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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

NICOLE RILEY, Plaintiff and Appellant, v. COUNTY OF EL DORADO, Defendant and Respondent.	C085338 (Super. Ct. No. PC20150258)

Nicole Riley worked in the El Dorado County Psychiatric Health Facility (PHF) where she expressed concerns about safety, specifically about a remodel that eliminated a hallway and scheduling changes that would reduce staffing at times. After she was injured by a patient and filed a workers' compensation claim, she took a higher paying job with the Office of the Public Guardian. Less than two months into the one-year probationary period for her new job, she was terminated for failure to complete probation satisfactorily. Riley sued the County for wrongful termination on a number of theories.

As relevant here, she claimed retaliation under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (h)).[1] The trial court granted the County's motion for summary judgment.

On appeal from the judgment in favor of the County, Riley contends the trial court erred in finding her claims were not covered by FEHA. She asserts that her advocating for mentally disabled patients and her filing of a workers' compensation claim were protected activities and she had associational status due to her advocacy for a protected class. Because Riley could not show she engaged in a protected activity, she failed to establish a prima facie case of retaliation; therefore, her FEHA retaliation claim fails. Accordingly, we affirm.

BACKGROUND

The County initially hired Riley in 2008 in a part-time position. Effective June 1, 2013, she was hired full time as a mental health worker in a county mental health facility known as the PHF. Patients are admitted to the PHF for treatment of a variety of serious mental health conditions. Some patients become violent at times.

In late 2013, Riley and others raised safety concerns in the PHF. These concerns related to changes to work schedules that resulted in fewer staff at times and construction modifications to the layout of the PHF that eliminated a hallway providing visual access to the community room before entering it. In January 2014, Riley was assaulted by a patient and filed a workers' compensation claim for her injuries.

Feeling unsafe at the PHF, Riley sought work elsewhere. In April 2014, before completing her one-year period of probation at the PHF, she took a position at the Office of the Public Guardian (OPG). This position paid more and had a new one-year probation period. On June 9, 2104, Riley was released from employment at the OPG due

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[1] Further undesignated statutory references are to the Government Code.

to failure to satisfactorily complete probation Riley then sought a position at the County's drug and alcohol department, but the verbal employment offer was rescinded.

Riley filed suit against the County for retaliation and wrongful termination. She alleged "the real reason she was fired from the Public Guardian's Office was to retaliate against her for her complaints about safety concerns" and the firing "constituted unlawful discrimination for her association with and advocacy for mental health and disabled patients and was retaliation for filing her worker's compensation claim." The third cause of action was for retaliation under FEHA. It alleged the County retaliated against Riley because of her safety complaints and filing the workers' compensation claim. It further alleged the proffered reason for her dismissal was pretextual. The retaliation included both termination from her position at the OPG and refusal to hire her at the drug and alcohol department.

The County moved for summary judgment. As to the third cause of action, the County contended Riley had not engaged in any protected activity, there was no causal link between any such activity and her termination, there were legitimate, nondiscriminatory reasons for her termination, and there was no evidence of pretext.

In opposition, Riley asserted her advocacy for mentally disabled patients was a protected activity, as was her filing of the workers' compensation claim. She argued that she established a causal connection because her termination coincided with the closing of her workers' compensation claim. She claimed the reason given for her termination was pretextual because she had received compliments for her work and had never been told it needed improvement.

The County offered supplemental authority, *Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368 (*Dinslage*), a case from the Court of Appeal, First Appellate District, Division 5, holding that supporting and promoting the rights of the disabled community did not constitute protected activity under FEHA.

The trial court issued a tentative decision granting the motion for summary judgment on all causes of action. At the hearing, Riley accepted the decision as to all causes of action except the third (FEHA retaliation) and the fifth (breach of contract).

The trial court adopted the tentative decision, granted the County's motion for summary judgment, and entered judgment in its favor. Riley appeals.

DISCUSSION

I

Retaliation Claim under FEHA

Section 12940, subdivision (a) makes it an unlawful employment practice to discharge from employment or discriminate against an employee because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person."

Subdivision (h) of section 12940 makes it an unlawful employment practice "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) "Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Ibid*.)

FEHA's implementing regulations aid in determining what constitutes protected activity. The regulations state: "(a)(1) Opposition to practices prohibited by [FEHA] includes . . . .; [¶] (A) Seeking the advice of the Department [of Fair Employment and Housing] or [Fair Employment and Housing] Council . . . .; [¶] (B) Assisting or advising any person in seeking the advice of the Department or Council . . . .; [¶] (C) Opposing employment practices which an individual reasonably believes to exist and believes to be a violation of the Act; [¶] (D) Participating in an activity which is perceived by the employer or other covered entity as opposition to discrimination, whether or not so intended by the individual expressing the opposition; or [¶] (E) Contacting, communicating with or participating in the proceeding of a local human rights or civil rights agency regarding employment discrimination on a basis enumerated in the Act. [¶] (2) Assistance with or participation in the proceedings of the Department or Council includes, but is not limited to: [¶] (A) Contacting, communicating with or participating in the proceedings of the Department or Council due to a good faith belief that the Act has been violated; or [¶] (B) Involvement as a potential witness which an employer or other covered entity perceives as participation in an activity of the Department or the Council." (Cal. Code Regs., tit. 2, § 11021.)

