Filed 1/25/12 Shannon v. LA County Fire Dept. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MICHAEL SHANNON et al., Plaintiffs and Appellants, v. LOS ANGELES COUNTY FIRE DEPARTMENT et al., Defendants and Respondents.	B223650 (Los Angeles County Super. Ct. No. BC380970)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Shook, Judge. Affirmed in part; reversed in part and remanded.

Ryan, Datomi & Mosely, Richard J. Ryan, J. Morgan Ryan and Dawn Cushman for Plaintiffs and Appellants.

Law Offices of David Weiss, David J. Weiss, Peter Bollinger; Greines, Martin, Stein & Richland, Martin Stein and Alison M. Turner for Defendants and Respondents.

* * * * * *

This case arises out of appellant Michael Shannon's (Shannon) termination from employment at the Los Angeles County Fire Department (LACFD). Shannon has since been reinstated with back pay. Shannon's wife, Sherri Shannon also appeals. The trial court granted summary judgment in favor of LACFD and its employees.

We conclude that although appellants provide evidence Shannon should not have been terminated, they fail to provide any evidence raising a triable issue that his termination was motivated by discriminatory animus or that Shannon was retaliated against or harassed because he suffered from posttraumatic stress disorder (PTSD) or a perceived drug addiction. "'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is . . . whether the given reason was a pretext for illegal discrimination'" or other illegal conduct. (*Arteaga v. Brink's Inc.* (2008) 163 Cal.App.4th 327, 344 (*Arteaga*); see also *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 76 [claims for disability discrimination, harassment and retaliation require that the adverse action was motivated "by a discriminatory purpose – or retaliatory motive – against plaintiff because of her [or his] protected status"].)

For that reason and others, we affirm summary adjudication of all causes of action except for the claim that LACFD failed to reasonably accommodate Shannon's disability. Respondents failed to provide any fact in their statements in support of summary judgment addressing this claim and therefore failed to show summary adjudication was warranted. The judgment is affirmed in part and reversed in part.

FACTS AND PROCEDURE

We construe the facts in the light most favorable to appellants, the parties opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) For purposes of this appeal, we assume that the individual respondents – Captain Norman Branch, Battalion Chief William Blackburn, Assistant Chief Mark Bennett, and Deputy Fire Chief Steve Lindsey – were Shannon's superiors at LACFD. Thomas J. Curry, a former assistant fire chief, provided a declaration in opposition to summary judgment, most of which the trial court found inadmissible.

1. Shannon's Tenure at LACFD Prior to September 28, 2005

Since 1987, Shannon was employed at LACFD, achieved the rank of firefighter specialist and was qualified to drive the Urban Search and Rescue truck. He had an exemplary record. On December 8, 2004, Shannon was injured while on duty. Afterwards, Dr. Ralph Gambardella diagnosed Shannon with "L/knee post-traumatic arthritis" and put Shannon on restricted duty. Among the restrictions was "no driving." On March 28, 2005, Dr. Gambardella found Shannon temporarily totally disabled. Shannon was off duty December 2004 through August 2005.

Shannon stated that while he was on leave, Chief Blackburn and Assistant Chief Bennett accused him of "shirking [his] responsibility as a firefighter." Blackburn and Bennett believed that the driving restrictions concerned only driving the fire engine; whereas Shannon believed he was restricted from driving to work. On May 26, 2005, Dr. Gambardella found Shannon temporarily totally disabled, indicated that his left knee was compromised, and stated that Shannon suffered from depression. On September 8, 2005, Dr. Gambardella released Shannon "to regular work effective 9/12/05."

Shannon returned to work and worked overtime, working ten 24-hour shifts between September 14, 2005, and September 28, 2005.

2. September 28, 2005

On September 28, 2005, Shannon was exhausted due in part to the overtime he had been working. Captain Branch and firefighter Joseph Chen observed what they believed to be unsafe driving by Shannon including unsafe lane changes and following other vehicles too closely. Shannon's "driving was not up to his usual standards."[1] "Captain Branch was concerned about the safety of the crew and the public." Prior to September 28, Branch had been told that two other captains suspected in the past that Shannon may have abused pain medication.

