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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GREGORY HUNTER,

Plaintiff and Appellant,

v.

RITE AID CORPORATION et al.,

Defendants and Respondents.

E047552

(Super.Ct.No. SCVSS148093)

OPINION

APPEAL from the Superior Court of San Bernardino County. Paul M. Bryant, Jr.

Judge. Affirmed.

Pedersen Law & Dispute Resolution Corp., Neil Pedersen, Teresa A. McQueen;
McCarty Law and John C. McCarty, for Plaintiff and Appellant.

Kelly, Hockel & Klein, Jonathan Allan Klein, and Annmarie M. Liermann, for
Defendants and Respondents.

1. Introduction

Defendant Rite Aid Corporation employed plaintiff Gregory Hunter as a computer field technician. His work performance was not satisfactory, but he also suffered an

injury on the job before he was terminated.

Hunter sued Rite Aid for employment discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, §12940),¹ wrongful termination, and unpaid overtime. The superior court granted Rite Aid's summary judgment motion. Hunter appeals and we affirm the judgment.

2. The Separate Statements

We are dismayed to be confronted with separate statements from both parties that misconprehend the nature and purpose of these documents for summary judgment. (Code Civ. Proc., § 437c, subd. (b)(1), (b)(3).) Rite Aid initially submitted a separate statement identifying 309 "material facts" that are purportedly undisputed. There is also a considerable amount of confusing duplication among the 309 facts. Furthermore, in addition to responding to Rite Aid's separate statement, Hunter then submitted another separate statement identifying 171 "material facts" which Hunter claims are in dispute.

It is doubtful that this case involves a total of 480 material facts, whether disputed or not: "To be 'material' for purposes of a summary judgment proceeding, a fact must . . . be essential to the judgment in some way." (*Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653.)

Simply listing a fact in the separate statement does not necessarily render it material in the dispositive sense. As happened here, parties often include facts in their separate statements that are background, or illustrative, or irrelevant, but not critical.

¹ All further statutory references are to the Government Code unless stated otherwise.

Moreover, claiming a fact to be disputed and actually raising a triable issue as to that fact are not the same thing. A responding party's separate statement will often claim "disputes" that are irrelevant, or trivial, or unsupported by the evidence.

Furthermore, as one court of appeal has commented: "The parties' separate statements 'are intended to permit the judge to *determine quickly* whether the motion is supported by sufficient undisputed facts. If the opposing statement disputes an essential fact alleged in support of the motion, the judge merely has to review the evidence cited in support of that fact. This saves the judge from having to review all the evidentiary materials filed in support of and in opposition to the motion.'" (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248-1249, citing Weil & Brown, Cal. Practice Guide: Civil Proceedings Before Trial (The Rutter Group 2002) ¶ 10:94.1, p. 10-32.)

Here, the parties' style of presenting every point in this case as a "material" fact does not promote the goal of the trial judge "determining quickly" whether there are disputed facts. Nor does it facilitate meaningful appellate review. In the future we encourage the lawyers for these parties to craft their separate statements so as to offer assistance to the overburdened courts who must review them.

Furthermore, our "task of setting forth the facts has been hampered by [Hunter's] failure to comply with California Rule of Court, rule 8.204(a)(1)(C), which requires parties to '[s]upport any reference to a matter in the record by a citation *to the volume and page number of the record where the matter appears.*'" (*Spangle v. Farmer's Ins. Ex.* (2008) 166 Cal.App.4th 560, 564, fn. 3.) Hunter's references are made entirely to the

separate statements themselves and not to the evidence in the record, forcing on the court the onerous charge of sifting through hundreds of pages of the appellant's appendix.

Hunter apparently incorrectly believes it is the court's "duty to search the record for triable issues of material fact." Instead, "[i]t is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations. [Citations.] Briefs which do not meet this requirement may be stricken. [Citation.] As practical matter, the appellate court is unable to adequately evaluate *which facts* the parties believe support their position. . . . The problem is especially acute when, as here, the appeal is taken from a summary judgment." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205; *Spangle v. Farmer's Ins. Ex., supra*, 166 Cal.App.4th at p. 564, fn. 3.)

3. Factual Background

In spite of these problems and deficiencies, we will undertake to decide the appeal. We rely primarily on Rite Aide's factual recitation. Except as noted, the following facts were undisputed or not effectively disputed by Hunter for purposes of summary judgment.

Hunter worked for Rite Aid as a Field Technician between August 2000 and April 2006. He injured his hand on September 27, 2005. He was fired on April 7, 2006.

Hunter's primary supervisor was Mark Kennedy. Hunter's job was to resolve hardware and software issues at 27 Rite Aid stores in the San Bernardino area. The job required being able to lift at least 10 pounds. Hunter claimed he could be expected to lift as much as 100 pounds.

In 2003 and 2004, Hunter received annual evaluations that he “needs development” and was rated “below expectations” because he was too slow in his performance of assigned tasks.

In February 2005, Kennedy proposed terminating Hunter but Sandra Biss, the human resources manager, required additional action. In June 2005, Kennedy gave Hunter a “below expectations” rating for his annual evaluation.

On September 27, 2005, Hunter sliced his little finger on his left hand with a box cutter, requiring surgery. Hunter was on medical leave until December 15, 2005. He returned to work subject to a medical restriction against lifting more than 10 pounds or using his left hand for gripping.

In his deposition, Hunter acknowledged he had discussed his medical restrictions with Kennedy and another Rite Aid employee, Roger Snider. Hunter was told to have other employees help him with any heavy lifting. Although Hunter apparently thought this was insufficient, he did not voice an objection. Additionally, Rite Aid sent other technicians to assist Hunter. Rite Aid also assigned him nonphysical projects.

