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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MIGUEL ALVAREZ, Plaintiff and Appellant, v. PEERLESS BUILDING MAINTENANCE INC., et al., Defendant and Respondent.	B284465 (Los Angeles County Super. Ct. No. BC625493)

APPEAL from orders of the Superior Court of the County of Los Angeles, Mark V. Mooney, Judge. Affirmed**.**

Law Offices of Jonathan J. Delshad, Jonathan J. Delshad for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton LLP, Gregg A. Fisch, Michael T. Campbell for Defendant and Respondent.

INTRODUCTION

In this disability discrimination action, plaintiff and appellant Miguel Alvarez (Alvarez) appeals the trial court's order granting the motion for summary judgment of defendant and respondent Tuttle Family Enterprises, Inc. dba Peerless Building Maintenance Inc. (Peerless). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2016, Alvarez's neighbor told him that Peerless might be hiring people to clean offices and he might consider applying for a job. Peerless operates a janitorial services company with over 500 employees. Alvarez went to Peerless's office in Chatsworth and submitted a job application.

When he submitted his job application, Alvarez could perform the duties of a janitor and he had no work restrictions. He did not request, and did not require, any accommodation from Peerless.

About three weeks after he applied for a job, Alvarez received a phone call from someone who identified herself as a Peerless employee. She said she would be running a background check on Alvarez and wanted to make sure his documents were in order. The caller also asked Alvarez if he was still interested in the job and could submit the necessary paperwork if he was hired. Alvarez answered the questions affirmatively. The caller told Alvarez that Peerless would get in touch with him.

The decision to run a background check of Alvarez was consistent with Peerless's practice of running background checks

on applicants for janitor positions. The background checks included workers' compensation claim histories.

In May 2016, Peerless received Alvarez's background check report.[1] Alvarez also received documents reflecting the background check information sent to Peerless.

Peerless did not call Alvarez and did not hire him. According to Peerless, this was because it had lost Alvarez's job application and could not contact him. Alvarez did not contact Peerless to ask about the status of his job application.

In May or June 2016, Alvarez took a position painting houses and doing construction work.

On July 11, 2016, Alvarez filed a complaint against Peerless. The record on appeal does not contain a copy of the complaint.[2] In his opening brief on appeal, Alvarez asserts the

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1 As discussed more fully below, the trial court sustained Peerless's objections to Alvarez's exhibits purporting to show the results of the background check, including the workers' compensation claim history. Alvarez does not address these rulings on appeal. Alvarez therefore has forfeited any challenge to the rulings. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief issue "constitutes a waiver or abandonment of the issue on appeal"].)

2 According to the trial court's order granting summary judgment, the complaint contained the following causes of action: (1) a first cause of action for disability discrimination under the Fair Employment and Housing Act (FEHA) based on a failure to provide reasonable accommodation and failure to engage in the interactive process; (2) a second cause of action for FEHA disability discrimination for wrongful termination of employment, failure to hire, and disparate treatment; (3) a third cause of action for FEHA disability discrimination for wrongful

theory of his lawsuit "was that he was perceived as having had a history of FEHA disabilities." (Bold and italics omitted.) Alvarez states he is "not alleging that he is presently disabled or even that he was perceived as being presently disabled." (Bold and underlining omitted.)

Peerless moved for summary judgment or, in the alternative, summary adjudication of issues. Peerless argued, among other things, Alvarez did not carry his burden of presenting a prima facie case that Peerless declined to hire Alvarez based on a perceived disability. Peerless presented evidence that it regularly hired janitor applicants whose background checks showed they had previously filed workers' compensation claims.[3]

Alvarez opposed the motion, arguing Peerless's practice of checking the workers' compensation claim history of job

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termination of employment, failure to hire, and disparate treatment; (4) a fourth cause of action for disability discrimination under FEHA based on a failure to provide reasonable accommodation and failure to engage in the interactive process; (5) a fifth cause of action for wrongful termination in violation of public policy; and (6) a sixth cause of action for FEHA disability discrimination for wrongful termination of employment, failure to hire, and disparate treatment. The complaint included a punitive damages claim.

3 Peerless presented evidence that between January 1 and August 31, 2016, Peerless offered jobs to nine out of fifteen people whose background checks showed they had prior workers' compensation claims. Of the nine individuals offered jobs, four had filed workers' compensation claims more recently than Alvarez. Six of the nine individuals remained in Peerless's employment in April 2017.

applicants, allegedly with the aim of minimizing its workers' compensation insurance premiums, supported the conclusion that Peerless discriminated against Alvarez by failing to hire him after his background check revealed a previous workers' compensation claim, which Peerless allegedly perceived as a disability.[4] Alvarez also asserted Peerless's contention that it lost his job application and therefore could not contact him to make a job offer was a pretext for unlawful discrimination.

