Filed 6/12/17 Trevino v. Southern Ca. Permanente Med. Group CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GUMARO TREVINO, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, Defendant and Respondent.	E064623 (Super.Ct.No. RIC1303504) OPINION

APPEAL from the Superior Court of Riverside County. Gloria Trask, Judge. Affirmed.

Iarusso & Dagher and Michelle Iarusso for Plaintiff and Appellant.

Nixon Peabody, Michael R. Lindsay, Alicia C. Anderson, and Mae K. Hau, for Defendant and Respondent.

Southern California Permanente Medical Group (Permanente) fired Gumaro Trevino from his job as a registered nurse. Trevino then filed this action, asserting,

among other things, employment discrimination based on his religion, in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.).

Permanente moved for summary judgment, arguing that it had legitimate, nondiscriminatory reasons for the termination and that Trevino could not show that these reasons were pretextual. The trial court granted the motion and entered judgment accordingly.

Trevino appeals. Finding no error, we will affirm.

I

FACTUAL BACKGROUND

Trevino is a registered nurse. He is also a minister at a nondenominational Christian church.

In 2008, Trevino became an employee of Permanente when it acquired the hospital where he was already working. As of 2011, he was assigned to the Emergency Department. His supervisor was Judy Peterman. Peterman knew that he was a minister.

Back in 2010, when Peterman first took over the Emergency Department, she found a "widespread" practice among the nurses of failing to follow the proper protocol for disposing of medication. She corrected that practice, over the course of about a year, by reeducating them and holding them accountable. Her supervisor had never terminated a nurse solely for failing to properly dispose of medication.

On August 19, 2011, a nurse found a syringe containing Dilaudid in a cabinet in an examination room. Dilaudid is a "powerful" and "dangerous" narcotic. The nurse

brought the syringe to Peterman. It was labeled with the date August 13, 2011 and with a certain patient's medical record number. Peterman determined that Trevino had been the nurse on that date for that patient.

Peterman therefore asked Trevino about the syringe. He admitted that he had administered only half of the dose ordered by the physician. He added that "he 'titrates' medications ordered for his patients."

On August 22, 2011, Trevino submitted a written "Statement of Fact." In it, he claimed that the patient asked him to stop after he had administered only a half-dose. He left to take care of other patients and forgot about the syringe.

Under Permanente's policies, if Trevino was administering Dilaudid and the patient asked him to stop, he could properly do so. However, "at that point, [he] should have documented in the medical record the accurate amount of dosage administered and notif[ied] the physician that the patient did not receive the complete dose as ordered." He also should have properly disposed of the unused Dilaudid, which would include having another nurse witness the disposition and documenting the disposition.

On August 23, 2011, Peterman placed Trevino on a paid investigatory suspension. Her subsequent investigation included a "fact-finding meeting" with him and his union representative. At the end of the investigation, she recommended that he be terminated. Her supervisor made the "ultimate" decision to terminate Trevino.

On September 23, 2011, Permanente terminated Trevino. The stated reasons for the termination were:

1. "[Y]ou left the unused portion of the [c]ontrolled [s]ubstance in the syringe in the patient exam area and failed to dispose of it according to policy."

2. "[Y]ou documented falsely in the patient's record that you had administered the full dose . . . ."

3. "You failed to carry out the [physician]'s order accurately and further failed to notify [the physician] of such."

4. "You stated . . . 'I titrated the medication slow to the patient's age, weight and tolerance of the medication. But . . . you . . . acknowledged that these are factors taken into account by the [physician] prior to prescribing . . . . Your action of further adjusting the dose prescribed by the [physician] was not within your scope of practice."

Additional facts will be stated as they become relevant.

II

PROCEDURAL BACKGROUND

Trevino filed this action against Southern California Permanente Medical Group (Permanente).[1] In his complaint, as subsequently amended, he asserted causes of action for (l) employment discrimination based on religion; (2) harassment based on religion; (3) retaliation for complaining about discrimination and harassment; (4) wrongful termination in violation of public policy; and (5) intentional infliction of emotional distress.

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[1] Other defendants were named in the complaint but later dismissed.

