remaining causes of action. (Cf. *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 308.)

In two sentences, the District briefly contends that no appealable judgment has been entered in this case because Morales “preserved ... for adjudication” the remaining causes of action (i.e., the second, fourth and fifth causes of action) by dismissing them *without* prejudice. Our treatment of this issue will be equally brief. The fact that the remaining causes of action were dismissed without prejudice is irrelevant for purposes of the one final judgment rule when, as here, there is no stipulation between the parties facilitating future litigation of the dismissed claims. (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105–1106; *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 665–667.)

A. *Standard of Review*

We review the court's orders granting summary adjudication de novo. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 753 (*Johnson*).

To determine whether an employer is entitled to summary judgment on a discrimination claim, we first determine whether it met its initial burden as moving party.¹¹ (§ 437c, subd. (p)(2) [defendant moving for summary judgment bears initial burden].) An employer meets its burden on summary judgment “if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. [Citations.]” (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098 (*Kelly*); see § 437c, subd. (p)(2).) Once this showing has been made, the burden shifts to the employee to present “evidence raising a triable issue[] that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. [Citations.]” (*Kelly, supra*, at p. 1098; see § 437c, subd. (p)(2).) If the employee fails to meet that burden, the employer is entitled to summary adjudication of the cause of action. If the employee successfully raises a triable issue regarding intentional discrimination, the summary adjudication motion must be denied.

¹¹ In its ruling, the trial court misallocated the initial burden. The trial court cited *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214–215 for the proposition that “a plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion.” (*Id.* at p. 214.) The District makes similar comments in its briefing.

Although it is true that the plaintiff bears this initial burden *at trial*, “the burden is reversed” on a motion for summary adjudication and rests initially with the moving party. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344, quoting *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150–151; see also § 437c, subd. (p)(2).) Because we conclude the District did meet its initial burden, and that Morales failed to meet hers, this erroneous statement of law was harmless.

B. Analysis

Here, the District set forth competent, admissible evidence of its reasons, unrelated to pregnancy bias, for terminating Morales. Specifically, the District showed that DRMC discharge planners complained about Morales's unprofessional behavior to the point of questioning whether the business relationship between DRMC and the District should continue. The District also produced evidence Calzo received complaints that Morales would not return calls from physicians' offices, failed to explain the billing process to the families of patients, and was rude to nurses.

This credible showing satisfied the District's initial burden.

Given the District's initial showing, the burden shifted to Morales to show "a triable issue that decisions leading to [her] termination were actually made on the prohibited basis" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 360.) She failed to do so.

1. *Perez's Comment Expressing Uncertainty About Morales's Entitlement to Protected Leave Does not Raise a Triable Issue of Material Fact*

On appeal, Morales emphasizes evidence the District was unaware, when it hired her, that Morales would be entitled to protected leave.¹² This evidence, she contends, shows that the District had always planned to terminate her once she began maternity leave. We do not agree that the evidence gives rise to such an inference.

Morales points to Perez's response to her request for pregnancy-related leave. Perez told Morales she did not know if the District would be able to hold Morales's position open because she did not have enough "hours." This evidence, Morales claims, creates a triable issue of fact as to the District's knowledge of Morales's eligibility for leave at the time it hired her as admissions coordinator. But that is not the issue on which

¹² Morales claims the trial court "ignored" this evidence. However, the trial court discussed Perez's comment in its ruling.

Morales needed to raise a triable issue of fact.¹³ To defeat summary judgment, “[t]he employee must do more than raise an issue whether the employer’s action was ... wrong or mistaken, because the overriding issue is whether discriminatory animus motivated the employer. [Citation.]” (*Johnson, supra*, 173 Cal.App.4th at p. 755.) That is, Morales needed to raise a triable issue concerning whether “intentional discrimination occurred.” (*Kelly, supra*, 135 Cal.App.4th at p. 1098.)

