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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

LARRY VAUGHAN,
Plaintiff and Appellant,

v.

JACOBS & JACOBS,
Defendant and Respondent.

2d Civil No. B144394
(Super. Ct. No. CIV 191592)
(Ventura County)

Larry Vaughan appeals the dismissal of his action against former employer, Jacobs & Jacobs (Jacobs). The dismissal followed summary adjudication of claims for wrongful termination and disability discrimination in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.,¹ and voluntary dismissal of the remaining breach of contract claim. Vaughan contends, among other things, that the trial court erred in concluding that statements on his disability application estop him from asserting that he was able to perform the essential functions of his job with a reasonable accommodation for his disability. We reverse. Triable facts exist on whether Vaughan established a prima facie case of disability discrimination and whether Jacobs' reasons for terminating Vaughan were pretextual.

¹ All statutory references are to the Government Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Vaughan worked as an accountant for Jacobs, a small accounting firm, for five months before he left during tax season on an unpaid medical leave. He had back pains along with fatigue, slurred speech, sore muscles, and experienced difficulty walking. He was diagnosed with multiple sclerosis (MS).² Vaughan immediately began a course of treatment that alleviated many of his symptoms. Toward the end of March 1999, Vaughan's doctor told him that he could return to work. On March 27, 1999, Vaughan called Jacobs and told him that he was ready to come back to work. But Vaughan did not return. Instead, another doctor certified that Vaughan would be unable to work until April 30, 1999. To handle the extra work during tax season, Jacobs hired a temporary accountant.

During April, Vaughan called Jacobs after tax season, three days before his leave expired. During that conversation, Vaughan told Jacobs that he was ready to "come back to work, try part time and work up to full time." Vaughan recalls that Jacobs told him he would have to check with his partners. Jacobs never got back to Vaughan.

While on medical leave, Vaughan applied for and received monthly disability benefits from the government. In his disability benefits application, Vaughan declared that his condition prevented him from returning "to regular and customary work." On the application, Vaughan's neurologist estimated June 1, 1999, as the date when Vaughan could return to work.

On May 1, 1999, when Vaughan's medical leave expired, he did not return to work. On May 12, 1999, Jacobs fired him.

² MS is a slowly progressive, debilitating disease of the central nervous system. "Typically, the symptoms . . . are weakness, incoordination, paresthesias, speech disturbances, and visual complaints. The course of the disease is usually prolonged, so that the term *multiple* also refers to remissions and relapses that occur over a period of many years." (Dorland's Illustrated Medical Dict. (28th ed. 1994) pp. 1495-1496.)

Vaughan filed suit for disability discrimination (§ 12940, subd. (a)),³ wrongful termination in violation of public policy, and breach of contract. Jacobs moved for summary adjudication of 20 specified issues.

The trial court chose one issue as the basis for its order granting summary adjudication. It concluded that Vaughan was not a qualified individual with a disability under FEHA and thus could not proceed with his FEHA or tort claim. It did so on two grounds: (1) Vaughan's statements on his disability benefits application precluded recovery on his FEHA claim, and (2) Vaughan's doctor had certified on that application that Vaughan could not perform the essential functions of his job until June 1, 1999. Thus, Vaughan was unable to perform his job with or without reasonable accommodations on May 12, 1999, when he was terminated. We conclude the court erred on both grounds.

DISCUSSION

Disability Discrimination

Where an employer moves for summary adjudication of a FEHA cause of action, "the plaintiff bears the burden of establishing a prima facie case of discrimination based upon physical disability [T]he burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has done so the plaintiff must offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. [Citation.]" (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44; see also *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 354-356.) We independently review the trial court's ruling on a summary adjudication motion. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487; see (Code Civ. Proc., § 437c, subd. (f)(1).)

³ Section 12940, subdivision (a) makes it an unlawful employment practice for an employer "because of the . . . physical disability . . . of any person, to discharge the person from employment"

Prima Facie Case of Discrimination

To establish a prima facie case of disability discrimination, Vaughan must prove that he (1) has a disability, (2) is qualified to perform the duties of the position with or without reasonable accommodation, and (3) has suffered an adverse employment action because of his disability. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236.) There is no dispute that Vaughan suffered an adverse employment action of termination, but Jacobs contends that Vaughan cannot establish that he was disabled as defined in FEHA, or that he was qualified to perform his job duties with or without reasonable accommodation.

1. *Disability under FEHA*

Jacobs contends that Vaughan cannot establish that, at the time of his termination, MS sufficiently limited a major life activity to qualify as a disability under FEHA. We disagree. Evidence in the record reveals a disputed issue of material fact as to whether Vaughan's ability to walk and work rendered him disabled under FEHA.⁴ Vaughan states in his declaration that he had difficulty walking and walks with a cane. It is uncontroverted that Vaughan requested a reduced work schedule presumably because he could not work full time and control his MS.

