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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOSEPH VILLANUEVA, Plaintiff and Appellant, v. MIDPEN PROPERTY MANAGEMENT CORPORATION et al., Defendants and Respondents.	H044066 (Santa Clara County Super. Ct. No. 1-14-CV-271846)

Plaintiff Joseph Villanueva sued his former employer, alleging he was fired because he took a leave of absence to care for his newborn child. The trial court granted summary adjudication for the employer on several causes of action. We conclude summary adjudication was improper because of disputed facts regarding the reason for plaintiff's termination. We will therefore reverse the judgment.

I. BACKGROUND

Joseph Villanueva worked for MidPen Property Management Corporation as an apartment complex manager. After his wife became pregnant with their first child, Villanueva requested a 12-week leave of absence from work, as provided for by California law (Gov. Code, § 12945.2). When his supervisor learned about the planned leave she started voicing disapproval. Villanueva says she asked him, "Why can't your wife stay home and take care of the child?"; "Will you be doing anything [], or just sitting and watching T.V. all day?"; and made other similarly inappropriate remarks. During much of his time off Villanueva was required to continue performing job duties and be

available by phone and e-mail. On the day he returned from leave, Villanueva was fired. He says the reason initially given to him for the termination was failure to meet deadlines. A written termination notice states the reason as "misconduct in the workplace." Villanueva's supervisor testified at deposition that there were several reasons she recommended firing him but "one of the main reasons" was allowing a tenant to move in without a rental application first being approved.

Villanueva sued MidPen Property Management and his supervisor for violating the laws that protect an employee's right to take family leave, and for discriminating against him because of his gender. The complaint alleged causes of action for harassment and discrimination in violation of the Fair Employment and Housing Act of 1959 (FEHA; Gov. Code, § 12940, subd. (a)); wrongful discharge in violation of public policy; retaliation in violation of FEHA (Gov. Code, § 12940, subd. (h)); violation of the California Family Rights Act (CFRA; Gov. Code, § 12945.2); and intentional infliction of emotional distress.

Defendants moved for summary adjudication of the causes of action for retaliation in violation of FEHA; violation of the CFRA; and intentional infliction of emotional distress. With their motion they provided evidence of a legitimate reason for Villanueva's termination: he was fired because he violated company policy when he allowed a tenant to move into an apartment without an approved rental application. The trial court granted the motion. Villanueva dismissed his remaining causes of action to allow entry of judgment so he could appeal the summary adjudication decision.

II. DISCUSSION

Our review of an order granting summary adjudication is de novo. We independently decide if the evidence in the record establishes the moving party is entitled to judgment as a matter of law. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1472.)

A. SUMMARY ADJUDICATION STANDARD

Under Code of Civil Procedure section 437c, subdivision (f)(1), a party may seek summary adjudication of a claim "if the party contends that the cause of action has no merit." The purpose of summary adjudication is to streamline a trial by ensuring it involves only causes of action that are in dispute. Summary adjudication is properly granted where no triable issue of material fact exists regarding the claim in question. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) A "triable issue of material fact" exists if the evidence would allow a reasonable trier of fact to find for the nonmoving party on the relevant issue. (*Smith v. Wells Fargo Bank, supra*, 135 Cal.App.4th 1463, 1473.) Essentially, if there is conflicting evidence regarding a material issue, that conflict must be resolved by trial. (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) "[D]oubts about the propriety of summary judgment … are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

B. SUMMARY ADJUDICATION OF THE CFRA AND FEHA CAUSES OF ACTION WAS IMPROPER

Villanueva's causes of action under the CFRA and FEHA allege defendants violated those statutes by firing him because he took time off to care for his newborn child. The CFRA directly prohibits employers from discharging an individual for exercising the statutory right to family leave. (Gov. Code, § 12945.2, subd. (*l*)(1).) FEHA more generally prohibits employers from retaliating against an employee who has engaged in specified protected activity. (Gov. Code, § 12940, subd. (h).) (Villanueva's theory here is that he was fired in retaliation for exercising his protected right to take family leave.)

