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Court of Appeal, Second
District, Division 3, California.

Alice POWELL, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
Defendant and Respondent.

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Filed 5/9/2019

APPEAL from a judgment of the Superior Court of Los Angeles County, Honorable Richard L. Fruin, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC575673)

Attorneys and Law Firms

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Hausman & Sosa, **Jeffrey M. Hausman** and Larry D. Stratton for Defendant and Respondent.

MURILLO, J. *

INTRODUCTION

***1** Plaintiff Alice Powell (Powell) appeals from the summary judgment entered in favor of her employer, the County of Los Angeles (County). In her complaint, she alleges disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code [1], § 12940, subd. (a)), and failure to accommodate her disability (§ 12940, subd. (m)(1)). She seeks general and compensatory damages for violations of the statute.

Having reviewed the filings in support of and in opposition to the summary judgment motion, we conclude that the County carried its burden demonstrating by undisputed evidence that Powell was not subject to an adverse employment action and was not denied a reasonable accommodation. In opposing the motion, Powell failed to raise a triable issue of material fact as to the issues. Accordingly, we affirm the summary judgment.

FACTUAL BACKGROUND

Powell, a 35-year County employee, was a Head Departmental Personnel Technician (HDPT) within the Human Resources Division of the County's Probation Department.

A. Plaintiff's Work History from 2009–2012

In February 2009, Powell was "loaned" to the Intergovernmental Relations Unit, another division within the Probation Department. In that assignment, she retained her civil service position as HDPT, but served as "Acting" Supervising Program Analyst and received an out-of-class bonus. Her status had to be approved annually, subject to review through the classification unit. In 2012, the Probation Department determined that Powell was not performing all of the significant duties of the position, specifically, she was not supervising a team of program analysts, thus it did not renew her position within Intergovernmental Relations. In November 2012, Powell went out on long-term medical leave for six months due to preexisting disabilities in her neck and back and jaw surgery. In May 2013, Powell was returned to her position in the Human Resources Division. At all relevant times, she maintained her civil service position as HDPT.

B. Plaintiff's Return to Work on May 23, 2013

Powell asserts that while she was on leave, she was offered the position of Assistant to the Ombudsperson, which she accepted. She provided the County a doctor's note allowing her to return to work on May 23, 2013. The "Reasonable Accommodation Discussion Work Sheet," dated May 23, 2013, reflects that Dr. Simon Lavi approved Powell for part-time work from May 23 to June 6, 2013, and thereafter for light-duty work. Her light-duty restrictions precluded her from heavy lifting and from sitting or standing for more than 20 minutes. Dr. Lavi also required her to have an ergonomic work station evaluation along with an ergonomic chair. The form indicated that Powell agreed to the prescribed work restrictions, and that they were temporary until July 2,

2013. Lena Virgil, Powell's caseworker, was to coordinate a consultation for an ergonomic workstation, and Powell agreed to meet with the ergonomic evaluator on May 24, 2013.

***2** Upon her return, Powell's position as HDPT was assigned to the Human Resources Division. She was temporarily assigned a desk in the reception area due to space restrictions and a lack of available staff cubicles. Her desk faced away from the reception and waiting area. Her temporary desk assignment was unrelated to, and did not alter, the rank or grade of her civil service position as HDPT. Although it was a temporary desk, the County sought to ensure that the workspace complied with Powell's work restrictions.

Powell met with Cynthia Maluto (Maluto), then Return to Work Manager for the Probation Department, and Zsa Zsa Maxwell (Maxwell), then Human Resources Manager for the department, as part of an effort to transition her back to her HDPT position. Powell objected to the assignment and told Maluto that her doctor had only released her to return to work in a specific assignment, the Assistant to the Ombudsperson. She said that her work restrictions were incompatible with a receptionist's duties in that she could not sit at a desk, pull files from a cabinet on the floor, sit and bend her neck to look up at people coming into the reception area, talk on the phone, or perform the typing required for the receptionist position. Maluto advised Powell that her restrictions were not based upon an assignment and that she was to report to the Human Resources Division. Powell maintained that Maluto told her repeatedly that she was going to be a receptionist.