Permanente filed a motion for summary judgment on all causes of action. With respect to the causes of action for religious discrimination, retaliation, and wrongful termination,[2] it asserted that it had legitimate, nondiscriminatory reasons for terminating Trevino.

Trevino filed an opposition to the motion. He argued that there were triable issues of fact with respect to whether Permanente's claimed legitimate, nondiscriminatory reasons for the termination were pretextual.

After hearing argument, the trial court granted the motion. Accordingly, it entered judgment against Trevino and in favor of Permanente.

III

TREVINO FAILED TO INTRODUCE EVIDENCE OF PRETEXT

Trevino contends that there was sufficient evidence to raise a triable issue of fact as to whether Permanente's stated reasons for the termination were pretextual.

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[2] Trevino disavows any contention that the trial court erred by granting summary judgment on the cause of action for intentional infliction of emotional distress.

Regarding the harassment cause of action, Permanente argued that any harassment more than one year before the filing of the complaint was time-barred, and that Trevino had no evidence of any conduct constituting harassment less than one year before the filing of the complaint. Trevino's brief does not challenge this argument. Thus, we deem him to have forfeited any contention that the trial court erred by granting summary judgment on the harassment cause of action.

A. *Governing Legal Principles*.

"'"'This case comes to us on review of a summary judgment. Defendant[] [is] entitled to summary judgment only 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.' [Citation.] To determine whether triable issues of fact do exist, we independently review the record that was before the trial court when it ruled on defendant['s] motion. [Citations.] In so doing, we view the evidence in the light most favorable to plaintiffs as the losing parties, resolving evidentiary doubts and ambiguities in their favor."' [Citation.]" (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 178.)

"In an employment discrimination case, an employer may move for summary judgment against a discrimination cause of action with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. [Citation.] A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. [Citation.] The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action. [Citation.]

"By presenting such evidence, the employer shifts the burden to the plaintiff to present evidence that the employer's decision was motivated at least in part by prohibited discrimination. [Citation.] The plaintiff's evidence must be sufficient to support a

reasonable inference that discrimination was a substantial motivating factor in the decision. [Citations.] The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive. [Citation.] [¶] . . . [¶]

" . . . To meet his or her burden, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,'"' and hence infer '"that the employer did not act for [the asserted] nondiscriminatory reasons."' [Citation.] '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with a *motive to discriminate illegally*. Thus, "legitimate" reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*.' [Citation.]" (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158-1160, fn. omitted.)

B. *Proffered Evidence of Pretext*.

Trevino asserts that there were seven different types of evidence of pretext. We will discuss these seriatim.

1. *Termination for false documentation*.

First, Trevino argues that firing him for false documentation was pretextual because "every nurse following [Permanente]'s medication administration protocol will enter false information into a patient's chart."

When a Permanente nurse administers medication, the nurse scans the bar code for the patient and the bar code for the medication. This creates a record that the medication has been given. This is necessarily done before the medication is actually administered, because, if the nurse has the wrong patient or the wrong medication, the computer will give an alert.

"If for any reason [the nurse] needs to change that administration information, e.g., dosage or the patient threw it up or . . . the patient did not actually receive it, whatever the reason may be, [the nurse] documents at that point if there's any difference other than the order as entered by the physician."

Apparently Trevino's argument is that, if the full dosage of a medication is not actually given, the system contains "false" information. However, this is true only fleetingly — after the bar codes are scanned and before the nurse corrects the chart. This complies with Permanente's procedures; it will not mislead anyone. Trevino, however, was terminated because he *failed* to comply with Permanente's procedures; he *never* corrected the information in the chart, leaving it misleading.

2. *Termination for failing to carry out a physician's order*.

Second, Trevino argues that firing him for "fail[ing] to carry out the provider's order accurately" was pretextual because he was allowed to stop administering a medication if the patient so requested. However, he was fired because he "failed to carry out the [physician]'s order accurately *and additionally failed to notify* [*the physician*] *of such*." (Italics added.) In his deposition, he admitted that, if he stopped administering a medication at a patient's request, he was required to "contact the doctor[.]"

3. *Termination for failing to dispose of medication properly*.

