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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KARI CAMPISE,

Plaintiff and Appellant,

v.

VALLEY CHILDREN'S HOSPITAL,

Defendant and Respondent.

F034603

(Super. Ct. No. 616761-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Doyle, Penner, Bradley & Seymour; Doyle, Penner, Bradley & Armstrong, David Douglas Doyle and Peter Sean Bradley, for Plaintiff and Appellant.

Foley & Lardner, Howard W. Cohen and Heather D. McNeill, for Defendant and Respondent.

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This case is the companion case to F034128, *Campise v. Morrison Health Care, Inc.* On August 13, 1998, Kari Campise filed a complaint against Morrison Health Care, Inc. (Morrison) and Valley Children's Hospital (VCH) pursuant to Government Code¹ section 12900 et seq., the Fair Employment and Housing Act (FEHA). VCH filed a motion for summary judgment, which was granted in part. A second motion for summary judgment was then filed by VCH, which also was granted and judgment entered in favor of VCH. We will reverse.

PROCEDURAL SUMMARY

The procedural summary of the case set forth in F034128 is adopted here. Set forth below are additional facts and case history pertinent to this appeal. Campise's complaint asserted a cause of action against VCH and Morrison, pursuant to section 12940, for sexual harassment and retaliation. VCH filed an answer to the complaint on October 5, 1998, generally denying the allegations and asserting numerous affirmative defenses.

On June 4, 1999, VCH filed a motion for summary judgment pursuant to Code of Civil Procedure section 437c. In addition to the motion, VCH filed a statement of undisputed facts; memorandum of points and authorities; several supporting declarations and copies of portions of two transcripts of depositions.

Campise filed a response to the statement of undisputed facts filed by VCH, her declaration in opposition, a statement of disputed material facts, and points and authorities in opposition to VCH's motion. VCH filed a reply, objections to Campise's declaration, and a consolidated separate statement of undisputed facts. With limited exceptions, the facts set forth as disputed material facts by Campise were undisputed by

¹ References to code sections are to the Government Code unless otherwise specified.

VCH. VCH maintained that the facts alleged by Campise were simply immaterial, and that the conduct complained of did not constitute sexual harassment or retaliation.

VCH did not dispute that Campise was an employee of VCH, worked in the kitchen at VCH, and reported to kitchen supervisors who in turn reported to Rafael Negroe and Rod Miranda, employees of Morrison. Nor did VCH dispute that Leslie Herzog, a VCH employee, was one of Campise's supervisors. It also was undisputed that Negroe assigned and adjusted daily work schedules and duties, and had the authority to discipline VCH employees. Virtually all of the conduct engaged in by Negroe, which Campise asserted constituted sexual harassment, was labeled by VCH as "undisputed and immaterial." VCH maintained that the conduct simply amounted to "isolated and trivial" remarks and incidents. With respect to the undisputed facts alleged by Campise to be retaliatory actions, VCH variously responded that these facts were disputed, undisputed, or immaterial.

On July 15, 1999, after argument, the trial court granted the motion in part. Summary adjudication was granted as to the sexual harassment claim. In addition, the trial court found that VCH had an affirmative defense under *Faragher v. Boca Raton* (1998) 524 U.S. 775 and *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 772. Summary adjudication of the retaliation claim and the claim for punitive damages was denied.

On August 6, 1999, VCH filed a second motion for summary judgment with respect to the retaliation and punitive damage claims asserted by Campise against VCH. Campise opposed the motion, asserting in part that it was barred by the provisions of Code of Civil Procedure section 437c, subdivision (f)(2). On September 3, 1999, the trial court granted the second motion for summary judgment.

DISCUSSION

Many of the issues raised in the instant appeal are raised and addressed by this court in the companion case, *Campise v. Morrison Health Care, Inc.*, F034128. We

hereby adopt the analysis and reasoning set forth in that case. Among the issues addressed in F034128 are whether: (1) Negroe is a supervisor; (2) an employer is strictly liability for harassment by a supervisor; (3) a triable issue of material fact exists regarding hostile environment and quid pro quo harassment; and (4) whether Campise has established a triable issue of material fact with respect to her claim of retaliation.

We address here those issues which are not raised and determined in the companion case.

First Motion

To the extent Morrison is the agent of VCH, VCH is strictly liable for the actions of Morrison employees. VCH acknowledged in its first summary judgment motion that it had contracted with Morrison to provide food management services for the kitchen. Although VCH's answer to the complaint was a general denial, in its first summary judgment motion VCH did not challenge the allegation of an agency relationship between Morrison and VCH. Instead, VCH took the position that Negroe was not a supervisor; there was no strict liability on the part of VCH; and Negroe's conduct did not rise to the level of sexual harassment.

