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Court of Appeal, Second District, Division 4, California.

Cheryl WILLIAMS, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
Defendant and Respondent.

No. B173162.
|
(Los Angeles County Super. Ct. No. BC294605).
|
June 3, 2005.

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Attorneys and Law Firms

Law Offices of Manuel H. Miller, Manuel H. Miller and Nyanza Shaw for Plaintiff and Appellant.

Law Offices of Hausman & Sosa, Jeffrey M. Hausman and Larry D. Stratton for Defendant and Respondent.

Opinion

HASTINGS, J.

***1** Cheryl Williams (appellant) filed a complaint against her employer, the County of Los Angeles (hereinafter the County), when she was reassigned to another job in the same department. The trial court sustained the County's demurrer to her First Amended Complaint without leave to amend and the action was dismissed. She appeals, contending the trial court erred in sustaining the demurrer and by refusing to allow her leave to amend. We affirm the order of dismissal.

FACTUAL & PROCEDURAL BACKGROUND

Appellant had been employed by the County for approximately 32 years in the Internal Services Department (ISD), and had been a Data Processing Specialist. In 2003, after being reassigned to a new job with the title Executive Liaison Manager, she filed a complaint against the County for "Workplace Retaliation in Violation of Public Policy, Labor Code § 1102.5 and Los Angeles County Code 5.02.060."

She alleged in her complaint that after submitting a controversial memo to her manager about various improprieties in the County's contract with Unisys and after making a related oral presentation about those improprieties to the County's Board of Supervisors, she received a negative performance evaluation and was thereafter subjected to other workplace retaliation and harassment, including a transfer to a new position which was a demotion in terms of seniority, rank and benefits.

The complaint was filed on April 25, 2003. The County filed a demurrer to that complaint, but a hearing on that demurrer was taken off calendar and appellant filed a first amended complaint on August 21, 2003.

The first amended complaint alleged, inter alia, that after submitting a negative report to her supervisor, Andy Barnes (Barnes), about the Unisys contract, on April 30, 2002, appellant revealed to the Board of Supervisors the "financial and incestuous improprieties" which were in violation of various sections of the Los Angeles County Code. Appellant also requested protection under the whistleblower provisions of County Code section 5.02.060. The first amended complaint also alleged that during April 2002, appellant was informed that the Human Resources Department had reviewed a negative performance evaluation prepared by her supervisor, Barnes. Appellant filed a grievance on April 29, 2002. She alleged that after Barnes denied her grievance, she filed a "second level grievance," which was denied on May 28, 2002. On July 15, 2002, appellant filed a "third level grievance" "which ultimately fell on deaf ears and was denied." Appellant filed a government tort claim with the County on October 30, 2002, and on February 11, 2003, filed a complaint with the Department of Fair Employment and Housing.

Appellant alleges that subsequently she had virtually no communication with or receipt of assignments from Barnes,

and on March 12, 2003, appellant was informed that she was going to receive a new assignment to Section Manager, Information Technology.

***2** Appellant alleges that the position was "unbudgeted" and that she told the people who offered her the position that she did not meet the requirements of a Section Manager, and told them that "it would result in a demotion" since her current position was a higher rank. Appellant then alleges that on May 20, 2003, the County changed her title to Information System Specialist, which had a "significant impact" on her ranking and seniority. She complained, and then the title was changed to Executive Liaison Manager, which again had a "significant impact" on her ranking and seniority.

The trial court sustained the County's demurrer to the first amended complaint, stating: "1. While plaintiff has alleged that she 'exhausted' her administrative remedies by filing a government tort claim with her employer ... and by filing a charge of discrimination with the Department of Fair Employment and Housing ..., she does not allege that she took any steps to exhaust her internal appeals under Los Angeles County Civil Service Rule 25.01(a) before the relevant county agency, the Civil Service Commission. Such exhaustion is mandatory before the same alleged improper personnel action is brought before the court (excluding statutory employment discrimination claims, which are subject to a different exhaustion requirement, an issue not presented here). [Citations.] All that plaintiff possibly alleged as to resort to available internal remedies is that she filed [ ] grievance[s] (with whom is not clear).... Her attempted pleading of exhaustion in paragraph 38 does not even reference back to these several grievances. The Court can therefore determine as a matter of law from what plaintiff acknowledges by her silence (i.e. what she does not plead) that she did not exhaust her available internal administrative appeal. [¶] 2. As to the sufficiency of the claim under Labor Code section 1102.5, whether the statute should be extended to cover whistle-blowing claims relating to alleged violations of county ordinances is a matter properly addressed to the legislature. Plaintiff fails to cite persuasive case authority as to why the plain language 'violation of state or federal statute, or violation or noncompliance with a state or federal regulation' actually means 'violation or noncompliance with a state, municipal [county] or federal regulation or ordinance.... [¶] Each of the two above cited reasons is independently sufficient to justify sustaining the Demurrer to the entirety of the First Amended Complaint. Taken together, the Court is satisfied that there is no reason to allow plaintiff a third bite at the apple by the filing of a Second Amended Complaint, for which reason the Demurrer is sustained without leave to amend...."