Third, Trevino argues that firing him for failure to dispose of medication properly was pretextual because no nurse had ever been fired for that. However, there was no evidence that any other nurse had ever failed to properly dispose of a *controlled substance*. Moreover, Peterman's supervisor testified that he that he had never fired anyone "only" for failing to dispose of medication properly. Trevino, of course, was fired not only for this, but also for false documentation, for failing to notify the physician that he had not administered a full dose, and for leaving the syringe in an unsecured area.

In any event, the evidence, taken as a whole, showed that in 2010, when Peterman took over the emergency room, other nurses were failing to properly dispose of medication. However, she "re-educat[ed]" them and "monitor[ed]" them. By 2011, they were doing "an excellent job of complying . . . because they were held accountable." At that point, once the reeducation was complete, Permanente could reasonably terminate a

nurse for failing to dispose of medication properly. Indeed, this was simply part of monitoring and accountability.

4. *Termination for "titration*."

Fourth, Trevino argues that firing him for "titration" was pretextual because supposedly titration was "physically impossible."

In this context, titration means adjusting the dose of a medication until a desired effect is achieved. (<http://medical-dictionary.thefreedictionary.com/titration+dose>, as of June 5, 2017.) For example, a nurse might titrate a blood-pressure-lowering medication by administering it until the patient's blood pressure has been brought within the normal range.

In his deposition, Trevino defined titration as administering medication slowly, "because you have to give the medication according to the patient's weight, age."

Peterman, in her deposition, was asked what Trevino meant when he said that he titrates. She responded, "Mr. Trevino would have to explain that to you." She added that titration was "probably not an accurate term for what he does."

She was also asked for her understanding of titration. Consistent with the actual definition, above, she responded, "There is no titration of a solution in a syringe. A titration is specifically ordered by a physician. . . . [T]he nurse is given parameters as to how to titrate. [¶] And that usually has to do with heart rate, blood pressure, numerous other patent responses, but . . . not the patient's age or weight alone."

Thus, this contention arises out of Trevino's own poor word choice. He told Peterman that he "titrates." However, once he described what he was actually doing, it became apparent that "titration" was not the right word. The physician had ordered a specified dose. He or she had *not* ordered titration, e.g., that the Dilaudid be given until the patient's pain was relieved. Moreover, Trevino did not *claim* to be giving the Dilaudid until the patient's pain was relieved. Rather, he repeatedly stated that he was adjusting the dose for age and weight. However, as he admitted, he was not authorized to do so. Thus, he could properly be terminated, not for "titration," but — as Permanente correctly described it at the time — for "further adjusting the dose prescribed by the [physician] . . . ."[3]

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[3] Permanente appears to accept Trevino's claim that he stopped administering the Dilaudid because the patient asked him to. At first glance, this seems to call into question its claim that it fired him for titrating based on the patient's age or weight.

The real problem, however, is that Trevino could not keep his story straight. On August 19, 2011, he claimed he did not give a full dose because he titrates. On August 22, 2011, he claimed he did not give a full dose because the patient asked him to stop. Permanente, not unreasonably, covered all the bases by deciding that he was subject to termination either way.

It is also significant that Trevino claimed that he *regularly* titrates based on age and weight — not just with this one patient. Therefore, even assuming that in this instance he stopped because the patient asked him to stop, Permanente could still fire him for titrating improperly on other occasions.

5. *Permanente's characterization of the reasons for the termination*.

Fifth, in a one-sentence argument, Trevino asserts that "[c]haracterizing allegations against an employee in the worst possible light is evidence of pretext." However, he does not explain, and we do not see, how Permanente did so.

6. *Disparate treatment as evidence of pretext*.

Sixth, Trevino argues that Permanente treated him differently than it treated his team leader, Thomas Perez.

Perez regularly assigned the most difficult patients to Trevino. Perez also falsely accused Trevino of improperly disposing of trash. Trevino then used a Permanente hotline to accuse Perez of religious discrimination and harassment. There is no evidence as to *why* Trevino concluded that Perez was motivated by discrimination against his religion.

Perez denied Trevino's allegations. Permanente conducted an investigation into them, then notified Trevino that it had not been able to substantiate them. Trevino knew that he could appeal this determination, but he did not. Permanente did not terminate Perez; however, it did place him on probation for 60 or 90 days.