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[1] Quotations in this part of the Facts are to an opinion issued by a hearing officer, which ultimately led to Shannon's reinstatement.

That same day, Shannon did not wake up to a call, requiring other firefighters to awaken him and slightly delaying the response. Shannon then drove the firetruck to the wrong address. Captain Branch relieved Shannon of his duties, and Chen drove the firetruck back to the station. Based on Shannon's driving, the difficulty awakening him, and his bloodshot eyes, Branch thought Shannon might be under the influence of drugs or alcohol.

When they returned to the station, Captain Branch asked Shannon if he took pain medication. Branch relieved Shannon from duty and told him he needed "to go and get some help." Shannon left the station. Later, Chief Blackburn asked Shannon why he had abandoned his post, and Shannon explained that Branch had told him to get some help.

3. LACFD Fails to Comply with Its Drug Testing Policy

An LACFD firefighter is prohibited from reporting to duty under the influence of alcohol or when the effects of prescribed medication will impair the employee's job performance. The LACFD's drug testing policy requires a supervisor who suspects an employee under the influence to undertake several steps including ordering the employee to undergo drug testing. Shannon was not asked to take a drug test on September 28, 2005. LACFD therefore failed to comply with its drug testing policy (as appellants' expert opined). Because it did not comply with procedures, LACFD was not entitled to the presumption that Shannon had used a controlled substance because he refused to be tested.

4. Shannon Is Placed on Medical Leave for Depression

On September 30, 2005, Dr. Alex Beebee, a psychiatrist, placed Shannon on medical leave due to major depression. Shannon was not cleared to return to work until April 2006.

While on leave, on November 5, 2005, Shannon completed a form entitled "Los Angeles County Fire Department Employee's Report of Injury/Illness." Shannon stated that he had suffered a "sudden on-set of panic from continuing stress from deep depression, agitation, lack of sleep, to[o] many days worked in a row." Shannon

indicated that the illness began September 28, 2005, and was reported that date. On that form, Shannon indicated that his request for treatment for depression was denied.

5. LACFD Conducts an Inquiry into Shannon's September 28, 2005 Conduct

On February 23, 2006, Assistant Chief Bennett notified Shannon of an internal inquiry into allegations that he engaged in "inappropriate behavior during the course of the 72 hour period beginning on September 26, 2005. Specifically, during this period you were observed demonstrating slurred speech, becoming upset and agitated, exhibiting periods of deep sleep where extraordinary efforts from other personnel were required to wake you up, and you were observed driving in a manner that was unsafe and reckless to the extent that you had to be relieved of driving duties." The letter requested Shannon respond in writing to the allegations.

Shannon responded in writing on March 14, 2006. He stated that he appropriately changed lanes. He had to be awakened for a run because he fell into a deep sleep due to exhaustion, sleep deprivation, and stress. Shannon stated that "[u]nder stress, sleep [deprivation], dry mouth and fatigue, I will sometimes stutter and slur some speech. I was upset, at what had taken place, and I did get a little agitated with myself." Shannon explained that he left the station after being relieved of his responsibilities. Shannon also stated that he was still attending physical therapy three times a week.

6. Shannon Is Diagnosed With PTSD

On April 4, 2006, Dr. Diane DeSilva diagnosed Shannon with major depressive disorder and PTSD. A report from Dr. DeSilva was sent to Intercare Insurance Services on May 12, 2006. Dr. DeSilva concluded that "[t]he predominant cause of [Shannon's] psychiatric injury was the actual events of his employment with the LA County Fire Department." Appellants identify no evidence that Dr. DeSilva's report or a summary of its contents was sent to any respondent.

7. Shannon Is Terminated

On May 16, 2006, four days after Dr. DeSilva informed Intercare Insurance Services that Shannon had been diagnosed with PTSD, LACFD wrote Shannon indicating that it intended to discharge him. The basis for the discharge substantially

tracked the allegations in the internal inquiry and included the following: On September 26, 2005, Shannon was in a deep sleep and had to be awakened to respond to a call. Shannon had bloodshot eyes and was slurring his speech that day and the next day. On September 28, 2005, Shannon drove too closely to other vehicles and in an unsafe manner. That same day, it took two employees to awaken Shannon for a rescue, at which point Shannon drove to the wrong location and nearly hit a light pole. When Shannon learned that he would be drug tested, he abandoned his post.