"The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge [citation], by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination [citation], or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action [citation]. The determination as to what constitutes a protected activity is inherently fact driven." (*Rope v. Auto-Chlor System of Washington, Inc*. (2013) 220 Cal.App.4th 635, 652 (*Rope*), superseded by statute on another ground.)

II

Protected Activity

A. *Safety Advocacy*

Riley contends her advocacy for mentally ill patients as to employer practices that placed their health and safety at risk (reconfiguring the layout of the PHF and schedule changes for staff) was a protected activity. Riley relies on *Lee v. Natomas Unified School Dist.* (E.D.Cal. 2015) 93 F.Supp.3d 1160. In *Lee,* a father claimed he was retaliated against by the school district for advocating on his daughter's behalf with respect to the provision of special educational services. He brought a retaliation action under both Title II of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) and section 504 of the Rehabilitation Act (29 U.S.C. § 794). (*Lee*, at p. 1162.) In denying the district's motion for summary judgment, the district court found "Advocating for disabled students on issues related to their federal and state educational rights is a protected activity." (*Id*. at p. 1168.)

The County argues *Lee* is inapplicable because it did not arise under FEHA.[2]

We find *Lee* distinguishable on its facts, not merely because of the different statutory schemes involved. In *Lee*, the father was advocating for educational services he believed his daughter entitled to under the ADA and section 504 of the Rehabilitation Act. In arguing for services for his daughter, he was in effect opposing practices forbidden by those laws. Here, in complaining about employer practices related only to the *health and safety* of staff and patients, Riley was not opposing a practice forbidden by

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[2] Riley asks us to reject respondent's brief as untimely, arguing that it was filed four days late without any good cause or other explanation. We have reviewed the clerk's electronic records and determined that the first attempt to file the respondent's brief was within minutes of the due date; thus, the brief was subsequently permitted to be filed without separate leave of the court. Accordingly, we shall decline to strike the brief as untimely.

FEHA. FEHA prohibits certain discrimination in employment. It does not address health and safety concerns in the workplace.

Complaints about workplace safety are not a protected activity that will support a FEHA retaliation claim.[3] In *Rodriguez v. Beechmont Bus Service, Inc.* (S.D.N.Y. 2001) 173 F.Supp.2d 139, the plaintiff alleged that he was retaliated against for cooperating with an OSHA investigation and for the filing of internal complaints relating to discriminatory conduct and worker safety. The court dismissed the retaliation claim to the extent it was based on cooperation with an OSHA investigation. "[T]he OSHA investigation was not brought pursuant to Title VII and [ ] unsafe working conditions are not made unlawful under Title VII." (*Id.* at p. 150; see also *Arn v. News Media Group* (9th Cir. 2006) 175 Fed.Appx. 844, 846 ["Blowing the whistle on environmental practices is not covered by FEHA because it is not conduct that gives rise to discrimination on the basis of any of the protected categories under FEHA"].) The complaint must concern discrimination. (See *Barber v. CSX Distribution Services* (3rd. Cir. 1995) 68 F.3d 694, 701-702 [letter to an employer's Human Resources Department was not protected activity because it did not specifically complain about age discrimination].)[4]

In finding Riley's complaints regarding safety were not a protected activity, the trial court relied in part on *Dinslage, supra*, 5 Cal.App.5th 368. Riley contends the trial court misapplied *Dinslage*. We disagree.

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[3] Retaliation against an employee for complaints of workplace safety may be actionable under Labor Code sections 6310-6312.

[4] "[C]ourts of this state have relied upon federal authority interpreting title VII in determining the meaning of analogous provisions of the FEHA. [Citations.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.)

In *Dinslage*, an employee with the Department of Parks and Recreation who worked on services for the disabled, complained about relocation of an event used to fund such services and about a policy change to focus on inclusion for recreational activities and programs rather than providing separate programs for the disabled. (*Dinslage, supra*, 5 Cal.App.5th at pp. 373-374.) After the employee lost his job in a reorganization and was not rehired, he sued claiming retaliation for his opposition to the department's actions that discriminated against disabled persons. (*Id*. at p. 372.) The appellate court upheld the grant of summary judgment. "Dinslage's advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. Dinslage has not shown the Department's actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA." (*Id.* at p. 383.)

Riley contends *Dinslage* is distinguishable because she was not advocating for the disabled community at large, but specifically for the disabled patients in the PHF. As explained *ante*, however, Riley's advocacy--complaining about workplace safety issues--was not opposition to an employment practice made unlawful by FEHA. It was simply not a protected activity under FEHA.