"Showing disparate treatment or policy enforcement is a permissible means to establish pretext. [Citation.] [¶] To establish pretext in this manner, [the employee] must identify other similarly situated employees the [employer] did not terminate. Another employee is similarly situated if, among other things, he or she '"engaged in the

same conduct without any mitigating or distinguishing circumstances."' [Citation.]" (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 172.)

Trevino failed to establish, however, that Perez was similarly situated to him in any way. The nature of their underlying misconduct was different; Perez allegedly engaged in religious discrimination against another employee, whereas Trevino left a controlled substance unsecured and failed to properly document his actions. An employer could reasonably treat Trevino more harshly, because his misconduct had a potential impact on patient care. Or, of course, an employer could reasonably treat Perez more harshly, particularly as Trevino's conduct did not cause any actual harm. Our point is that the two types of conduct are apples and oranges.

In addition, the allegations against Trevino were substantiated; however, there was no evidence that the allegations against Perez were ever substantiated. Thus, there is no evidence that Permanente had any grounds to terminate Perez. And finally, as Permanente points out, there was no evidence that Perez was not in the protected class — i.e., that he was *not* a nondenominational Christian minister.

7. *Termination for false documentation*.

Seventh and finally, Trevino argues that even if Peterman had a legitimate, nondiscriminatory reason for the termination, she may have acted as a conduit for other employees who had a discriminatory animus against him. This has sometimes been called the "cat's paw" theory of liability. (*Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95, 116.)

Trevino forfeited this argument by failing to raise it below. (*Waisbren v. Peppercorn Productions, Inc*. (1995) 41 Cal.App.4th 246, 263.) Moreover, precisely because it was not raised, the parties' separate statements contain no facts supporting it. Indeed, aside from Perez, the other employees were not so much as mentioned in the separate statements. And finally, we have found no evidence supporting it. Evidently Trevino has not found any evidence supporting it, either; his discussion of this issue cites exclusively to his complaint. Summary judgment, however, is designed "to pierce the allegations in the pleadings to ascertain whether a genuine cause of action exists or whether the complaint is simply the product of artful pleading. [Citation.]" (*Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 542.)

We therefore conclude that there was no evidence that Permanente's stated reasons for the termination were pretextual.

IV

TREVINO'S REQUEST TO STRIKE SOME OF PERMANENTE'S PROPOSED UNDISPUTED FACTS

Trevino contends that the trial court erred by refusing to strike some of Permanente's proposed undisputed material facts.

A. *Additional Factual and Procedural Background*.

A number of Permanente's proposed undisputed material facts were to the effect that Trevino had made certain statements. For example, one was: "*Plaintiff admits that*

he should never leave a controlled substance unattended, but that he did so here," citing Trevino's deposition. (Italics added.)

Trevino responded to each such proposed fact: "Undisputed that Plaintiff gave quoted testimony, but irrelevant as this is not a 'fact' for the purpose of a motion for summary judgment."

Then, in his opposition to the motion, he asked the trial court to strike all proposed undisputed facts that were in the form of statements, citing *Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th 95. The trial court did not expressly rule on this request. Nevertheless, it seems that it must have considered at least some of these facts in coming to the conclusion that Permanente had shown a legitimate, nondiscriminatory reason for the termination. In any event, even aside from whether *the trial court* considered on these facts, we need to reach Trevino's contention in order to decide whether *we* can consider them.

B. *Discussion.*

In *Reeves*, the appellate court criticized the party moving for summary judgment for "assert[ing] various 'undisputed facts' in terms not of relevant *events* but of what a witness has *said* about events . . . ." (*Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th at p. 106.) It used as an example one proposed material fact, which stated that a witness had testified in his deposition that he heard the plaintiff make a damaging admission. (*Ibid.*) It explained that "what [a witness] might have said *in deposition* is not, as such, a 'material fact.' It is of interest only as *evidence* of a material fact . . . ."

(*Ibid*.) It further noted that the plaintiff had denied making the damaging admission attributed to him. (*Ibid*.)

The court opined: "We believe trial courts have the inherent power to strike proposed 'undisputed facts' that fail to comply with the statutory requirements and that are formulated so as to impede rather than aid an orderly determination whether the case presents triable material issues of fact. If such an order leaves the required separate statement insufficient to support the motion, the court is justified in denying the motion on that basis. [Citation.] Here, however, the court reached the merits of the motion, and we will do likewise." (*Reeves v. Safeway Stores, Inc*., *supra*, 121 Cal.App.4th at p. 106.)

