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

TONY WOODS,

Plaintiff and Appellant,

v.

RAINBOW ACRES et al.,

Defendants and Respondents.

B153844

(Super. Ct. No. BC 236040)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Morris B. Jones, Judge. Affirmed in part; reversed in part with directions.

Myer Law Firm and Scott D. Myer for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Jeffrey S. Behar, Tina I. Mangarpan and
James O. Miller for Defendants and Respondents.

Tony Woods appeals from the dismissal of five of his causes of action after demurrers were sustained with leave to amend and he failed to file an amended pleading. We affirm the trial court's decision on all five causes of action: retaliation, defamation, invasion of privacy, eavesdropping and intentional infliction of emotional distress.

He also appeals from the summary judgment of his remaining causes of action. We find a triable issue of material fact as to gender discrimination in violation of the Fair Employment and Housing Act (FEHA), and reverse as to that cause of action. We affirm the adjudication as to the causes of action for race discrimination, failure to maintain a discrimination-free environment, interference with contractual relations and negligent infliction of emotional distress.

FACTUAL AND PROCEDURAL SUMMARY

Tony Woods (Woods) is an African-American male who worked as a cashier at Vans Shoes. To supplement his income, he applied for an entry-level cashiering position at Rainbow Acres, a health food store adjacent to the shoe store. The only qualification required for the Rainbow Acres position was cashiering experience.

In his declaration in opposition to summary judgment, Woods states that he applied for the job on or about November 1, 1998. He did so because assistant manager Robert Barry advised him that there was an open position. Woods also says that a sign advertising the position was displayed in the store window at all times. Barry's declaration corroborates Woods' statement.

Woods declares that when he checked on his application in late November 1998, the store manager, Laura Hughes, told him that Rainbow Acres was only hiring women. Barry recalls that he overheard managers discussing their intent to

only hire women in late 1998. Woods told Hughes he believed that was illegal discrimination and asked to speak with the owner.

In her initial deposition, Hughes estimated that Woods applied in the latter part of 1998. However, the next day she amended her statement to say that he actually applied in late January 1999. The reason for the amendment was that she later remembered that Woods applied while she was training a new employee, an Hispanic woman, who was hired in late January 1999. At that time Rainbow Acres also had hired an African-American male. Hughes says that she did not hire Woods because she had just hired these two people and there were no available positions.

Hughes also states that two additional employees, one male and one female, were hired in late November as well. She says that if Woods was denied employment in November, it was because there was no position available for him at that time. Woods states that an Hispanic male and an African-American male were hired, after he was refused employment.

In July 1999, Woods formally notified Rainbow Acres that he planned to sue for discrimination. An employee of Rainbow Acres then complained to Vans Shoes about Woods' alleged harassment of one of the Rainbow Acres cashiers. The employee told a store representative that Woods was "stealing time." In his deposition, Woods acknowledges that he suffered no adverse employment action at Vans Shoes.

Toward the end of 1999, Woods requested a copy of his employment application from Rainbow Acres in order to resolve the date issue. Rainbow Acres could not provide it because the store destroys such records after a one-year retention. Rainbow Acres has no record that Woods ever submitted a written application.

Woods filed his complaint in August 2000 against Rainbow Acres, owner Howard M. Pollack, and Hughes, alleging 10 causes of action. The defendants' demurrer was sustained as to five causes of action: retaliation, defamation, invasion of privacy, eavesdropping and intentional infliction of emotional distress. The trial court gave leave to amend the complaint. Woods did not do so.

The defendants moved for summary judgment of the remaining causes of action: sex and race discrimination, failure to maintain a discrimination-free environment, interference with contractual relations and negligent infliction of emotional distress. The trial court granted the motion and awarded the defendants attorney's fees. Woods timely appealed the court's ruling on the demurrer, motion for summary judgment and award of attorney's fees.

DISCUSSION

I

A demurrer on the basis of failure to state a cause of action may not be sustained "if the pleading, liberally construed, states a cause of action on any theory." (*Covo v. Lobue* (1963) 220 Cal.App.2d 218, 221; see also *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 368-369.) "Where the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff; "if the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal must be affirmed. [Citations.]'" (*Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 48, quoting *Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 994; see also *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.) Since the trial court sustained the

demurrer with leave to amend and Woods declined to amend, we examine the relevant pleadings with these principles in mind.

The demurrer to Woods' third cause of action for retaliation in violation of FEHA was properly sustained. It is an unlawful employment practice for "any employer . . . to discharge, expel, or otherwise discriminate" against anyone who has opposed a practice forbidden by FEHA or has filed a complaint, testified or assisted in any FEHA proceeding. (Gov. Code, § 12940, former subd. (f), now subd. (g).) It also is an adverse employment action for "an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the [FEHA]." (Cal. Code Regs., tit. 2, § 7287.8, subd. (a).)

"To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, the employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

Woods claims that he filed a complaint with the Department of Fair Employment and Housing (DFEH), and then "the Defendants . . . went to [his] current employer and complained about [him], in an act of retaliation" Consequently he "suffered the intangible loss of such employment-related opportunities such as experience in the position that [he] had been working." Contacting the DFEH is a protected activity. However, Woods fails to sufficiently allege facts constituting an adverse employment action prohibited by FEHA. That is fatal to the cause of action.

The demurrer to Woods' fifth cause of action for defamation was properly sustained. A complaint for defamation is defective if it "does not allege either the specific words or the substance of [the] statements . . . but instead merely alleges the conclusions of the pleader that statements were made which 'intimated and suggested' that plaintiff had done certain wrongful things." (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 235; see also *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 951.) Woods' complaint alleges "[f]alse and defamatory statements were written and spoken about [him], including within the last year." This is not a sufficient pleading of defamation.