Shannon denied the allegations and requested a *Skelly* hearing. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*).) A *Skelly* hearing is an opportunity for an employee to challenge proposed discipline and provide information that was not known before the proposed action was taken. After that hearing, on August 16, 2006, it was recommended that the LACFD proceed with the proposed action because there appeared to be credible evidence that Shannon "shirked responsibilities regarding submitting to a drug test; failing to cooperate/communicate with supervisors/Department."[2]

Shannon was discharged effective September 7, 2006. No progressive discipline was used with Shannon. As a result, Shannon was successful in overturning the discharge. A hearing officer found that there was no presumption that Shannon was under the influence of alcohol or drugs because the procedure required to attain that presumption – i.e., a demand for a drug test – did not occur. The hearing officer found Shannon did not report for duty under the influence of a drug, or controlled substance, or alcohol. The hearing officer concluded that "[t]o the extent that [Shannon's] driving on September 28, 200[5] was below par, it was caused by a recognized medical condition and not by illegal drugs, prescription drugs or alcohol." The hearing officer also

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2 Curry opined that the *Skelly* hearing was a sham, but his opinion was not based on any facts and therefore was properly excluded for lacking any evidentiary support. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743 ["'the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact'"].)

concluded that Shannon "and the Department have different perceptions of [Shannon's] driving on September 28, 200[5]," and "[e]ach is telling the truth as they perceive it." The hearing officer ultimately concluded that because this was Shannon's first discipline in 18 years, the discipline was disproportionate and the discharge was grossly unfair. The Civil Service Commission overturned Shannon's termination, and he was reinstated with back pay.

8. Curry Opines That LACFD Should Have Conducted an Investigation

The internal inquiry into Shannon's conduct on September 28, 2005, was a factfinding process, not an investigation. According to Curry, a factfinding process commenced February 2006 and the LACFD should have conducted an investigation instead of a factfinding process before terminating Shannon. While Curry faults fact finder Ronald Wu for failing to interview Dr. DeSilva after she issued her report May 12, 2006, there is no evidence that Wu or any respondent was aware of Dr. DeSilva's report, should have been aware of the report, or would have been aware of the report if an investigation had been conducted instead of a factfinding process. We assume for purposes of this appeal that Curry's conclusion and investigation would have required interviewing Shannon, other witnesses, and preparing a report was admissible (and respondents do not argue otherwise). But no evidence supports appellants' statement that LACFD engaged "in a warped 'fact-finding' expedition inside the chain of command, designed not to elicit the true facts . . . ."

9. First Amended Complaint

On April 25, 2008, appellants sued the LACFD, Mark Bennett, William Blackburn, Norman Branch and Steve Lindsey alleging causes of action for *breach of contract*, *breach of implied contract*, wrongful termination, disability discrimination, harassment, retaliation, *Labor Code violation*, *defamation*, *intentional interference with prospective economic advantage*, *negligent interference with prospective economic advantage*, *willful misconduct*, intentional infliction of emotional distress, *negligent infliction of emotional distress*, *negligence*, and loss of consortium. Appellants do not challenge the summary adjudication of the italicized causes of action.

In his cause of action for disability discrimination, Shannon alleged that he suffered from PTSD and was perceived as suffering from drug abuse. He alleged that he was discriminated against on the basis of his PTSD and wrongfully terminated "under the pretext" that he used drugs. He alleged LACFD failed to reasonably accommodate his need for medical attention due to PTSD or his perceived need for drug intervention.

In his cause of action for harassment, Shannon alleged that respondents subjected him to harassment and ridicule and improperly interacted with him as if he were under the influence of alcohol or drugs. In his cause of action for retaliation, Shannon alleged that he was accused of being on drugs or otherwise disabled. He was retaliated against by being denied sick leave, being told to leave the premises, and being ordered to stay away from all fire stations. He was placed on administrative leave and notified of the intent to terminate his employment based on false charges. Shannon's wrongful termination cause of action was based on alleged discrimination against him based on an actual or perceived disability.