Intervening amendments and additions to FEHA have arguably altered the standard by which we view whether Vaughan has a disability. The amendment to section 12926, subdivision (k) and the addition of section 12926.1 state that a substantial

⁴ When Vaughan was fired (and summary adjudication was granted), FEHA defined "physical disability" as an actual or perceived "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss [that both] [a]ffects . . . the neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine [systems of the body and] [l]imits an individual's ability to participate in major life activities." (Former § 12926, subd. (k), enacted by Stats. 1992, ch. 913, § 21.3.) Major life activities include working and walking. (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a).)

limitation is not required to demonstrate a limit on a major life activity.⁵ Whether or not these changes to FEHA apply retroactively is now before our Supreme Court.

(*Colmenares v. Braemar Country Club, Inc.* (2001) 89 Cal.App.4th 778, review granted Aug. 22, 2001, S098895 [amendment and addition not retroactive]; see contra *Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, review granted, Oct. 10, 2001, S100231.) Assuming the legislation is retroactive, Vaughan has presented sufficient evidence of a triable issue.

2. *Qualified Individual with a Disability*

Jacobs contends that Vaughan cannot establish that he was qualified to perform his job duties with or without reasonable accommodation. Jacobs argues, and the trial court agreed, that Vaughan's disability claim for the purpose of obtaining disability benefits constitutes a judicial estoppel. Jacobs argues that Vaughan's statement on his disability application, that he could not perform his regular or customary work, is inconsistent with his litigation position that he is capable of performing his job with reasonable accommodations. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 956-960 (*Prilliman*); see also *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1387 (*Bell*.) We disagree.

Judicial estoppel is invoked "only in situations where the litigant has taken positions so clearly inconsistent that one necessarily excludes another. [Citation.]" (*Bell, supra*, 62 Cal.App.4th at p. 1386.) Although Jacobs recognizes that the doctrine did not preclude the FEHA claim by the employees in either *Prilliman* or *Bell*, the authorities Jacobs relies upon here, it contends those cases are factually different. We are not persuaded.

⁵ Section 12926.1, subdivision (c), provides in part: "[T]he Legislature has determined that the definition[] of 'physical disability' . . . under the law of this state require[s] a 'limitation' upon a major life activity, but do[es] not require, as does the American with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act."

Both *Prilliman* and *Bell* involved equivocal statements on disability applications. In *Prilliman*, an airline pilot's disability application stated he was grounded, a reason not inconsistent with his litigation position that his employer failed to reasonably accommodate him by not informing him of suitable job opportunities. (*Prilliman, supra*, 53 Cal.App.4th at pp. 962-963.) In *Bell*, the applicant stated that he could not perform his "regular work" but also indicated that he anticipated returning to his previous job but had requested accommodation. (*Bell, supra*, 62 Cal.App.4th at pp. 1387-1388.)

Here, just as in *Prilliman* and *Bell*, Vaughan's response to a question asking him why he could not perform his regular and customary duties was equivocal. The statement alone does not tell us what Vaughan considered his regular and customary work. If Vaughan was referring to his job prior to medical leave, then the position he takes in this litigation is not inconsistent. Vaughan maintains he was capable of performing his regular job but with reasonable accommodations in his work schedule. This raises an issue of fact. (*Bell, supra*, 62 Cal.App.4th at p. 1389.)

The trial court also erred in emphasizing that Vaughan's doctor certified that Vaughan was disabled until the end of his initial medical leave on June 1, 1999. FEHA requires that Vaughan be able to perform the essential functions of his job with or without reasonable accommodations. An extension of an unpaid medical leave is a reasonable accommodation, provided it does not pose an undue hardship. (*Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247.) If Vaughan's medical leave was a reasonable accommodation, then his inability to work during an extended leave period would not automatically render him unqualified.

Moreover, Vaughan offered his own declaration testimony that he "would have [worked] part-time, and then full time, had [he] not been fired." The trial court erred by striking this testimony as lacking foundation. Declarations and affidavits "shall be made . . . on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated [therein]." (Code Civ. Proc., § 437c, subd. (d).) Vaughan is competent to testify regarding the effect his

disability had on his ability to perform job duties at the time. (*Liberty Mut. Ins. Co. v. Industrial Acc. Commission* (1948) 33 Cal.2d 89, 96-97.)

Jacobs asks that we uphold the summary adjudication on the alternative grounds that (1) Vaughan is not disabled, (2) Jacobs did not fail to reasonably accommodate him, and (3) Jacobs has proffered legitimate reasons for Vaughan's termination that have not been rebutted by competent evidence.⁶ We consider these alternative grounds and conclude that they do not support Jacobs' position.