Perez’s comment does not create a triable dispute on the ultimate issue of discrimination.¹⁴ There is no dispute that Morales was granted the leave as requested, despite Perez’s initial uncertainty regarding the law. And, two days after conveying uncertainty about Morales’s legal right to leave, the same employee confirmed that she was in fact entitled to it. These undisputed facts simply do not give rise to the inference urged by Morales: that when the District initially hired her for the admissions coordinator position it planned to terminate her once she took maternity leave.¹⁵

2. *Morales’s Other Contentions Fail to Raise a Dispute of Material Fact*

Morales also claims other evidence shows the District had planned, since the time it hired her, to terminate her at the beginning of maternity leave.

Morales points to evidence that the District failed to follow its established policy of providing employees with written job descriptions and having employees sign written

¹³ And even if it were, there is no dispute as to this fact issue. The District does not dispute that when Perez first spoke with Morales about her leave request on March 28, 2012, she “was not sure if there was a qualifying work period for pregnancy disability leave.”

¹⁴ The District contends that Perez’s comment was a “stray remark by a non-decision maker” and does not raise an inference regarding the decision to terminate Morales. We do not accept this contention as the basis for our conclusion. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 538–545.)

¹⁵ Morales also contends the District’s employee handbook also indicates that the District misunderstood the law regarding pregnancy leave. But without evidence that the District acted with discriminatory animus, it is irrelevant that an employer might be “wrong or mistaken.” (*Johnson, supra*, 173 Cal.App.4th at p. 755.)

acknowledgments upon receipt. However, Albiar, the district administrator, testified that she had a meeting with Morales and others about the responsibilities assigned to each of them. At the meeting, Albiar gave Morales a written “task list.” The list was in a table format, with headings for “Task” and “Responsible Person.” The written list identified several tasks as Morales’s responsibility including: daily communication with DRMC, copy/organize admission packets, admission approvals from admission committee, appointment with residents, as needed, discharge planning (receive and provide communication), and referrals.¹⁶

Even assuming that this meeting and the written task list were insufficient under the company handbook, it would not alter our conclusion. While a failure to follow a company handbook can be consistent with discrimination, it does not *necessarily* raise an inference of discrimination. Sometimes, an employer’s failure to follow the company handbook does not undermine the credibility of the employer’s reasons for terminating the employee. (E.g., *Diaz v. Eagle Produce Ltd. Partnership* (9th Cir. 2008) 521 F.3d 1201, 1214–1215.) This is such a case. And, as the District argues, any written job description would not likely have expressly explained that the admissions coordinator should not be rude and unprofessional to nurses or DRMC discharge planners.

Morales also claims that the District failed to train her for the admissions coordinator position. However, she did not present evidence of a triable dispute on this issue. Instead, she cites evidence that a checklist is usually created when an employee is trained and that Calzo had not seen a checklist for Morales. But it is undisputed that Calzo was not the person who trained Morales. Morales was trained by Albiar and another District employee. Thus, Morales’s contention that the District never intended to keep her as a long-term employee as evidenced by the failure to train her is unsupported by evidence.

¹⁶ Albiar testified that this list was not necessarily exhaustive.

Morales also contends that the District required her to perform “social services duties” in addition to responsibilities as admissions director. She then proceeds to argue that the assignment of these social services duties is evidence the District did not intend to provide Morales with pregnancy leave when it hired her for the admissions director position. Morales’s conclusion does not follow from her premise. Put another way, the evidence that Morales was required to perform duties beyond admissions director responsibilities does not raise an inference that the District hired Morales intending to deny her pregnancy leave.

Morales also attempts to raise a dispute concerning an audit of her records by the medical records department. She argues that the “so-called medical records audit” was not completed until after her termination and “therefore could not have been a basis for the termination decision.” But the District’s undisputed material fact does not claim that it was a basis for its termination decision. Morales has not raised a dispute of material fact on this issue.