Appellants' intentional infliction of emotional distress claim was based on the allegation that respondents "knew or should have known [Shannon] suffered from [PTSD]" when he injured his knee and falsely accused him of drug use and drunkenness. There were no allegations for Sherri Shannon's loss of consortium cause of action.

10. The Trial Court Granted the Motions for Summary Judgment

The LACFD and the individual respondents moved for summary judgment. Appellants opposed the motions and attached a copy of Shannon's deposition transcript to their opposition. In his deposition, Shannon acknowledged driving to the wrong location on September 28, 2005, but denied almost hitting a light post. Shannon did not recall if he slurred his speech, but if he did it was "most likely" the result of "being upset." Shannon acknowledged that his eyes probably were bloodshot. Shannon stated that Chief Blackburn threatened to have him arrested if he reported to his fire station.[3]

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[3] Shannon had previously told the deputy chief in charge of the *Skelly* hearing that this order extended to any fire station.

Judgment was entered in favor of respondents, and this appeal followed.

DISCUSSION

"We independently review an order granting summary judgment. [Citation.] We determine whether the court's ruling was correct, not its reasons or rationale. [Citation.] 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' [Citation.] We review for abuse of discretion any evidentiary ruling made in connection with the motion." (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504-505.) Although we review summary judgments de novo, appellants bear the burden of showing error. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.)

1. Disability Discrimination

The California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) prohibits discrimination against a person with a disability. (*Green v. State of California* (2007) 42 Cal.4th 254, 257.)

"'Federal and California courts have acknowledged the difficulty of proving intentional discrimination: "Proving intentional discrimination can be difficult because '[t]here will seldom be "eyewitness" testimony as to the employer's mental processes.' . . . It is rare for a plaintiff to be able to produce direct evidence or 'smoking gun' evidence of discrimination. . . ." . . .

"'"Consequently, the United States Supreme Court has developed rules regarding the allocation of burdens and the order in which proof is presented to resolve 'the elusive factual question of intentional discrimination.' [Citations.] . . . [P]laintiffs may demonstrate via indirect or circumstantial evidence that they were the victims of discrimination." . . . "First, it is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff proves the prima facie case, then the burden shifts to the defendant to [articulate a] legitimate nondiscriminatory reason for its employment decision. Third, if the defendant [offers such a reason], then the plaintiff must have an opportunity to show by a preponderance of

the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. . . .” . . .

“‘While the burden of production shifts to the defendant . . . once a prima facie case is made, “the ultimate burden of persuading the trier of fact that the defendant engaged in intentional discrimination remains at all times with the plaintiff.” . . . If the defendant succeeds in carrying its burden of production, [the presumption of discrimination] ‘drops from the case’ and the trier of fact determines the ultimate question of whether the plaintiff has shown intentional discrimination.” . . . [¶] . . . [¶]

“‘ . . . “The ultimate question is whether the employer intentionally discriminated, and proof that ‘the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the *plaintiff’s* proffered reason . . . is correct.’ . . . In other words, ‘[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’ . . .” . . . Nevertheless, evidence that the employer’s proffered reasons are pretextual is significant: “Thus, a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.”’ [Citations.]

“‘“The [employee] cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. . . . Rather, 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 [the asserted] non-discriminatory reasons.’ . . .”’ [Citation.]” (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 342-343.)

In the context of a summary judgment motion, “‘“‘the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.’” . . . Thus, “‘[a]lthough the burden of proof in a [discrimination] action claiming an unjustifiable

[termination] ultimately rests with the plaintiff . . . , in the case of a motion for summary judgment or summary issue adjudication, the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue. . . . In other words, the burden is reversed in the case of a summary issue adjudication or summary judgment motion. . . .'"' [Citation.]" (*Arteaga*, *supra*, 163 Cal.App.4th at p. 344.) "'[G]enerally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.'" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 169.)

As we explain, we agree with the trial court that appellants failed to raise a triable issue of fact as to pretext. The discharge letter provided reasons for Shannon's termination, which were legitimate.[4] Thus, appellants had the burden to show a triable issue of the falsity of the proffered reason and a triable issue that the motive was instead discriminatory. (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1101.)