The problem in *Reeves* was that the proposed facts were artfully worded so as to make a truly disputed fact appear to be undisputed. In the example the court gave, it was undisputed that the witness *said in his deposition* that the plaintiff had made a damaging admission; however, it was disputed that the plaintiff had *in fact* made the damaging admission.

We do not face the same problem here. Trevino has not contested *either* that he made the statements attributed to him *or* that the facts that he stated are true. Thus, presenting the underlying facts in the form of statements does not "impede . . . an orderly determination [of] whether the case presents triable material issues of fact."

In addition, the statements of a party, as here, are significantly different from the statements of a mere witness, as in *Reeves*. A party who has made an admission in a deposition cannot raise a triable issue of material fact by contradicting that admission in a

declaration; rather, the admission is binding on that party, unless there is other credible evidence that explains or contradicts the admission. (*Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 144-145.) Accordingly, it is highly relevant to point out that a party admitted a certain fact in a deposition.

Finally, *Reeves* did not hold that such "attributive" proposed facts necessarily must be stricken or disregarded. Quite the contrary, it proceeded to reach the merits of the motion. The trial court here was equally capable of focusing on the underlying facts and disregarding the way they were presented.

V

THE AWARD OF COSTS

Trevino contends that the trial court erred by awarding costs against him.

A. *Additional Factual and Procedural Background.*

The judgment provided: "Defendant . . . shall recover from Plaintiff . . . its statutory costs incurred in this action." Permanente filed a memorandum of costs claiming $10,089.79. Trevino did not file a motion to tax costs nor did he otherwise object to an award of costs.[4]

[4] The clerk did not enter a dollar amount of costs on the judgment. (See Cal. Rules of Court, rule 3.1700(b)(4).) Hence, it is not entirely clear that Trevino has been prejudiced. We will assume prejudice arguendo.

B. *Discussion*.

In a FEHA action, "the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees." (Gov. Code, § 12965, subd. (b).) Despite the wording of this provision, it does not authorize an award of costs to a prevailing *defendant* against a nonprevailing *plaintiff*, unless the plaintiff's claim is objectively frivolous, unreasonable, or groundless. (*Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, 104, 109-115.) Trevino argues that the trial court never made a finding that his claim was objectively groundless.

Permanente argues, however, that Trevino forfeited any objection to the cost award by failing to raise it below. As Trevino has chosen not to file a reply brief, he does not respond to this argument. We deem this to be acquiescence. (*Lujano v. County of Santa Barbara* (2010) 190 Cal.App.4th 801, 806, fn. 3; *Flores v. Enterprise Rent-A-Car Co*. (2010) 188 Cal.App.4th 1055, 1072, fn. 10; *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 803, fn. 4.)

If only out of an excess of caution, however, we note that we agree with Permanente. "As a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court. [Citations.]" (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 913.) "Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]' [Citation.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

One of the exceptions to this rule applies to a claim of insufficiency of the evidence. (*Beverly Hills Unified School Dist. v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 674.) Trevino has not argued, however, that there was insufficient evidence to support a finding that his claim was objectively groundless. He merely argues that the trial court failed to make such a finding. This particular argument has been forfeited.

Finally, we also reject Trevino's contention on the merits. "It is a fundamental principle of appellate review that we presume that a judgment or order is correct. [Citations.] Moreover, it is the appellant's burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling. [Citations.] From these principles, courts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. [Citations.]" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271-1272.) Trevino has not argued that any exception requiring an express finding applied in this case. Accordingly, if, in fact, the trial court had to find that Trevino's employment discrimination claim was objectively groundless, then we must imply such a finding.

VI

DISPOSITION

The judgment is affirmed. Permanente is awarded costs on appeal against Trevino. Permanente has asked us to order that those costs shall include attorney fees. Because Permanente is entitled to attorney fees if and only if it is entitled to costs under FEHA, an issue that has not yet been litigated below (see part V, *ante*), we leave it up to the trial court to decide this issue in the first instance on remand.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

SLOUGH
J.