3. *Morales’s Evidence Does not Raise an Inference that the District Lied About its Reasons for Terminating Her*

Next, Morales claims that the District “concocted a sham termination.”

a. *Complaints from DRMC Discharge Planners*

Morales first argues that although District management claimed her interactions with the DRMC discharge planners were a primary impetus for her termination, those issues had been “resolved” by mid-March 2012. Even assuming Morales’s “issue” with the discharge planners did not reemerge from mid-March 2012 through her termination in early May, there is no reason the District could not have considered the earlier problems in determining whether Morales’s probationary period had been successful. An employer can reasonably conclude that an employee’s unprofessional behavior, though ceased for a period, might recur. And, on that basis, an employer might conclude the employee’s

probationary period was unsuccessful. In other words, Morales failed to raise a triable issue of whether the District's stated reasons were a "sham."

b. Patient Census

According to Morales, the District maintains a report that tracks the number of beds filled by patients at a given time. It was one of Morales's duties to ensure all of the beds in the facility were occupied. Yet, Morales claims that her average monthly census numbers were high compared to the time before she was hired as admissions coordinator. Consequently, she concludes that because the "census numbers did not decrease ... that could not be used as a reason for her termination."

The District's decision to discharge Morales was supported by evidence of dissatisfaction with her job performance. Morales emphasizes issues related to the patient census and argues that the patient population numbers were adequate. However, the question of whether the District's expectations were too high is not the ultimate issue. The important question is whether the patient census was used as a pretext to mask discrimination or, instead, was a business concern unrelated to her pregnancy or disability. Morales did not submit evidence that the census issue was a pretext, rather than a legitimate business consideration.

II. The District was Entitled to Summary Adjudication of the Sixth Cause of Action for Retaliation

Morales also argues that the court should have denied the motion for summary adjudication on her retaliation cause of action. However, the trial court concluded there was no evidence the District terminated Morales because she requested reduced work hours, and we agree.

First, Morales claims her one-week leave request made in late March 30, 2012, was "met with hostility" from the District. There is simply no evidence to support this claim.

Next, Morales notes that she requested a reduced work schedule and was terminated days later. She argues that the temporal proximity between the protected activity and an adverse employment action can constitute circumstantial evidence of retaliation “by itself.” This is wrong as a matter of law. Temporal proximity, by itself, “does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action.” (*Arteaga v. Brink’s, Inc., supra*, 163 Cal.App.4th at p. 334.) And the District has offered evidence of a legitimate reason for its actions in this case.

III. The District was Entitled to Summary Judgment on the Eighth Cause of Action for Failure to Prevent Discrimination

Morales also argues the trial court erred in granting summary adjudication of her failure to prevent discrimination claim. Morales disputes the trial court’s indication that she alleged no facts to support her allegation that the District failed to prevent discrimination. She responds by noting that the retaliation cause of action incorporates the prior allegations of the complaint “and then alleges that by allowing the aforementioned discrimination to occur, [the District] failed to prevent discrimination.”

We agree that plaintiffs may incorporate prior allegations in a complaint by reference. However, since we found above that the court properly granted summary adjudication of Morales’s discrimination claims, we also affirm the summary adjudication of her claims the District failed to *prevent* discrimination. (Cf. *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288–289.)¹⁷

CONCLUSION

On the discrimination causes of action, the District met its initial burden of showing evidence of “nondiscriminatory reasons that would permit a trier of fact to find,

¹⁷ Because we affirm on this basis, we need not consider the District’s alternative argument that Morales failed to exhaust her administrative remedies.

more likely than not, that they were the basis for the termination. [Citations.]” (*Kelly, supra*, 135 Cal.App.4th at pp. 1097–1098.) This shifted the burden to Morales. She failed to carry this burden because the evidence she presented does not raise any inference of discrimination. And even if Morales’s responsive showing could reasonably be viewed as raising a weak suspicion of discrimination, it would not suffice in light of the District’s “plausible, and largely uncontradicted[] explanation” (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 370.)

DISPOSITION

The trial court’s order granting summary adjudication as to the prayer for punitive damages and the first, third, sixth, seventh and eighth causes of action is affirmed. The District shall recover costs.

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P. J.

DETJEN, J.