Defendants contend they are entitled to summary adjudication of the CFRA and FEHA claims because Villanueva cannot establish that the reason he was fired is related

to taking family leave. (See *Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 914 [a defendant can obtain summary judgment by showing that a necessary element of the cause of action cannot be established].) They point to deposition testimony from Villanueva's supervisor and a contemporaneously prepared memorandum explaining the primary reason for the termination was that Villanueva allowed a tenant to move into a unit before a rental application was approved—a serious violation of company policy. But Villanueva has at least some circumstantial evidence suggesting the firing was prompted by his family leave: before taking leave he generally received favorable performance evaluations; his supervisor expressed disapproval that he was taking leave; he was required to work during leave; he was fired the day he came back to work; and not until well afterward was he told he had been terminated for allowing the tenant to move in. And Villanueva offers that he allowed the tenant to move in without application approval only because his supervisor instructed him to and he feared losing his job if he did not comply. A reasonable trier of fact could conclude from that evidence that Villanueva's termination was due to taking family leave, not the employer's principal justification of a company policy violation. Since material evidence is in conflict, the dispute about why Villanueva was fired must be resolved by a trial.

Defendants assert that Villanueva's explanation for why he allowed the tenant to move in must be disregarded because it first appeared in a declaration opposing summary adjudication and it conflicts with his earlier deposition testimony on the subject. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 [in deciding a summary judgment motion, court should defer to admissions obtained through discovery over a party's inconsistent statement in a later declaration].) They point out that before his termination, Villanueva sent an email responding to questions about why he allowed the tenant to move in and the only explanation he offered there was, "I wanted to help him and his family." Then at deposition, when asked about whether the supervisor instructed him to do anything regarding that tenant's move in and if she told him what to say in the

email, Villanueva repeatedly answered "I don't recall." When asked why he allowed the tenant to move in, Villanueva said, "[j]ust doing my job."

We acknowledge the deposition testimony selected by defendants runs counter to Villanueva's declaration opposing summary judgment. But in an earlier session of Villanueva's deposition, he testified *consistently* with his declaration, saying he moved the tenant in because that is what his supervisor instructed him to do. He also testified in that session that the supervisor told him what to say in the email. So we are left with deposition testimony from Villanueva that is in some places inconsistent with his later declaration, and in some places consistent. While that will be an important consideration for the trier of fact in assessing Villanueva's credibility, it is not an unequivocal contradiction that warrants disregarding otherwise admissible evidence at the summary adjudication stage. (*Scalf v. D.B. Log Homes, Inc.*, *supra*, 128 Cal.App.4th at p. 1522 [*D'Amico* rule regarding inconsistent statements should not be applied broadly to prevent an examination of the entire record; the rule is properly applied only where a later declaration completely contradicts an earlier discovery admission].) When resolution of an issue turns on credibility, that issue should be resolved by trial. Summary adjudication should not have been granted as to the CFRA and FEHA causes of action.

C. SUMMARY ADJUDICATION OF THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION WAS IMPROPER

The trial court also granted summary adjudication of Villanueva's cause of action for intentional infliction of emotional distress. That claim requires proof of extreme and outrageous conduct, intended to cause emotional distress, that does in fact cause emotional distress to the plaintiff. (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 100.) Here, if Villanueva were to prove he was fired because he exercised his right to take time off to care for a newborn child, a reasonable trier of fact could find the conduct sufficiently severe to support a cause of action for intentional infliction of emotional distress. That could include the further finding that the conduct

was intended to cause emotional distress (or was undertaken with reckless disregard for that risk, which is all that is required). (*Ibid*.) And there is evidence that defendants' conduct did cause emotional distress: Villanueva testified at deposition and in his declaration that being fired caused him significant emotional problems, such as depression and anxiety.

Defendants argue summary adjudication is appropriate because Villanueva presented no medical documentation diagnosing the emotional distress and his description of symptoms he experienced is too general. It is correct that a cause of action for intentional infliction of emotional distress requires "severe" emotional distress. (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 477.) But it " 'is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397). The evidence offered by Villanueva is sufficient to allow a trier of fact to decide whether it meets the standard for intentional infliction of emotional distress.

III. DISPOSITION

The judgment is reversed. The order granting defendants' motion for summary adjudication is vacated and the case is remanded with directions to enter a new order denying the motion. Plaintiff shall recover costs on appeal.

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Grover, J.

WE CONCUR:

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Mihara, Acting P. J.

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Danner, J.