On July 6, 2017, the trial court sustained several of Peerless's objections to evidence submitted by Alvarez in opposition to the summary judgment motion. The excluded evidence included:

(1) A letter that Alvarez received from the Workers' Compensation Appeals Board (WCAB).

(2) Alvarez's background check results obtained by Peerless.

(3) This statement by Alvarez in his declaration: "I assumed, correctly, that [Peerless] did not call me back because of what it discovered in my workers' compensation records. Sad and disappointed, I did not call [Peerless] because I knew that they would have called me if they wanted to hire me."

(4) These statements in a declaration by Alvarez's counsel about documents which counsel requested and received from the WCAB:

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4 Alvarez did not dispute Peerless's evidence showing it offered jobs to nine out of fifteen applicants with prior workers' compensation claims between January 1 and August 31, 2016. Instead, Alvarez focused on the six remaining applicants who did not receive job offers.

(a) "These must be the same documents that were provided to ADP on [Peerless's] behalf by the WCAB as the WCAB does not have a way of limiting the information produced in response to such a request."[5]

(b) "The public record documents . . . include detailed information about Mr. Alvarez's injury and the limitations of work that resulted, including the fact that the injury was to his back and sustained when Mr. Alvarez 'fell off stage sustaining injuries to back, spine . . .' and that such injuries were ongoing since 10/27/2012.'"

The trial court granted summary judgment, finding no triable issues of fact.[6] With respect to the second, third, and sixth causes of action "for FEHA disability discrimination for wrongful termination of employment, failure to hire, and disparate treatment," the court concluded:

1. Alvarez "lacks admissible evidence of a causal connection between any purported adverse employment action taken by Peerless and [Alvarez's] purported or perceived disability and, thus, [Alvarez] cannot establish a *prima facie* case for any of those claims."
2. Alvarez could not establish a prima facie case on these claims because he did not suffer an adverse employment action.

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5 ADP was Peerless's third-party vendor for background screening.

6 The record on appeal does not include a reporter's transcript of the summary judgment hearing or an authorized substitute.

3. Alvarez "lacks admissible evidence that Peerless'[s] proffered legitimate, non-discriminatory reason for not having [Alvarez] perform any work for [Peerless] was a pretext for unlawful discrimination."

With respect to the first and fourth causes of action "for disability discrimination under [FEHA] based on a failure to provide reasonable accommodation and failure to engage in the interactive process," Alvarez could not establish a prima facie case because he "did not have a disability and did not need an accommodation, . . . never sought an accommodation from Peerless, and . . . never put Peerless on notice that he needed any type of accommodation at all . . . ." The court also determined that these claims were "derivative."

The fifth cause of action for "wrongful termination in violation of public policy" was "entirely derivative of [Alvarez's] failed claims for discrimination and, therefore, fails for the same reasons."

With respect to the punitive damage claim, Alvarez "lacks evidence that a Peerless officer, director, or managing agent engaged in malicious, oppressive, or fraudulent conduct toward him or ratified such conduct by another Peerless employee."

Alvarez appealed.[7]

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7 An order granting summary judgment is not appealable. (*Dang v. Maruichi American Corp.* (2016) 3 Cal.App.5th 604, 608, fn. 1.) In the interests of justice and efficiency, we construe the order granting summary judgment as an appealable judgment. (See *ibid.*)

DISCUSSION

I. Legal standards.

A. Physical disability discrimination under the FEHA.

The FEHA makes it "an unlawful employment practice . . . : [¶] (a) For an employer, because of the . . . physical disability . . . of any person, to refuse to hire or employ the person . . . ." (Gov. Code, § 12940, subd. (a).)

"'Physical disability' includes, but is not limited to, all of the following:

"(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: [¶] (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. [¶] (B) Limits a major life activity. For purposes of this section: [¶] (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. [¶] (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult. [¶] (iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

"(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

"(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

"(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

"(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2)." (Gov. Code, § 12926, subds. (m)(1) – (m)(5).)

"FEHA proscribes two types of disability discrimination: (1) discrimination arising from an employer's intentionally discriminatory act against an employee because of his or her disability . . ., and (2) discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees [who have] a disability . . . ." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246 (*Avila*).) Alvarez alleges intentional discrimination.

To establish a prima facie case of intentional disability discrimination, a plaintiff must show (1) he or she has a disability, (2) he or she is otherwise qualified to do the job, (3) he or she suffered an adverse employment action, and (4) the employer harbored discriminatory intent. (*Avila*, *supra*, 165 Cal.App.4th at p. 1246.)