2. Appellants Provided No Admissible Evidence to Rebut LACFD's Legitimate Reason for Termination

The only evidence appellants cited in response to the reasons given for terminating him were from Curry's declaration. Curry opined that the *Skelly* hearing was a "sham," that Shannon was perceived as being disabled, that respondents knew Shannon suffered from PTSD, and that Shannon was wrongfully terminated. Shannon does not argue that the court erred in excluding these opinions. (He argues other evidence was improperly excluded, which we discuss in the last part.) Thus, Shannon fails to show the court

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[4] Appellants argue that the LACFD's statement that the "letter of discharge indicates that [Shannon] was terminated for legitimate reasons . . ." is insufficient to state that Shannon's employment was terminated for legitimate, nondiscriminatory reasons. We disagree. Appellants were on notice that LACFD contended it terminated Shannon for legitimate reasons. The fact that LACFD referred to its letter identifying the reasons instead of simply listing the reasons does not render the statement of fact fatally ambiguous. Moreover, LACFD argued "there is no evidence that [Shannon's] disability played any role in the process of terminating [Shannon]."

abused its discretion in excluding the opinions, which were the only evidence cited to rebut the legitimate reasons for termination. (See *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074 ["It is appellant's 'burden on appeal to affirmatively challenge the trial court's evidentiary ruling, and demonstrate the court's error'"].) The court properly summarily adjudicated Shannon's cause of action for disability discrimination.

Shannon makes several additional arguments on appeal, which as we explain also lack merit. In short, he presents no evidence raising a triable issue of fact that he was terminated because of his PTSD or his perceived drug addiction.

A. PTSD

There is no dispute that PTSD is a protected disability. The hearing officer found Shannon "was severely affected by" PTSD. Appellants, however, fail to raise a triable issue of fact showing that LACFD's legitimate reasons for terminating him was instead pretext for discrimination.[5] We discuss seriatim appellants' arguments that (1) they showed LACFD's reason for terminating him was false; (2) Shannon was not treated the same as similarly situated employees; and (3) retaliatory animus may be imputed because Shannon's supervisors acted with discriminatory animus. As we explain, no argument has merit.

1. Appellants argue that Shannon "proved the falsity and wrongfulness of the [LACFD]'s decision to terminate his employment in the Civil Service Commission

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5 Shannon also failed to make a prima facie case of disability discrimination based on PTSD because there was no evidence that the adverse employment action was because of his PTSD. (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 344-345.) However, because LACFD failed to support this ground in its separate statement, we do not rely on it. To the extent Shannon is arguing the LACFD could not assume Shannon could show a prima facie case and still obtain summary judgment if he could not show pretext, we reject that argument. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203 ["If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing"].)

hearing and was entitled to collateral estoppel . . . ." There was evidence that LACFD failed to follow its policies and could not rely on the presumption that Shannon had used drugs on September 28, 2005. Although there was evidence that the LACFD's reasons for terminating him were not correct, Shannon does not raise a triable issue of material fact showing that the articulated reasons were not the true reasons for the termination. (See *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 361 ["the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory"]; *Pye v. NuAire, Inc.* (8th Cir. 2011) 641 F.3d 1011, 1022 ["proffered legitimate, non-discriminatory reason for termination need not, in the end, be correct if the employer honestly believed the asserted grounds at the time of termination"]; *Majewski v. Automatic Data Processing, Inc.* (6th Cir. 2001) 274 F.3d 1106, 1117 ["as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect"]; *Pugh v. City of Attica, Indiana* (7th Cir. 2001) 259 F.3d 619, 626 [even if city is incorrect, plaintiff fails to show pretext if city acted in good faith and held honest belief in reason for termination].)[6]

2. Appellants state that "the employer's failure to treat [Shannon] in the same manner that it treated similarly situated other employees provides evidence that the employer disciplined [Shannon] because of discriminatory animus and not because of the alleged work deficiencies." Appellants, however, cite no evidence that Shannon was treated differently from other similarly situated employees.

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6 "'Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 (Title VII) [(42 U.S.C. § 2000e et seq.)], the Age Discrimination in Employment Act (ADEA) [(29 U.S.C. § 621 et seq.)] and the Americans with Disabilities Act (ADA) [(42 U.S.C. § 12111 et seq.)] are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA.'" (*Reno v. Baird* (1998) 18 Cal.4th 640, 647-648.)