DISCUSSION

1. *Demurrers*

" 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.]" (*Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 438-439, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

***3** When there are claims against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity. (*Hood v. Hacienda La Puente Unified School Dist., supra,* 65 Cal.App.4th at p. 439.)

Bearing these rules in mind, we review the various substantive claims made by the County in its demurrer.

2. *Did Appellant Comply with the Requirements of Labor Code Section 1102.5?*

Labor Code section 1102.5, subdivision (b) provides that: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal law, or a violation or noncompliance with a state or federal rule or regulation."

Appellant alleged in her first amended complaint that the practices engaged in by the County were in violation of Los Angeles County Code sections 2.180.010, 2.121.260, 2.121.280, 2.121.300, 2.121.310, 2.121.330, 2.121.350, 2.121.380, 4.12.120, 4.12.130, 4.12 .150, and 2.121.420.

The County argued in its demurrer that because appellant did not allege a violation of state or federal law, rule or regulation, she cannot state a cause of action under Labor Code section 1102.5.

Appellant argues that the Los Angeles County Codes have the objective of protecting the public at large and protecting the public fisc. She then argues that the False Claims Act (Gov.Code, § 12650) also has the purpose of protecting the public fisc, so that the Los Angeles County Codes are "sufficiently tethered in public policy to satisfy a claim in violation of Labor Code § 1102.5," citing *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66. *Green* holds that a where a fundamental public policy has been implemented by administrative regulations, an employer may be held liable for violating that fundamental public policy. In *Green,* allegations of violations of federal aviation regulations were held to be sufficient to implicate the fundamental public policy of air travel safety. (*Id.* at pp. 88-90.) However, here, appellant has not alleged that the County violated the False Claims Act. The False Claims Act relates to false claims for payment made to governmental entities, and the making of related records. None of these acts are alleged by appellant, nor are her claims against the County sufficiently specific for us to ascertain the nature of the wrongdoing she reported to the Board of Supervisors.

Because we cannot discern from the complaint what state or federal law or fundamental public policy was violated by the County, the trial court's ruling sustaining the demurrer on this ground was proper.

3. *Exhaustion of Administrative Remedies*

"[I]n California a requirement that administrative remedies be exhausted is jurisdictional. [Citation.]" (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1151.) Appellant has a duty to plead exhaustion of administrative remedies or facts which indicate that the duty to do so has been excused. (*Hood v. Hacienda La Puente Unified School Dist., supra,* 65 Cal.App.4th at p. 439.)

***4** Appellant alleged only in her complaint that she filed a "grievance," a "second level grievance" and a "third level grievance," and that they were all denied, but does not state when she filed the grievance, with whom, and who denied them, except that Barnes, her immediate supervisor denied her first grievance. She also alleged that she filed a government tort claim with the Department of Fair Employment and Housing. The filing of a government tort claim, however, does not fulfill the requirement that she make " 'a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings. [Citations.]' " (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520.)

Accordingly, we examine the procedures set forth in the Los Angeles County Civil Service Rules (hereinafter the Rules), which have in part, the purpose of "assuring all employees in the classified service of fair and impartial treatment at all times subject to Merit System Standards and appeal rights as set forth in these Rules" (Rules, 1.02) The Civil Service Commission is the independent administrative appeals body established by the Los Angeles County Charter to provide impartial and fair application of the Rules.

Pertinent portions of the Rules which we have reviewed provide as follows: [1]

"4.01 Right to petition for a hearing. Any employee or applicant for employment may petition for a hearing before the commission who is: [¶] A. Adversely affected by any action or decision of *the director of personnel* concerning which discrimination is alleged as provided in Rule 25." (Italics added.)

"5.04 Reviews and appeals. Any employee or appointing power adversely affected by a classification action may request *the director of personnel* to review such action. *Such request for review by the director of personnel shall be made in writing within 30 days of notification of such action, and shall specify the basis for the request.* The director of personnel shall either amend the classification action or provide the employee with reasons for affecting no change. Except as otherwise provided in these Rules, the decision of the director is final, subject to such judicial review as provided by decisions of local administrative agencies." (Italics added.)

"20.01 Performance evaluation. The performance of each employee in the classified service shall be evaluated by *the appointing power* in relation to standards for efficient performance of the work in accordance with these Rules." (Italics added.)