Section 12940, subdivision (j)(1), provides in part that harassment of an "employee ... by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate appropriate action...." This section has been interpreted to mean that an employer is strictly liable for the actions of its supervisors *and* agents. (*Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136-1137; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1046.) The term agent is not defined in the FEHA, nor in the FEHC regulations, but is defined in the Civil Code as "one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) A supervising employee is an agent of the employer. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328.)

Under general agency principles, for purposes of FEHA, it appears that Morrison and its supervisory employees are agents of VCH in that Morrison contracted to operate the kitchen and dietary department of VCH and to act on VCH's behalf in that regard. (See *Fiol v. Doellstedt, supra*, 50 Cal.App.4th at p. 1328.) Thus, VCH would be strictly liable to Campise for conduct by Morrison employees that is actionable. (*Ibid.*)

Second Motion

On July 15, 1999, with respect to the first motion for summary judgment, the trial court addressed the retaliation claim on the merits and denied summary adjudication. VCH thereafter filed a second motion for summary judgment on August 6, 1999, with respect to the issue of whether VCH engaged in retaliatory conduct when VCH allegedly failed to permit Campise to return to work for 28 days after she was cleared to work subsequent to being injured.

Code of Civil Procedure section 437c, subdivision (f)(2), states in relevant part:

“However, a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.”

In granting the second motion for summary judgment, the trial court acknowledged that the merits of the retaliation claim, and specifically the issue of retaliation by VCH employees, was addressed in the first motion. The court, however, permitted the second motion to go forward because: (1) Campise's opposition papers to the first motion were filed late; and (2) VCH did not realize the issue was “material” when it filed its reply to the opposition papers in the first motion. The trial court then proceeded to grant summary judgment on the merits as to the second motion.

Campise challenges the ruling on the second motion on procedural grounds, as well as on the merits. We need not address the merits of the second motion for summary

judgment because we conclude the second motion should have been denied on procedural grounds.

With respect to VCH's assertion in the second motion that it did not have an adequate opportunity to respond to Campise's late-filed opposition to the first motion, the record establishes that VCH did not request a continuance or assert prejudice as a result of the late opposition. The reply brief filed by VCH in response to Campise's opposition to the first motion specifically addresses *all* the bases of alleged retaliation asserted by Campise. The reply brief argues not only that allegedly new facts should not be considered, but also the merits of the retaliation claim. Moreover, during the hearing on the first motion, counsel for VCH argued the issue of the 28-day delay in reinstatement in great detail, and referenced a declaration in counsel's possession signed by a VCH employee, which later was filed in support of the second motion.

The record reflects that the second motion simply did not raise new issues or present newly discovered evidence. As such, the second motion was improper. (*Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1096-1097.) Moreover, in bringing the second motion, VCH essentially asked one judge to reconsider and overrule the decision of another judge of the same bench. One trial judge may not reconsider and overrule the decision of another trial judge. (*Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739; *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876-877.) Thus, even if the second motion was properly before the court, it was improper for it to be heard by another judge, absent a clear showing that the first judge was unavailable to hear the matter. (*Curtin v. Koskey, supra*, 231 Cal.App.3d at p. 877.)

Supervisor

VCH contends that the amendment to section 12926, adding subdivision (j) and the definition of "supervisor," is inapplicable to Campise's case because it was enacted after the harassment occurred. (Stats. 1999, ch. 592 (Assem. Bill No. 1001), § 3.7.) This argument ignores the fact that the definition of supervisor adopted in section 12926,

subdivision (j), simply codified the definition which previously had been applied in sexual harassment cases.

In *Doe v. Capital Cities, supra*, 50 Cal.App.4th 1038, the appellate court noted that the FEHA did not contain a definition of the term supervisor. That court looked to the dictionary definition of the term, the National Labor Relations Act (29 U.S.C. § 152(11)), and the California Agricultural Labor Relations Act (Lab. Code, § 1140.4, subd. (j)). The *Capital Cities* court noted that under the definitions of supervisor contained in these three sources, a supervisor included one who had the authority to direct others and/or to assign duties to others, as well as one who has plenary authority to hire or fire other employees. (*Doe v. Capital Cities, supra*, 50 Cal.App.4th at pp. 1046-1047.) Thus, the adoption of section 12926, subdivision (j), appears merely to clarify the definition of the term “supervisor.” A statute that simply clarifies or codifies existing case law is properly applied to transactions predating its enactment. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.)

DISPOSITION

The order dated September 27, 1999, granting VCH’s second summary judgment motion is reversed and the judgment vacated. The July 15, 1999, ruling on VCH’s first summary judgment motion is reversed with respect to the summary adjudication of the sexual harassment cause of action against VCH and the determination of the availability of the defense set forth in *Faragher v. Boca Raton, supra*, 524 U.S. 775 and *Burlington Industries, Inc. v. Ellerth, supra*, 524 U.S. 742. The matter is remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to Campise.

Cornell, J.

WE CONCUR:

Vartabedian, Acting P.J.

Wiseman, J.