3. Appellants rely on the principle that "[i]mputation of retaliatory animus will be justified by any set of facts that would permit a jury to find that an intermediary, for whatever reasons, simply carried out the will of the actuator, rather than breaking the chain of causation by taking a truly independent action." (*Reeves v. Safeway Stores Inc*. (2004) 121 Cal.App.4th 95, 114-115, fn. 14.) This principle applies where a supervisor acts based on animus, but someone else makes the ultimate decision adverse to the employee. (*Id*. at p. 114.) The principle, however, is inapplicable here because as we explain appellants present no evidence that Shannon's supervisors acted with discriminatory animus.

Shannon's claim of discrimination is based on the following evidence, which either is not supported by the record or does not lead to an inference of discrimination based on Shannon's PTSD: (1) Shannon was "ridiculed" for not returning to work sooner; (2) Shannon's requests for treatment for depression were denied; (3) when Shannon was released to return to work, he was terminated; (4) Shannon's supervisor prejudged his behavior on September 28, 2005, as that of a person addicted to pain medications; and (5) Shannon's chain of command ignored evidence that his erratic behavior on September 28, 2005, was due to PTSD. None of this evidence raises a triable issue of material fact regarding whether Shannon was terminated for having PTSD.

Most of the alleged discriminatory conduct is unrelated to Shannon's PTSD diagnosis. Criticism for not returning to work sooner concerned Shannon's knee injury and a dispute regarding the extent of the driving restriction. It had nothing to do with PTSD. Shannon's statement that he was denied treatment for depression does not show or support an inference that he was terminated because he suffered from PTSD. Evidence that Shannon was accused of using pain medication on September 28, 2005, does not support an inference that Shannon was terminated because he suffered from PTSD.

Shannon's statement that his chain of command ignored evidence that his conduct on September 28, 2005, was due to PTSD is not supported by any evidence.[7] Dr. DeSilva's report was sent to Intercare Insurance Services on May 12, 2006, long after his supervisors questioned his conduct and began an internal inquiry. Shannon cites no evidence indicating that his supervisors were aware of his PTSD, learned that his conduct on September 28, 2005, was due to PTSD, or ignored evidence that his conduct on September 28, 2005, was due to PTSD. Indeed, Shannon cites to no evidence showing his supervisors learned that he suffered from PTSD prior to his termination. (See *Raytheon Co. v. Hernandez* (2003) 540 U.S. 44, 54, fn. 7 [where employer unaware of disability, adverse decision could not be based on disability].)

Although Shannon was terminated after he had been diagnosed with PTSD, the process began before Shannon was diagnosed with PTSD. Under these circumstances, the temporal proximity does not support the inference that Shannon was terminated because he suffered from PTSD. (*Arteaga*, *supra*, 163 Cal.App.4th at p. 353.) In short, appellants fail to present any evidence supporting an inference that he was terminated because he suffered from PTSD.

B. Perceived as Being Addicted to Alcohol or Drugs

Appellants raise no triable issue of fact regarding whether Shannon was terminated because he was perceived as being a member of a protected class. Appellants' entire argument that Shannon was perceived as having an alcohol or drug addiction is as follows: "FEHA also provides protection for an employee who is 'erroneously or mistakenly believed[] to have a physical or mental condition that limits a major life activity.' (Gov. Code, § 12926.1(d)[].) In that regard, alcoholism is considered a disability covered both by the [ADA] and FEHA and an employer is required to provide a reasonable accommodation for such a disability, even where it is only a 'perceived' disability." Appellants then argue that the reason for the adverse action was

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[7] Appellants cite to 26 pages of Curry's declaration. They fail to provide any legal argument as to the admissibility of the evidence. In any event, there is no *evidence* in Curry's declaration indicating that Shannon's supervisors knew he suffered from PTSD.

discriminatory and that he "produced evidence sufficient to raise a triable issue of fact regarding the real reason for . . . Shannon's termination – the chain of command's erroneous perception of drug addiction . . . ."

Plainly, FEHA protects an employee believed to have a physical or mental condition that limits a major life activity.[8] However, appellants identify no major life activity in which Shannon was perceived as limited.