B. *Filing a Workers' Compensation Claim*

Riley contends that filing a workers' compensation claim is a protected activity for purposes of FEHA retaliation. She relies on *Vogel v. Dollar Tree Stores, Inc*. (E.D.Cal., Jan. 14, 2008, No. CIV. 07-22750) U.S. Dist. Lexis 2801, at *13, in which the district court relied, without further analysis, on two other unpublished federal district court decisions to conclude "that a plaintiff's allegation that he filed a workers' compensation claim sufficiently pleads a 'protected activity.' "

In the first case cited by *Vogel*, *Rund v. Charter Communs., Inc*. (E.D.Cal., Mar. 20, 2007, No. CIV. S-05-00502) U.S. Dist. Lexis 19707, at *30-31, the court stated:

"Defendant cites no legal authority nor has the court found any, to support the contention that filing a workers' compensation claim is not a protected activity under FEHA. As such, the court will not dismiss this claim on the ground that plaintiff did not engage in a 'protected activity.' [¶] Nevertheless, summary judgment is properly granted in favor of defendant as plaintiff has no evidence of a causal connection between his 'protected activity' and his termination. Plaintiff may support his allegation of causation with either direct evidence or circumstantial evidence." (Fn. omitted.) We do not read *Rund* to hold that filing a workers' compensation claim is necessarily a protected activity under FEHA; the court declined to decide the issue. Cases are not authority for propositions that are not considered. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160.)

In the second cited case, *Davis v. California Dept. of Corrections* (E.D.Cal., Feb. 23, 1996, No. CIV. S-93-1307) U.S. Dist. Lexis 21305 (*Davis*), the district court considered a copy of a workers' compensation claim for stress-related injuries resulting from alleged harassment by co-workers in its finding of "some evidence" of a protected activity. (*Id.* at *127.)

To the contrary, published federal cases have held that filing a worker's compensation claim is *not* a protected activity for purposes of retaliation under the ADA. (*Reynolds v. American Nat'l Red Cross* (4th Cir. 2012) 701 F.3d 143, 154; *Leavitt v. SW & B Const. Co., LLC* (D. Me. 2011) 765 F.Supp.2d 263, 286 and cases cited.)

We need not decide whether filing a workers' compensation claim is generally a protected activity under FEHA. (See *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158 [Lab. Code, § 132a is not exclusive remedy for disability discrimination].) As noted above, we have observed: "The determination as to what constitutes a protected activity is inherently fact driven." (*Rope, supra*, 220 Cal.App.4th at p. 652.) Here, the filing of the workers' compensation claim was completely unrelated to any discriminatory employment practice. Riley did not file for stress injuries caused by discriminatory harassment as in *Davis*. Rather, she sought--and received--treatment in

the form of physical therapy, chiropractic, and acupuncture services, for her physical injuries of bumps, bruises, and neck and shoulder injuries caused by an assault in the workplace. In this circumstance, the filing of a workers' compensation claim is not a protected activity.

Riley did not establish a prima facie case of retaliation because she failed to show she engaged in a protected activity. The trial court did not err in granting the County summary judgment.

II

Associational Status

Riley contends her advocacy created an associational relationship with mentally disabled patients that gave her a claim under FEHA. She contends the facts of her associational status support her "claim for disability discrimination and retaliation under Defendants' own arguments." She cites to a number of federal cases that found the plaintiff had a valid claim based on associational status.

In these cases, the discussion of associational status applied to a discrimination claim, not a retaliation claim. (E.g., *Barrett v. Whirlpool Corp.* (6th Cir. 2009) 556 F.3d 502 [discrimination on the basis of their friendships with and advocacy for certain African-American co-workers in violation of Title VII]; *Johnson v. University of Cincinnati* (6th Cir. 2000) 215 F.3d 561 [race discrimination based on efforts to ensure that the University complied with its affirmative action policies, and because of advocacy on behalf of women and minorities]; *Lyman v. New York State Office of Alcoholism Substance Abuse Servs.* (N.D.N.Y. 2013) 928 F.Supp.2d 509 [employment discrimination under Title VII].)

A prima facie case of employment discrimination under FEHA requires evidence the plaintiff: (1) is a member of a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) some other circumstance suggesting discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)

" 'The term "associational discrimination" refers to a claim that a plaintiff, although not a member of a protected class himself or herself, is the victim of discriminatory animus directed toward a third person who *is* a member of the protected class and with whom the plaintiff associates.' " (*Knidel v. T.N.Z., Inc*. (D. Mass. 2016) 211 F.Supp.3d 382, 396.) Thus, associational status serves to fulfill the element of being a member of a protected class. That element is not present in a claim for retaliation; instead, the plaintiff must show that he or she engaged in a protected activity. (*Yanowitz, supra,* 36 Cal.4th at p. 1042.)

Riley did not bring an action for employment discrimination under FEHA. On appeal, she challenges only the ruling with respect to the third cause of action for retaliation. Her associational status has no relevance to that claim.

DISPOSITION

The judgment is affirmed. The County shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
Duarte, Acting P.J.

We concur:

/s/
Renner, J.

/s/
Krause, J.