When she reported to work on May 23, Powell never sat or worked at the temporary desk within the reception area. Powell advised her supervisors that she could not sit in the chair they provided, and she left after three hours. She did not return to work the next day to meet with an ergonomic specialist.

Twenty-two days later, on June 14, 2013, she reported to work for three hours. During that time, she met with the ergonomic specialist and left after the evaluation took place. Powell went out on medical leave due to mental distress arising from the conflict until September, 2013. She then went out on medical leave for neck surgery until April 16, 2014.

C. Plaintiff's Return to Work on April 16, 2014

When she next returned to work in April, she met with Maxwell and Doreen Heintzelman, her direct supervisor, and was informed that she would be placed on a "transition plan." The purpose of the plan was to transition Powell into her supervisorial role as a HDPT by re-familiarizing her with human resources systems as well as Probation Department practices and policies. During her temporary assignment within the Intergovernmental Relations Unit, Powell was not engaged in human resource operations. She had also been on out on extended leave. In the interim, an "Electronic Human Resources" system was implemented in the Human Resources Division in 2012 and Maxwell wanted Powell to be competent in its use.

D. Plaintiff's Workspace Under an Air Conditioning Vent

Upon this return, Powell was assigned to a staff cubicle that was located underneath two air conditioning vents. Powell complained that the cold air was aggravating the plates that had recently been placed in her neck. Maxwell immediately contacted Facilities Management to adjust the overhead vent controlling Powell's area. After Facilities Management closed the vent, Powell confirmed that no more air was flowing and the issue had been resolved. However, the adjustment changed the flow of air, and other staff members began to complain that the office was too warm.

Approximately one month later, Powell again complained about the air conditioning at her work location. She was moved to a different desk, approximately three cubicles down from her prior work position. That cubicle did not have an overhead vent. Powell continued to complain about the temperature, so a floor heater was placed under Powell's desk. She noted that her area of discomfort was to her neck, not to her feet, so the space heater was moved to the top of her desk. Maxwell had Facilities Management come in over the weekend to test the air conditioning system and provided Powell with a heating pad. Powell stated that she stopped using the pad because it heated the metal in her neck and caused pain to radiate down her back and shoulder.

***3** At some point, Powell began moving to vacant workstations to escape the cold air. Supervisor Vicky Santana told Powell that she needed to ask before moving on a daily basis because "we have not accommodated you." During an interactive process meeting, Powell was told that the County would "address [her] cold air on a day-to-day basis." Maxwell stated that as an older County building, the office was drafty and without separate controls for the air conditioning system.

PROCEDURAL BACKGROUND

A. The Present Action

Plaintiff filed the Fourth Amended Complaint on January 13, 2016. As relevant to the present appeal, Powell's first cause of action alleged physical disability discrimination in violation of FEHA (§ 12940 et seq.). Specifically, Powell alleged (1) the County failed to accommodate her disability by requiring her to perform receptionist duties upon her return to work on May 23, 2013, and by placing her in a physical work space that exacerbated her injuries, and (2) the County discriminated against her based on her disability by demoting her to a receptionist position. Plaintiff sought general and compensatory damages, among other relief. [2]

B. Motion for Summary Judgment

The County moved for summary judgment or, in the alternative, for summary adjudication. Powell opposed the motion, arguing that there were triable issues of fact as to whether she suffered an adverse employment action, namely, demotion to a receptionist position because of her physical disability and whether the County reasonably accommodated her disability. The trial court granted the County's motion for summary judgment. Powell timely appealed from the resulting judgment.

STANDARD OF REVIEW

In reviewing Powell's challenge to the grant of summary judgment, "[o]ur standard of review is well settled. Under Code of Civil Procedure section 437c, a motion for summary judgment or summary adjudication shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. On appeal from an order granting summary adjudication, we exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, 320.)

DISCUSSION

I.