Assuming alcoholism is considered a disability, there was no evidence that Shannon was perceived as an alcoholic. Assuming appellants are attempting to analogize a drug addiction to alcoholism, they cite no evidence indicating that Shannon was perceived as a drug addict limited in one or more major life activities.[9] (*Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, 896 [drug addiction that limits one or more major life activities is a recognized disability].) Evidence that Shannon was perceived to have used pain killers on September 28, 2005, does not show that he was perceived as a drug addict but instead shows that he was perceived as using drugs on a single day. (See *Lopez v. Pacific Maritime Assn.* (9th Cir. 2011) 657 F.3d 762, 764 [distinguishing a drug addiction from a one-time drug use]; cf. 42 U.S.C. § 12114(c)(1) [an employer may

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8 The federal ADA was amended in 2009 to include perceived physical or mental impairments whether or not the impairment limits or is perceived to limit a major life activity. (42 U.S.C. § 12102(3)(A).) Shannon does not argue that this definition is applicable to him.

9 Appellants also state that Shannon was accused of being addicted to pain medication, but that statement was not supported by the record. The evidence appellants cite shows that there were forms related to "'reasonable suspicion' of alcohol/drug abuse but he never filled them out." The evidence also shows that Captain Branch "asked [him] if he had taken or was using any pain medications," but does not show that Branch accused him of drug abuse and relieved him from duty because of drug abuse as Shannon states. Curry's conclusion that respondents "falsely perceived and portrayed . . . Shannon as a drug abuser" was properly excluded. It is not a proper subject of expert opinion as Curry had no expertise on respondents' view of Shannon. (Evid. Code, § 801 [expert opinion must be based on a matter perceived by or personally known to the witness or made known to him prior to the hearing].)

prohibit use of illegal drugs and alcohol in the workplace].) Appellants argue that there was evidence that Captain Branch had learned that Captains Monahan and Boyle "had suspected in the past that . . . Shannon might have pain med abuse problems." Shannon does not identify Captains Monahan or Boyle, but even assuming they were his superiors, the evidence does not show that they or any respondent perceived Shannon as a drug addict limited in a major life activity. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 50 ["a person is disabled if he is 'regarded or treated by the employer . . . as having, or having had, any physical condition that [currently] makes [or, in the future may make] achievement of a major life activity difficult'"].) None of the remaining evidence Shannon emphasizes is related to drug use or a drug addiction. And, it therefore does not support an inference that Shannon was terminated because he was perceived as a drug addict.

C. Reasonable Accommodation

The FEHA imposes an additional duty on the employer "to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations . . . ." (Gov. Code, § 12490, subd. (n).) It is an unlawful employment practice "[f]or an employer . . . to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (*Id.*, subd. (m).) "An employer's failure to engage in this process is a separate FEHA violation." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193.) To establish a prima facie case for a failure to accommodate, a plaintiff must show that he is qualified for the position as to which an accommodation was sought. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603.)

Shannon alleged that the LACFD made no effort to reasonably accommodate the perceived need for drug intervention or to reasonably accommodate his PTSD. LACFD failed to include any facts in its separate statement concerning the reasonable accommodation claim and therefore failed to show that summary adjudication of this claim was appropriate. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 929.)

2. Retaliation

To establish a prima facie case of retaliation, a plaintiff must show that "he engaged in a protected activity, his 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.) Appellants argue that the court erred in finding that they failed to show Shannon was engaged in a protective activity because respondents stated only that he failed to allege any protected activity. According to appellants, respondents should have instead stated that he was not engaged in a protected activity. We disagree.

The statement that Shannon failed to allege a protected activity is not meaningfully distinguishable from the statement that Shannon failed to show he was engaged in a protective activity. Both statements placed Shannon on notice that he was required to identify the protected activity at the root of his retaliation claim. The trial court correctly found he failed to "identify a protected activity."

In their reply brief, appellants argue that the protected activity was that Shannon asked for a sick day on September 28, 2005. Assuming that they preserved the argument, there is no evidence raising a triable issue of fact that Shannon was terminated because he requested a sick day. No evidence supports that inference.