"20.09 Reconsideration of ratings. Except for [management appraisal and performance plan participants], the employee may initiate a timely grievance in accordance with *the department's grievance procedure* or through the grievance procedure contained in any memorandum of understanding in effect between the county and the certified employee organization for the classification in which the employee works, or any specified item or items of the report including the overall rating, except for an overall rating of 'unsatisfactory.' *Upon completion of the grievance proceedings, the appointing power shall either approve the report as originally prepared or direct that a new report be prepared, and shall notify the employee of the decision.* If, subsequent to a resignation, an employee who held permanent status receives a performance evaluation with an overall rating of 'improvement needed' or 'unsatisfactory,' *the employee may, within 10 business days after delivery or mailing a copy of the evaluation, request reconsideration of the rating by the director of personnel. This request* must be in writing setting forth in detail all the reasons upon which the request is made. Upon receipt of the request, the director of personnel may deny the request, upholding the rating as prepared, or conduct a hearing from written materials. In no event shall the decision of the director of personnel affect the employee's resignation." (Italics added.)

***5** "20.11 Management appraisal and performance plan participants. [¶] For employees who are not in a bargaining unit certified by ERCOM and who are compensated under the management appraisal and performance plan, performance will be evaluated at the end of each performance period using a written performance plan approved *by the appointing authority.* [¶] ... [¶] D. Request for review. The participant may, within 10 business days of receipt of a performance rating, request a review of the rating received. *The participant will be allowed the opportunity to present to the appointing* authority, in writing, factors pertinent to the request for review. The decision of the appointing authority shall be final ." (Italics added.)

"25.01. Employment practices. A. No person in the classified service ... shall be appointed, reduce or removed, or in any way *favored or discriminated against in employment* or opportunity for employment because of race, color, religion, sex, physical handicap ... *or other non-merit factors.... 'Non-merit factors' are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position.* Any person who appeals alleging discrimination based on a non-merit factor must name the specific non-merit factors(s) on which discrimination is alleged to be based. No hearing shall be granted nor evidence heard relative to discrimination based on unspecified non-merit factors." (Italics added.)

It is not apparent from the first amended complaint which of these rules is applicable to appellant, nor whether she complied with any of them. We do not know if she is in a bargaining unit, and thus whether Rule 20.09 or 20.11 applies. We do not know if she filed a grievance with the director of personnel or the "appointing power" or the Civil Service Commission as required by Rule 4.01, 20 .01, or 5.04. We do not know which of these administrative bodies, if any, denied her grievances, and if they were denied in writing. The wording used by appellant in her complaint, that is "second level" and "third level" grievances, is not used anywhere in these rules, and tells us nothing of the procedure she purported to follow.

In addition, appellant argues that the trial court was incorrect in basing its ruling on Rule 25.01 because it does not apply, but on its face, it appears that appellant's grievance is of discrimination because of a "non-merit factor" which is not related to the successful performance of her duties.

Because appellant has cited only conclusory allegations, not facts, which would demonstrate she fulfilled the requirement that she exhausted her administrative remedies, we conclude the demurrer was properly sustained on this ground.

4. *No Adverse Employment Action*

In order to establish a prima facie case of employment discrimination, generally, a plaintiff must prove that "1) [s]he was a member of a protected class, (2)[s]he was qualified for the position [s]he sought or was performing competently in the position [s]he held, (3)[s]he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) To establish a prima facie case of retaliation, "the plaintiff must show that [s]he

engaged in a protected activity, [her] employer subjected [her] to adverse employment action, and there is a causal link between the protected activity and the employer's action. [Citations .]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) If the defendant articulates a legitimate nonretaliatory explanation for its acts, the plaintiff must show that the defendant's proffered explanation is merely a pretext for the illegal termination. (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253.)

***6** "The inquiry as to whether an employment action is adverse requires a case-by-case determination based upon objective evidence. (*Blackie v. State of Me.* (1st Cir.1996) 75 F.3d 716, 725.)" (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 510-511 (*Thomas*).)

Appellant states that her "ability to receive promotions and pay raises was diminished" as a result of the negative performance evaluation. She alleged that she was "excluded from department meetings and training seminars; denied regular 'one-on-one' meetings with her manager-Barnes; denied work assignments, with exception of occasional clerical duties and was ostracized ... from the department in retaliation for her discovery of and reporting of ISD managements' wrongful conduct." She claimed that the changing of her title to Information System Specialist I had "a significant impact on [her] ranking and seniority." The subsequent change to Executive Liaison Manager also had "a significant impact on her ranking and seniority." She then claims the County "placed her in isolation, impeded her ability to obtain advancements and promotions, denied her equal pay, gave her unwarranted negative performance reviews."