"'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer.'" (*Avila*, *supra*, 165 Cal.App.4th at p. 1247; see *id*. at p. 1243 [affirming summary adjudication of plaintiff's FEHA claims "because plaintiff failed to raise a triable issue as to whether the Continental employees who made the decision to discharge him knew of his alleged disability at the time they made that decision"].)

B. The *McDonnell Douglas* framework.

Failure-to-hire claims under the FEHA are subject to the burden-shifting framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 736 (*Abed*); see *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860 (*Serri*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).)

The plaintiff has the initial burden of producing evidence that establishes a prima facie case of discrimination. If the plaintiff establishes a prima facie case, creating a "'presumption of discrimination,'" the burden shifts to the employer to provide "'a legitimate, nondiscriminatory reason for the challenged action.'" (*Abed*, *supra*, 23 Cal.App.5th at p. 736.) Under the third step of the *McDonnell Douglas* framework, "'the "plaintiff must [then] . . . have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive."'" (*Ibid*., quoting *Serri*, *supra*, 226 Cal.App.4th at p. 861.) The employer's burden to provide a legitimate nondiscriminatory reason is one of production, not

persuasion, and the employer """need not persuade the court that it was actually motivated by the proffered reasons . . . [but only] raise[ ] a genuine issue of fact as to whether it discriminated against the [plaintiff]."""" (*Id*. at pp. 736-737, quoting *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 (*Caldwell*).) Once the employer satisfies this burden, the presumption of discrimination created by a prima facie case """drops from the case"" and the factfinder must decide upon all of the evidence before it whether [the] defendant intentionally discriminated against [the] plaintiff. [Citation.] In short, the trier of fact decides whether it believes the employer's explanation of its actions or the [plaintiff's]."" (*Id*. at p. 737, quoting *Caldwell*, *supra*, 41 Cal.App.4th at p. 201.)

C. Summary judgment standard.

"'The pleadings define the issues to be considered on a motion for summary judgment. [Citation.]'" (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1355.) Summary judgment is appropriate if "there is no triable issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) For a defendant to meet its initial burden when moving for summary judgment, it must demonstrate "'that a cause of action has no merit'" by showing either "'that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.'" (*Abed*, *supra*, 23 Cal.App.5th at p. 737, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) In the context of an employer's motion for summary adjudication of a discrimination claim, this means the employer

"""has the initial burden to present admissible evidence showing either that one or more elements of [the] plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.""" (*Id.* at p. 738, quoting *Serri*, *supra*, 226 Cal.App.4th at p. 861.)

Once a defendant satisfies its initial burden, "'the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.'" (Code Civ. Proc., § 437c, subd. (p)(2).) In the context of an employer's motion for summary adjudication of a discrimination claim, this means "'the burden shifts to the [plaintiff] to "demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action."'" (*Abed*, *supra*, 23 Cal.App.5th at p. 738, quoting *Serri*, *supra*, 226 Cal.App.4th at p. 861, italics omitted; see also *Caldwell*, *supra*, 41 Cal.App.4th at p. 203 [plaintiff must "produce[ ] admissible evidence which raises a triable issue of fact material to the defendant's showing" to avoid summary judgment].) Thus, "'by applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary judgment, "the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury."'" (*Abed*, *supra*, 23 Cal.App.5th at p. 738, quoting *Caldwell*, *supra*, 41 Cal.App.4th at pp. 202-203.)

D. Standard of review.

In evaluating a grant of summary judgment, we review the record de novo, "'liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.'" (*Abed*, *supra*, 23 Cal.App.5th at pp. 738-739, quoting *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) If summary judgment was properly granted on any ground, we affirm "'regardless of the trial court's stated reasons.'" (*Ibid*., quoting *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1155.)

"While we must liberally construe plaintiff's showing and resolve any doubts about the propriety of a summary judgment in plaintiff's favor, plaintiff's evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact 'if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] Moreover, plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citation.]" (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.)

II. Analysis.

A. The FEHA disability discrimination claims.

1. Peerless presented evidence showing Alvarez could not prove Peerless perceived him as having a disability or a history of disabilities.

"'While [the employer's] knowledge of [the employee's] disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." [Citations.]'" (*Avila*, *supra*, 165 Cal.App.4th at p. 1248; see *id*. at p. 1249 [documents given to employer which showed plaintiff was unable to work on four days due to an unspecified condition and was hospitalized for three days, but which did not specify plaintiff suffered from any condition that qualified as a disability under FEHA, "did not contain sufficient information to put [employer] on notice that plaintiff suffered from a disability"].)