Hunter contends these accommodations were ineffective because Rite Aid was understaffed and the accommodations increased delays in his work performance. In his declaration opposing summary judgment, Hunter admitted that he was told to ask for help with lifting but he claimed he was not told to limit himself to “non-physical jobs” and he “was still performing hard drive replacements, and taking servers apart, which involved lifting more than 10 pounds.”

After Hunter returned from medical leave in December 2005, his work performance did not improve, even with accommodations. Kennedy gave Hunter a written warning in January 2006. Kennedy gave further warnings in March 2006.

Hunter never complained about his injury or its dilatory effect on his work performance although he did apologize to some coworkers on March 29, 2006, for any inconvenience caused by him.

Rite Aid finally determined that Hunter's job performance was not going to improve. In April 2006, Rite Aid fired him with the approval of Biss, the human resources manager.

4. Standard of Review

On an appeal from a grant of summary judgment, we examine the record independently to determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) We view the evidence in a light favorable to, and resolve any evidentiary doubts or ambiguities in favor of, the nonmoving party. (*Id.* at pp. 768-769.) The moving party bears the burden to demonstrate "that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "There is 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." (*Ibid.*,

fn. omitted; see also *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1245-1246.)

5. Discussion

On appeal, Hunter makes three arguments. He maintains Rite Aid did not engage in a good faith process to determine reasonable accommodations, it did not provide reasonable accommodations, and it fired him because of his disability.

With respect to his claims for disability discrimination and wrongful termination, Hunter admitted he was an underperforming employee both before and after his injury. Therefore, he cannot make the required prima facie showing that he was qualified for his job or performing it competently. (*Guz v. Bechtel Nat'l. Inc.* (2000) 24 Cal.4th 317, 355-356; *Green v. State of California* (2007) 42 Cal.4th 254, 261-262.) His claims for termination in violation of FEHA and for wrongful termination lack any evidentiary substance.

Instead, the two fundamental arguments underlying Hunter's appeal are that Rite Aid did not engage in a good-faith interactive process regarding accommodation of his disability and hence did not make reasonable accommodations: "In addition to a general prohibition against unlawful employment discrimination based on disability, FEHA provides an independent cause of action for an employer's failure to provide a reasonable accommodation for an applicant's or employee's known disability. (§ 12940, subs. (a), (m).) 'Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself.'

[Citations.] Similar reasoning applies to violations of Government Code section 12940,

subdivision (n), for an employer's failure to engage in a good faith interactive process to determine an effective accommodation, once one is requested. (§ 12940, subd. (n); *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 243.)

“Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.) Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.] While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.” (*Gelfo v. Lockheed Martin Co.* (2006) 140 Cal.App.4th 34, 54.)

a. Claim of Failure to Accommodate

An employer must make reasonable accommodations for the known physical or mental disability of an employee. “Reasonable accommodation” means “a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.” (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974.)

Here, Rite Aid afforded Hunter reasonable accommodations for his injured little finger, including medical leave, assistance from other employees, and nonphysical work assignments. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 994, 1009-1012.) The evidence offered by Rite Aid established that Hunter could not perform

most of his work satisfactorily, including nonphysical work unaffected by the restrictions of his disability.

While admitting his inability to perform, the only contrary “evidence” offered by Hunter was his general contention that the “inadequate nature of the attempted ‘accommodation’ was creating delay, which affected all of plaintiff’s work.” As the trial court recognized, Hunter did not create a triable issue of material fact on this point.

b. Claim of Failure to Engage in Good Faith Interactive Process

Hunter also asserts Rite Aid failed to engage in the “interactive process” as required under section 12940, subdivision (n). “The ‘interactive process’ required by the FEHA is an informal process with the employee or the employee’s representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. [Citation.] Ritualized discussions are not necessarily required. [Citation.]” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.)

The interactive process imposes reciprocal burdens on the employer and the employee. The employee must initiate the process: “Although it is the employee’s burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation.” (*Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at p. 62, fn. 22.)

The employer must reasonably—and continuously—accommodate limitations. (*Scotch v. Art Institute of California*, *supra*, 173 Cal.App.4th at p. 1013.) “Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one

party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." (*Gelfo v. Lockheed Martin Corp.*, *supra*, 140 Cal.App.4th at p. 62, fn. 22.)

The evidence reflects that Rite Aid knew about Hunter's disability and discussed his limitations, offering several kinds of accommodation. But Hunter did not request any further accommodations then or later:

"To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because "[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . ." [Citation.] However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision] (n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' (*Nadaf-Rahrov*, *supra*, 166 Cal.App.4th

at p. 984.)” (*Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at pp. 1018-1019.)

The only accommodations Hunter identifies that should have been offered to him are retraining him or hiring him an assistant—accommodations which were not reasonable because neither would allow Hunter to perform his present job: “Put another way, if this case were presented to a jury, what remedy could it provide? How was [Hunter] damaged by any failure by [Rite Aid] to engage in the interactive process in good faith? The FEHA has a remedial rather than punitive purpose. [Citations.] Unless, after litigation with full discovery, [Hunter] identifies a reasonable accommodation that was objectively available during the interactive process, he has suffered no remedial injury from any violation of section 12940, subdivision (n).” (*Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at p. 1019.) Hunter has not made the requisite showing to support his claim for failure to engage in a good faith interactive process.

6. Disposition

Any other claims asserted by Hunter were waived by his failure to address them on appeal. We conclude there was no triable issue of material fact regarding reasonable accommodation of Hunter’s purported disability or Rite Aid’s participation in the good faith interactive process.

We affirm the judgment. Rite Aid, the prevailing party, shall recover its costs on appeal.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Richli
J.