The demurrer to Woods' sixth cause of action for invasion of privacy also was properly sustained. Article 1, section 1 of the California Constitution provides a right to privacy, but only if the expectation of privacy is reasonable. "The action has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231.)

Woods alleges that the defendants "directly violated [his] privacy by communicating private information to others about Plaintiff who had no need to know the information" and committed other "intrusions [that were] offensive and objectionable to Plaintiff and to a reasonable person of ordinary sensibilities. The intrusions were into aspects of Plaintiff's life, including his employment history and home life, which were private and entitled to remain private." These statements do not establish that Woods had a particular and reasonable right of privacy not subject to invasion.

The demurrer to Woods' eighth cause of action for eavesdropping invasion of privacy in violation of Penal Code section 632, which protects confidential communications, was properly sustained. "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably

indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” (Pen. Code, § 632, subd. (c).) A conversation is a ““confidential communication”” under this statute only if a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768.)

Woods alleges that he had “confidential and private conversations with various employees, customers and others” at Rainbow Acres and that the defendants invaded his privacy by “willfully, deliberately, maliciously and intentionally eavesdropping on and recording [these conversations] by means of an electronic device.” However, where the workplace is regularly open to entry or observation by the public, any expectation of privacy from recording is unlikely to be deemed reasonable. (*Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at pp. 236-237.) Woods did not have a reasonable expectation of privacy “at, within, outside and around” the Rainbow Acres store, a workplace that is open to the public. Woods did not specify the location within the store where these conversations took place. He did not allege a basis for a reasonable expectation that the conversation was not being overheard or recorded. Further, there is no allegation beyond Woods’ speculation that any recording indeed took place.

The demurrer to Woods’ ninth cause of action for the intentional infliction of emotional distress (IIED) was properly sustained. To establish IIED, “the modern rule requires a showing of conduct exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.” (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) The elements required for a prima facie case are: “(1) extreme and

outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593.) Woods contends that the conduct set forth herein in causes of action one through eight, for sex discrimination, race discrimination, retaliation, failure to maintain an environment free of discrimination, defamation, invasion of privacy, eavesdropping, and interference with a contract was extreme and outrageous. The case as pleaded does not allege the kind of egregious conduct necessary to sustain a cause of action for IIED. Nor does Woods allege that he suffered severe or extreme emotional distress.

II

““Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision to grant [defendant's] summary judgment de novo.” [Citation.]” (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951, quoting *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713.)

Summary adjudication should not have been granted on the first cause of action for sex discrimination. In employment discrimination cases, the employee must first establish a prima facie showing of wrongful discrimination. If the employee does so, the burden shifts to the employer to show a lawful reason for its actions. If that is done, the burden shifts back to the employee to demonstrate that the reason is pretextual. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.)

Woods established a prima facie case. According to his evidence, he applied for a job while positions were posted as available, he was qualified for the job, and he was told by Hughes, the store manager, that he would not be hired because only women were being hired at that time.

Rainbow Acres asserts a legal reason for not hiring Woods: it had just hired two cashiers and did not need another. Hughes denies that she told Woods that the store would only hire women; she says she told him that Rainbow Acres did not have positions available at that time. This creates a triable issue of material fact.

There also is a factual discrepancy regarding the timing of Woods' application. Woods claims that he applied in November 1998. Rainbow Acres claims that it was in late January 1999. Rainbow Acres has destroyed Woods' application. The timeframe is relevant if there were positions available in November, but not in January. There is no evidence in the record except the declarations of Rainbow Acres personnel as to how many new employees were hired and when. This conflicting testimony presents another triable issue.

This takes us to pretext. If Woods is right that he applied at a time when there was a help wanted sign in the window and there were positions available, then Rainbow Acres' lawful reason could be pretext. As we have pointed out, there is a triable issue of fact on this question.

Summary adjudication was properly granted on the second cause of action for race discrimination in employment. Woods did not establish a prima facie case. Generally, race discrimination must be proven by circumstantial evidence. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Here there is no evidence sufficient to raise an inference of race discrimination in the record. There is only Woods' speculation that Rainbow Acres' sex discrimination was a pretext for discrimination based on race. That is not sufficient.

Summary adjudication on the fourth cause of action, for failure to maintain a discrimination-free environment, was properly granted. It is an unlawful employment practice “for an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (Gov. Code, § 12940, former subd. (i), now subd. (k).)

Assuming that this ground may be asserted by someone who is not an employee, it is not established here. Plaintiff does not dispute that defendants maintained a work environment with approximately two-thirds of its employees being members of various racial and ethnic minorities, about half of whom were males. No evidence was submitted sufficient to create a triable issue of material fact as to whether this integrated working environment discriminated against members of any protected classes.

Summary adjudication of the seventh cause of action, for interference with contractual relations, also was properly granted. The elements of this tort are: (1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; (5) resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55, citing *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Woods failed to establish that Vans breached a contract with him, and he testified in deposition that nothing anyone at Rainbow Acres may have done or said to anyone at the Vans store had any negative impact on his employment there.

Finally, summary adjudication on the tenth cause of action for negligent infliction of emotional distress (NIED) was properly granted. The elements of this tort are duty, breach, causation and damages. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588; *Klein v. Children’s Hospital*

Medical Center (1996) 46 Cal.App.4th 889, 895.) Duty is determined by considering factors such as the foreseeability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1079-1080.) Woods has not established that Rainbow Acres owed him a duty, that it breached that duty, or that he suffered damages as a result of any breach.

DISPOSITION

The judgment is affirmed as to nine causes of action. As to the cause of action for sex discrimination, the judgment is reversed and the case remanded. The order granting attorney's fees to defendants also is reversed. Each side is to bear its own costs on appeal.

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EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

CURRY, J.