The Trial Court Did Not Err in Granting Summary Adjudication of Powell's Disability Discrimination Claim

Powell challenges the grant of summary judgment only with respect to her first cause of action for disability discrimination. [3] That cause of action alleged two distinct statutory violations, namely: (1) plaintiff suffered an adverse employment action because of her disability (§ 12940, subd. (a)), and (2) the County failed to reasonably accommodate plaintiff's disability (§ 12940, subd. (m)(1)). Like the trial court, we will separately address these two alleged statutory violations. [4]

A. Governing Law

***4** FEHA prohibits an employer from, among other things, discriminating against an employee in the terms, conditions or privileges of employment because of a medical condition or physical disability. (§ 12940, subd. (a).) The express purposes of FEHA are "to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (§ 12920.5.) "Because the FEHA is remedial legislation, which declares '[t]he opportunity to seek, obtain and hold employment without discrimination' to be a civil right [citation], and expresses a legislative policy that it is necessary to protect and safeguard that right [citation], the court must construe the FEHA broadly, not ... restrictively." (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 243.)

A prima facie case of disability discrimination under FEHA requires a showing that the plaintiff (1) suffered from a medical condition or physical disability, (2) was able to perform the essential functions of his job, with or without reasonable accommodation, and (3) was subjected to adverse employment action because of the disability—that is, the disability was a substantial factor motivating the employer's adverse action. (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1037; *Green v. State of California* (2007) 42 Cal.4th 254, 262.) Once

the plaintiff establishes a prima facie case, "the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action." (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) The plaintiff may then show the employer's proffered reason is pretextual or offer any further evidence of discriminatory motive. (*Castro-Ramirez*, at p. 1037.) " 'In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias.' " (*Ibid.*)

The parties agree that Powell was able to perform the essential functions of her job with accommodation, and that when she returned to work on May 23, 2013, she was physically disabled. Thus, we turn to the question of whether she suffered an adverse employment action. Like the trial court, we conclude she did not.

B. No Triable Issues of Fact Exist as to Whether Powell Suffered an Adverse Employment Action

Powell contends that she suffered an adverse employment action as reflected by two incidents that occurred her first day back from medical leave, May 23, 2013. First, she alleges that she was denied the position of Assistant Ombudspeson, and second, she was assigned "a receptionist's position, which constituted a demotion in rank and privileges."

In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, our Supreme Court held that to be actionable, "an adverse employment action must materially affect the terms, conditions, or privileges of employment." (*Id.* at p. 1052.) "[C]onsidering an employer's actions in context comports with our conclusion that it is appropriate to consider plaintiff's allegations collectively under a totality-of-the circumstances approach." (*Id.* at p. 1052, fn. 11.)

Thus, the relevant inquiry here is whether the County's actions had " 'a detrimental and substantial effect' on the plaintiff's *employment*." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454, citing *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 512, italics added.) "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers,* at p. 1455.) "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." (*Thomas,* at p. 511.)

***5** Applying these principles to the relevant facts before us, we conclude that the court properly found that Powell did not suffer an adverse employment action. Powell's primary claim is that she was demoted to a receptionist upon her return from medical leave. In support, she points to evidence that she was temporarily assigned a workspace in the receptionist area, and was told she would have to sit at a desk, pull files from a cabinet on the floor, sit and bend her neck to look up at people, perform the typing required of the receptionist position, and talk on the phone. She also points to the fact that she was told by Maluto that she was going to be a receptionist. There is no documentary evidence that Powell was ever demoted to receptionist; to the contrary, the undisputed evidence is that Powell maintained her civil service title as HDPT during the entire period.

Thus, Powell has failed to offer substantial evidence in support of her conclusory statement that she was assigned a receptionist position which was a "demotion in rank and privileges."

Next, she claims that she was demoted when the County failed to assign her as Assistant to the Ombudsperson. The only evidence supporting Powell's claim that she was offered the position of Assistant to the Ombudsperson is her own statement. Powell has not supported her claim with any documentary evidence surrounding the announcement of a promotional opportunity within a civil service context. She does not point to an application, examination results, "banding" information, letters from the Department or the County, or a list of the essential duties of the position. Even assuming she was offered the position, as we must, she provides no information as to how the rank or privileges of an Assistant to the Ombudsperson compare to those of the civil service title she maintained as HDPT. From this evidence, no trier of fact could conclude that she was demoted.

Having failed to make a prima facie showing of disability discrimination, we need not turn to whether the County produced substantial evidence of legitimate, nondiscriminatory reasons for its actions. The court did not err in granting the County's summary adjudication on this cause of action.