In support of its motion for summary judgment, Peerless presented evidence that it did not perceive Alvarez as having a disability or a history of disabilities. The evidence showed Alvarez never told anyone at Peerless that he had a disability or any type of medical issue. Likewise, Alvarez never asked Peerless for a work accommodation.

In addition, Alvarez testified at his deposition that although he has a bad back, he can work and his back issues have not prevented him from performing work. Alvarez testified he could perform the duties of a janitor and he had no restrictions on his work abilities when he applied for a position with Peerless.

Peerless also submitted Alvarez's background check results, which listed one worker's compensation matter (case number ADJ8916526) arising from an accident that occurred on October 27, 2012, when Alvarez was employed by Hacienda Corona.[8] Peerless noted the background check results did not contain any further information or details about the accident, Alvarez's injury, or the workers' compensation case.

Peerless accordingly argued there was no evidence to suggest it knew, should have known, or perceived that Alvarez had a disability or a history of disabilities.

We conclude that Peerless carried its initial burden of showing an element of Alvarez's prima facie case – perception of a physical disability or history of disabilities – cannot be established. (See *Avila*, *supra*, 165 Cal.App.4th at p. 1249 ["that plaintiff suffered a disability was not 'the only reasonable interpretation of' the information" that plaintiff could not work on four days due to an unspecified condition and was hospitalized for three days].)

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8 The trial court sustained Peerless's objection to Alvarez's submission of a generally similar background check document.

2. Alvarez did not demonstrate the existence of a triable issue of fact.

Because Peerless carried its initial burden, the burden shifted to Alvarez to show the existence of a triable issue of material fact concerning whether Peerless perceived Alvarez to have a disability or a history of disabilities. (See Code Civ. Proc., § 437c, subd. (p)(2).)

In response to Peerless's evidence, Alvarez asserted that when Peerless obtained Alvarez's background check, it learned that he "had two injured discs in his lower back as a result of his prior work which prevents him from performing some major life activities, but would not have prevented him from working as a janitor." Alvarez makes the identical assertion on appeal. In fact, however, the record contains no evidence that Peerless had information about Alvarez's injured discs at any time before Alvarez filed his lawsuit.

Alvarez also argued Peerless "regarded Mr. Alvarez as having a history of disabilities" based on the workers' compensation background check showing Alvarez had a prior workers' compensation claim. (Emphasis omitted.) But the admissible evidence about Alvarez's workers' compensation claim showed only the existence of a claim, the worker's compensation case number, the date of the accident in 2012, and the name of the employer.[9] A conclusion that Peerless perceived Alvarez as

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9 Alvarez argued Peerless could have used the workers' compensation case number to obtain access to the complete workers' compensation file, which contained additional information. The record, however, contains no evidence that Peerless ever reviewed the complete workers' compensation file.

disabled or as having a history of disabilities is not the only reasonable interpretation of this evidence. (See *Avila*, *supra*, 165 Cal.App.4th at p. 1249.)

We conclude that Alvarez's evidence was insufficient to raise a triable issue concerning whether Peerless perceived him as having a disability or a history of disabilities. Therefore, the trial court properly granted summary judgment on the FEHA disability discrimination claims.

B. Alvarez's remaining claims.

Alvarez's remaining claims for failure to provide reasonable accommodation, failure to engage in the interactive process, and wrongful termination in violation of public policy depend on a finding that Peerless perceived him as having a disability or a history of disabilities. (See, e.g., *Avila*, *supra*, 165 Cal.App.4th at p. 1252 ["Section 12940, subdivision (m) requires an employer to accommodate only a '*known* physical . . . disability'"]; Gov. Code, § 12940, subd. (n) [employer engages in unlawful employment practice if it "fail[s] 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 by an employee or applicant *with a known physical . . . disability*" (emphasis added)]; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 355 ["The elements of Arteaga's common law disability [wrongful] termination claim are the same as those of his FEHA claim. . . . As a result, the wrongful termination claim fails for the same reasons as the FEHA claim"].) For the reasons explained above in connection with the FEHA disability discrimination claims, Peerless carried

its initial summary judgment burden of showing Alvarez cannot establish this element of his case and Alvarez has not raised a triable issue of fact. Therefore, we affirm the trial court's order granting summary judgment on these claims as well.

Because the trial court correctly granted summary judgment on all of Alvarez's substantive claims, preventing Alvarez from recovering compensatory damages, the trial court was correct to grant summary judgment on Alvarez's punitive damage claim. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530 ["There must be a recovery of actual damages to support an award of punitive damages"].)

CONCLUSION

The judgment is affirmed. Peerless is to recover its costs on appeal.

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JASKOL, J.*

We concur:

MOOR, Acting P. J.

KIM, J.

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