"The only published California cases on point have held that it is not enough for the plaintiff to show that he or she has been subjected to some form of adverse treatment. The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment. [Citations.] 'A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.' [Citation.]" (*McRae v. Department of Corrections* (2005) 127 Cal.App.4th 779, 788 (*McRae*), citing *Thomas, supra,* 77 Cal.App.4th at pp. 510-511 .) "We therefore align ourselves with existing California decisions, holding that an adverse employment action means an employment action that causes substantial and tangible harm, such as, but not limited to, a material change in the terms and conditions of employment.... We hold, further, that while something less than an 'ultimate employment action' may be actionable, a plaintiff may seek redress through the courts only for final employment actions; i .e., those that are not subject to reversal or modification through internal review processes." (*McRae, supra,* at pp. 789-790, fn. omitted.)

An action is not an adverse employment action if it does not entail a demotion, a reduction in pay or loss of benefits, a change in status or a less distinguished title, a significant change in job responsibilities. (*Mc Rae, supra,* 127 Cal.App.4th at p. 796.) An adverse employment action does not include discrete, one-time events involving an employer's exercise of judgment. (*Thomas, supra,* 77 Cal.App.4th at p. 512.)

A negative performance evaluation alone, does not constitute an adverse employment action. (*McRae, supra,* 127 Cal.App.4th at p. 793; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1457.) However, "[a] pattern of negative employment evaluations, or a negative employment evaluation accompanied by other conduct, might create a hostile work environment, providing grounds for a retaliation claim on that basis. In addition, adverse employment actions such as terminations, demotions, etc., may be based in part on unwarranted criticism. In such cases, the fact that the criticism is unwarranted will be a factor in deciding if the employer's motive for the adverse action is pretextual, but it is the later action, and not the criticism itself, that is the adverse employment action." (*McRae,* at p. 793.)

***7** "There is no question but that a transfer can be an adverse employment action, when it results in substantial and tangible harm. It also is settled that an adverse employment action does not occur when the transfer is into a comparable position not resulting in substantial and tangible harm. [Citation.]" (*McRae, supra,* 127 Cal.App.4th at pp. 795-796, citing *Akers v. County of San Diego, supra,* 95 Cal.App.4th at p. 1457.)

Appellant alleges that her pay, ranking, and seniority were adversely affected and she was treated negatively on a day-to-day basis. What is missing from her complaint are the factual

particulars of these actions and what the "significant impact" on her ranking and seniority actually was.

Appellant's complaint also seems to suggest that the proposed reassignment to Section Manager/IT was in essence a *promotion,* since appellant admittedly did not possess many of the qualifications listed for that position. In addition, because her complaint is so vague on dates, it is unclear whether the negative performance evaluation actually came after her controversial report to Barnes.

Because all of these matters are unclear, we conclude that the trial court properly sustained the demurrer on this ground as well.

5. *Should the Trial Court Have Given Appellant Leave to Amend?*

It is an abuse of discretion to sustain a demurrer if there is any reasonable possibility that the plaintiff can state a cause of action. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 970-971; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 976.)

In her opposition to the demurrer, appellant contends that in her first amended complaint she has pled sufficient facts to establish that she exhausted her administrative remedies and that she was subjected to adverse employment action. She does not allege any new, more specific facts which she proposes to add to the complaint. She explains that: "The significance of the negative PE [performance evaluation] is that PEs are relied upon for the purposes of promotions, advancements and transfers as the PE's are the main source upon which a supervisor prepares a candidate's appraisal of promotionability (AP). The AP sets forth the candidate's qualifications, accomplishments, and skills, which are derived from the last three years of the candidate's PE ratings. The scoring determines the candidate's rank on the promotional list or failure. As such, a negative PE, will have a significant impact of Plaintiff's scoring for purposes of promotions and advancements as Plaintiff's qualifications and accomplishments are not accurately reflected." Appellant does not allege that she has actually suffered a consequence from the negative performance evaluation. Nor does appellant allege that she has actually suffered a pay decrease, or detail what benefits she will no longer have as a result of her reassignment.

Appellant has failed to demonstrate she can cure the defects in her pleading.

DISPOSITION

***8** The judgment is affirmed.

We concur: EPSTEIN, P.J., and CURRY, J.

All Citations

Not Reported in Cal.Rptr.3d, 2005 WL 1317043

Footnotes

1 In addition to the rules listed, the County also refers to noncompliance with Civil Service Rule 7.20 regarding protests against ratings, but that rule comes within the section devoted to "Competitive Examinations" and it is not applicable in this matter.