II.

The Trial Court Properly Granted Summary Adjudication of Plaintiff's Claim for Failure to Reasonably Accommodate

Powell contends that the County failed to accommodate her disability on May 23, 2013, when it assigned her receptionist duties instead of her preferred position as Assistant to the Ombudsperson. She further contends that beginning April 16, 2014, the County failed to accommodate her by placing her in a workstation that exacerbated her neck injuries. We address these contentions in order and conclude that Powell's claims are not supported by the evidence, and that she failed to identify an accommodation for which she was denied.

A. Applicable Law

FEHA requires employers to make a "reasonable accommodation for the known physical or mental disability" of employees and to "to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation." (§ 12940, subds. (m)(1), (n).)

"Reasonable accommodation" is undefined by the statute, but has been defined by cases to mean "a modification or adjustment to the workplace that enables the employee to perform the essential functions of" his or her job. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974, (*Nadaf-Rahrov*); *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.) "Interactive process" is also undefined in the statute, but has been described as " ' "the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an 'undue burden' on employers." ' [Citation.] .... '[T]he focus of the interactive process centers on employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated ....' [¶] In sum, when an employer needs to fill a position and an applicant or employee desires the position, the interactive process is designed to bring the two parties together to speak freely and to determine whether a reasonable, mutually satisfactory accommodation is possible to meet their respective needs.)" (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61–62 (*Gelfo*).)

***6** " 'For the process to work, "[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." [Citation]. When a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to " 'isolate the cause of the breakdown ... and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' [Citation.]" [Citation.]' (*Jensen [v. Wells Fargo Bank* (2000)] 85 Cal.App.4th [245,] 261 [*Jensen*].)" (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984–985.) "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Gelfo, supra*, 140 Cal.App.4th at p. 54.)

Moreover, "[t]he employer is not obligated to choose the best accommodation or the accommodation the employee seeks." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228 (*Hanson*).)

B. The County did not fail to accommodate Powell on May 23, 2013

Powell first contends that there are triable issues of fact that the County frustrated her attempt to return to work on May 23, 2013, by failing to assign her to her preferred position and by assigning her tasks that did not comport with her work restrictions. For the reasons that follow, we do not agree.

Once Powell notified the County that she required a reasonable accommodation, the County was required to modify or adjust the workplace to enable her to perform the essential functions of her job. (*Jensen, supra*, 85 Cal.App.4th at p. 261 [once the employee gives such notice, the interactive process is mandatory].) Both Powell and the County had a duty to communicate directly and to exchange essential information, and neither could " ' "delay or obstruct the process." [Citation.] When a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to " 'isolate the cause of the breakdown ... and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations

ensues only where the employer bears responsibility for the breakdown.' [Citation.]" [Citation.]' " (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984–985.)

However, this did not obligate the County to agree to Powell's preferred accommodation. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1194 ["an employer is not required to choose the best accommodation or the specific accommodation the employee seeks"].) Instead, the statute requires only that the employer's proposed accommodation be *reasonable* (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222), and the employer retains the ultimate discretion to choose between effective accommodations. (*Hanson, supra*, 74 Cal.App.4th at p. 228.)

Powell asserts that following her jaw surgery in May 2013, her former physician, Dr. Lavi, "released her to return to work as the OA [Assistant to the Ombudsperson]." She describes this position as one that would have accommodated her disability. However, the work restrictions attributed to Dr. Lavi do not make any mention of the Ombudsperson position, nor do they support her claim. Furthermore, there is utterly no evidence describing what duties the position of Assistant to the Ombudsperson entails, or how it would have accommodated her disability. Regardless, even assuming the Assistant to the Ombudsperson position would have accommodated her disability, based upon the foregoing authority, the County retains the ultimate discretion in choosing between effective accommodations. The fact that it did not choose the one Powell preferred is insufficient to support a claim that the County failed to accommodate her.