3. Harassment

To make out a prima facie case of harassment, plaintiff must show he or she was subject to, harassment "sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment . . . ." (See *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 203.) "'"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [Citation.]' [Citation.] . . . [Citations.] Although annoying or 'merely offensive' comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work

environment is unlawful, even if it does not cause psychological injury to the plaintiff." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.)

"'"[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." [Citations.]' [Citation.] [¶] With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Lyle v. Warner Brothers Television Productions*, *supra*, 38 Cal.4th at p. 283.)

Appellants argue that the following evidence demonstrates harassment: (1) August 2005 and September 2005 criticism for not returning to work earlier; (2) September 28, 2005 discussion between Captains Monahan and Branch regarding whether Shannon used pain medication; (3) Branch asking Shannon if he used pain medication on September 28, 2005; (4) Chief Blackburn accusing Shannon of abandoning his post on September 28, 2005, and; (5) ordering Shannon when on leave to refrain from communicating with firefighter personnel. Appellants argue that the conduct was pervasive because it began in August 2005 and continued through August 2006. They argue that it was severe because he "was criticized for being off work, was falsely accused of drug abuse and was issued a direct order from an upper level supervisor to forever stay away from [LACFD] personnel and property."

Assuming the incidents amounted to harassment, appellants failed to raise a triable issue of material fact demonstrating that the alleged harassment was severe enough or sufficiently pervasive to alter the conditions of his employment or to constitute a hostile or abusive work environment. The alleged misconduct was not pervasive but followed isolated events such as Shannon's knee injury and his below par driving. Although Shannon demonstrated that he was not using pain medication on September 28, the question followed his admitted driving to the wrong address when he had bloodshot eyes and slurred speech. The various criticism addressing different events occurred sporadically over a year period and was not pervasive. Nor was the alleged harassment severe, as Shannon appears to acknowledge by failing to argue that he suffered an objectively abusive or hostile work environment or that it altered his conditions of employment. (Cf. *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 710-711 [finding evidence of harassment where a supervisor engaged in rude behavior daily, shunned the disabled employee weekly, and regularly excluded the disabled employee from office events].) Additionally, appellants failed to show that the alleged harassment was linked in any manner to his PTSD or perceived drug addiction.

4. Appellants' Remaining Causes of Action Were Properly Summarily Adjudicated

Appellants' remaining claims require a finding that they raised a triable issue of material fact as to harassment, discrimination or retaliation. Appellants acknowledge that the remaining claims "arise[] out of harassment, discrimination and retaliation." Because we find no evidence of discrimination, harassment, or retaliation, the derivative claims of intentional infliction of emotional distress, wrongful termination, and loss of consortium also fail.

5. Curry's Declaration

Appellants argue that the trial court erred in excluding portions of Curry's expert declaration. Curry worked for LACFD from 1978 through 1999 attaining the level of assistant fire chief. In his declaration, he stated that he knew the standard of practice required of fire departments in the community of Southern California for 2004 through

2009 "with regard to employment issues and under the circumstances presented in this case."

Shannon argues the court erred in excluding the following evidence: the drug and alcohol policies and departure therefrom, practices regarding investigations and Curry's concern with the investigation; and the imposition of disproportionate discipline. Shannon relies on *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 294, footnote 6, in which the court held that opinions by a qualified expert on human resources management on similar topics might assist the jury in its factfinding.

For purposes of this appeal, we assume that Curry's position as assistant chief educated him on the policies and practices of LACFD. We also assume that his experience was relevant even though he was no longer employed at the relevant time. With these assumptions, Shannon has shown that evidence LACFD violated its drug and alcohol policy and should have conducted an investigation that would have required interviewing Shannon, other witnesses, and writing a report was admissible. Curry also opined, as the hearing officer found, that the discipline imposed on Shannon was disproportionate to his offense. That evidence, however, does not raise a triable issue indicating that Shannon was terminated because he suffered from PTSD or was a perceived drug addict. Therefore, even if the evidence should have been admitted it does not show that the summary adjudication of any cause of action was improper.

DISPOSITION

The judgment is reversed as to Shannon's claim LACFD failed to reasonably accommodate him. In all other respects, the judgment is affirmed. The case is remanded to the trial court. The parties shall bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J. RUBIN, J.