Reasonable Accommodation

Under FEHA, employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an "undue hardship." (*Prilliman, supra*, 53 Cal.App.4th at p. 947; Cal. Code Regs., tit. 2, § 7293.9.) Reasonable accommodations include part-time or modified work schedules. (Cal. Code Regs., tit. 2, § 7293.9, subd. (a)(2).) Jacobs urges us to affirm because it made a reasonable accommodation for Vaughan (medical leave) and it was Vaughan's inaction during April that caused a breakdown in the interactive process of determining a reasonable accommodation. We are not persuaded.

Citing *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226, Jacobs argues that Vaughan's medical leave was a reasonable accommodation and that it was not required to indefinitely extend it before replacing him. We agree. But we cannot overlook the fact that Vaughan did not request an additional period of leave or ask for an extended one. Instead, he requested a modified work schedule.

We also reject Jacobs' contention that Vaughan was responsible for the breakdown in communication. As stated in *Prilliman, supra*, 53 Cal.App.4th at p. 950, once an employee has given the employer notice of a disability, "[t]his notice triggers . . . the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . Reasonable accommodations thus envisions an exchange between

⁶ The trial court rejected the latter two arguments in denying Jacobs' motion for summary adjudication on Vaughan's tort claim. Inexplicably, it did not address those issues on Vaughan's FEHA claim.

employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.' [Citation.]" (See also *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385.) In *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 262-263, the court concluded that in order for the employer to prevail on a failure to accommodate claim, the employer must show it did "everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."

Vaughan creates a factual dispute on this issue by testifying that he asked for a modified work schedule. It is uncontroverted that there was no further communication between Jacobs and Vaughan on this issue. Jacobs did not accept, reject or propose an alternative accommodation.

Reason for Termination

As an additional basis for its motion, Jacobs proceeded to the next step in the burden-shifting test by producing substantial evidence of reasons, unrelated to Vaughan's disability, why it fired Vaughan. (Code Civ. Proc., § 437c, subd. (o)(2); *Guz v. Bechtel Nat., Inc., supra*, 24 Cal.4th at p. 357.) According to Jacobs, Vaughan was fired because customers complained about him and he had excessive write-offs of billable hours; he failed to return to work at the end of his medical leave; and he failed to communicate with Jacobs regarding his intention to return to work so Jacobs hired his replacement and when it did so, had to fire Vaughan because it could not support three accountants in its Ojai office.

Notwithstanding Jacobs' rebuttal evidence, Vaughan could still prevail if he produced evidence establishing a prima facie case plus sufficient additional evidence from which a reasonable fact finder could reject "the employer's asserted justification [as] false." (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148.) Vaughan has met his burden and presented evidence in both categories.

As discussed, Vaughan offered evidence comprising a prima facie case of disability discrimination. In addition, he presented this evidence: (1) Jacobs never

complained about his work nor did he receive complaints from any clients before he was fired; (2) Jacobs does not dispute that Vaughan called on April 27, 1999, three days before his medical leave expired, and told Jacobs he was ready to return to work but received no response to his request for a modified work schedule; (3) Jacobs did not comply with its own policy of allowing up to four months of unpaid medical leave as Vaughan had been on medical leave for less than two months when he was fired; (4) Jacobs did not establish that Vaughan accepted other employment during his disability period; and (5) Jacobs began considering whether to permanently hire the accountant who replaced Vaughan "shortly after April 15th," almost two weeks before Vaughan's medical leave had expired and following tax season when its business slowed down. From the additional evidence, a trier of fact could reasonably reject as false Jacobs' asserted business justifications for Vaughan's termination. Thus, having raised an issue of fact in dispute, the trial court erred in granting summary adjudication.

Wrongful Discharge in Violation of Public Policy

Since disability discrimination can form the basis of a common law wrongful discharge claim, the trial court erred in dismissing Vaughan's tort claim. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1161.) Although Jacobs sought adjudication that Vaughan was not entitled to punitive damages, the court made no separate findings limiting Vaughan's damages. Thus, Vaughan's claim for punitive damages as alleged in this cause of action also is reinstated.

Attorneys' Fees

In light of this ruling, the trial court's award of fees to Jacobs as the prevailing party must be reversed. We note that a prevailing defendant is entitled to fees and costs "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387, citing *Christianburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412, 421, citing *Carrion v. Yeshiva University* (2d Cir. 1976) 535 F.2d 722, 727.) Here, there were

no such findings. The award could not be upheld without such findings, even if Jacobs had prevailed in this appeal.

The judgment of dismissal is reversed. Vaughan is awarded attorneys' fees and costs on appeal, in an amount to be determined on motion in the trial court. (§ 12965, subd. (b); Cal. Rules of Court, rule 870.2(c)(1).)

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Roland N. Purnell, Judge
Superior Court County of Ventura

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