***7** Powell next asserts that she was assigned receptionist duties that did not comport with her work restrictions. In support of this claim, she relies on her own statements: that Maluto told her she was going to be a receptionist, and that she was going to have to pull files from cabinets, bend her neck, type memos and answer phones. As we have said, there is no substantial evidence that Powell was ever moved into a receptionist position; but even if she had been, the work restrictions outlined by Dr. Lavi on May 23 were not inconsistent with the receptionist duties Powell says she was assigned. Furthermore, even assuming those duties were assigned, there is no evidence that she attempted to engage in an interactive process with the County to modify the duties to accommodate her disability. Instead, she left work after three hours and did not appear for a meeting with the ergonomic evaluator the next day. In short, assuming the County assigned Powell duties that were beyond her capacity to complete, she delayed the process of accommodation by not exchanging essential information regarding new limitations resulting from her recent jaw surgery. Powell cannot expect that her workspace would be ideally situated on her first day back after a six-month leave without a period of discussion and interaction. Neither can she be heard to complain that the County failed to accommodate her disability when she abandoned the process that day.

C. The County did not fail to reasonably accommodate Powell's disability when she returned to work in April 2014

Powell next contends the trial court erred in finding no triable issue as to her claim that the County "placed her in a physical location that exacerbated her neck injuries." As we explain, Powell fails to raise a triable issue of fact regarding the County's efforts.

As the trial court recognized, the County offered Powell numerous and varied accommodations, all of which were found by Powell to be inadequate or unreasonable. The accommodations offered by the County included system-wide air conditioning tests, the closure of certain vents, a space heater, a heating pad, and a new workspace location. In her brief, Powell concedes that the County "did make some non-satisfactory efforts."

Powell also created her own accommodation by sitting in a vacant spot. Her supervisor, Vicky Santana, admonished her for this and told her, "I told you if you need to sit somewhere else, you need to ask me on a daily basis because we have not accommodated you." This was confirmed by Powell who stated that during an interactive process meeting, she was told that the County would "address [her] cold air on a day-to-day basis."

Once litigation began, Powell was required to identify a " 'specific, available reasonable accommodation through the litigation process.' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1017, italics omitted.)

In her brief, Powell argues that the County never explained why she "could not have simply been accommodated by being seated in [the] alternate location," and suggests that having to seek "specific permission to [sit elsewhere] every single day" is evidence of the County's bad faith and failure to engage in

the interactive process. However, the accommodation sought by Powell, the ability to sit in a vacant cubicle of her choosing, was not denied by the County. In fact, the facts show that the County *agreed* to Powell's proposed accommodation by committing to address the issue on a day-to-day basis. Significantly, Powell identifies no evidence that she was ever denied permission to sit where she was comfortable.

Thus, the County presented undisputed evidence showing that it offered to reasonably accommodate Powell's disability and Powell failed to counter with evidence by showing the measures the County took were insufficient or inadequate. (See, e.g., *Jensen, supra*, 85 Cal.App.4th p. 263 [court held "the employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes through undisputed facts that ... [a] reasonable accommodation was offered and refused"]; *Hedrick v. Western Reserve Care System* (6th Cir. 2004) 355 F.3d 444, 457 ["if an individual rejects a reasonable accommodation, the individual will no longer be considered a qualified individual with a disability"].) Powell has not presented sufficient evidence of the County's failure to reasonably accommodate her disability.

DISPOSITION

***8** The judgment is affirmed. The County is awarded its appellate costs.

We concur:

EGERTON, Acting P.J.

DHANIDINA, J.

All Citations

Not Reported in Cal.Rptr., 2019 WL 2052130

Footnotes

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 All subsequent undesignated statutory references are to the Government Code.

2 The complaint alleges additional causes of action, including for race and age discrimination. Those causes of action are not relevant to the present appeal, thus we do not address them.

3 Powell does not argue on appeal that the court erred in granting summary adjudication as to her remaining causes of action against the County. We therefore affirm the summary adjudication of those causes of action. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [trial court's judgment is presumed to be correct, and appellant has burden to overcome presumption by demonstrating reversible error].)

4 Even if pled as a single cause of action, "discrimination based on separate protected characteristics (for example, race and age) or claims of employer liability for different actions (for example, harassment and retaliation) are distinct causes of action for purposes of a motion for summary adjudication [citation]." (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 587, fn. 6.)