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LEGALLY-DEFECTIVE REASONS FOR TERMINATION CANNOT ESTABLISH LEGITIMATE, NON-DISRIMINATORY OR NON-RETALIATORY MOTIVES SUFFICIENT FOR EMPLOYER TO OVERCOME PRESUMPTION CREATED BY EMPLOYEE'S *PRIMA FACIE* CASE

Santillan v. USA Waste, 2017 U.S. App. LEXIS 6027 (9th Cir. April 7, 2017)

Santillan was a garbage truck driver with USA Water since 1979. He alleged that, beginning in 2009, a new manager began attempting to discipline him repeatedly with "write ups" that violated the collective bargaining agreement. In 2011, Santillan was fired, allegedly for having four accidents within a year. He alleged that he was one of five older Spanish-speaking employees fired or suspended by the same new manager. He also alleged he was replaced by a worker 13 years younger and with 21 fewer years experience as a garbage truck driver. Santillan and his legal counsel filed a formal grievance challenging both the basis for the termination and the procedures used. A settlement was reached in which Santillan was reinstated subject to a last chance agreement requiring: (1) a California DOT drug test and physical, (2) a criminal background check, and (3) "e-Verify" (a term which was not defined in the agreement). Santillan passed the drug test, physical, and the criminal background check, and USA Waste's human resources personnel sent him a letter specifying that on his first day back at work, he would need to complete an I-9 form and show related documentation of his right to work in the U.S. The letter was written in English, although USA Waste was alleged to be aware that Santillan communicated in Spanish. He reported for work as directed and with his driver's license and social security card to complete the I-9 form, but HR told him he also needed to provide his work authorization number and its expiration date, which he did not have with him. Santillan alleged he was told to bring it the next day and that he attempted to present it on each of the next two days. USA Waste contended Santillan was not able to provide the expiration date, and thus HR was not able to complete the electronic employment verification of his work authorization. The employer sent a letter telling him that he was being terminated because he did not provide proof of a legal right to work in the U.S. as required by federal law and the settlement agreement.

Santillan sued for wrongful termination in state court alleging age discrimination and retaliation for having an attorney represent him in the settlement negotiations. USA Waste removed the case to federal court and sought summary judgment. The district court ruled for the employer, holding that Santillan had failed to make out a

prima facie case of age discrimination and that Santillan's failure to provide work authorization information was a legitimate, non-discriminatory reason for the termination.

The Ninth Circuit reversed, holding that the historical events and timing of the termination, when construed as they must be in favor of Santillan, provided some circumstantial evidence suggesting discriminatory and retaliatory motives. This *prima facie* case established a presumption of unlawful discrimination, for which the burden then shifted to USA Waste to rebut. The Court held that USA Waste's stated reason for the termination – failure to supply proof of a right to work as required by the Immigration Control and Reform Act (ICRA) and the settlement agreement – could not suffice as a matter of law. First, because he was a continuing employee hired in 1979, ICRA exempted Santillan from the requirement for new employees to provide employment eligibility documentation. Second, USA Waste's contractual attempt to make reinstatement contingent on verification of immigration status violated public policy under California law.

EMPLOYER NOT REQUIRED TO PERMIT FORMER EMPLOYEE TO RESCIND RESIGNATION ABSENT CONTRACTUAL OBLIGATION TO DO SO OR EVIDENCE OF CONSTRUCTIVE DISCHARGE SURROUNDING THE RESIGNATION

Featherstone v. Southern California Permanente Medical Group, 2017 Cal. App. LEXIS 362 (April 19, 2017)

Ruth Featherstone (Featherstone) suffered from chronic sinusitis both before and during her tenure at SCPMG. In October 2013, she was advised to have surgery on the sinus tumor causing her condition. SCPMG granted her leave to have and recover from the surgery, and she then returned to work December 13, 2013 without any medical restrictions. Ten days later, Featherstone called her supervisor (Sheppard) to say she was resigning effective immediately because "God had told [her] to do something else." Sheppard did not find that statement to be out of character for Featherstone. After they spoke, Sheppard emailed Featherstone to ask that she confirm her resignation in writing. Sheppard then reached out to SCPMG's human resources department to process termination paperwork and Featherstone's final paycheck, all of which was completed later that same day. On December 26, 2013, Featherstone responded to Sheppard's earlier email and confirmed her decision to resign effective December 23, 2013.

On December 31, Featherstone contacted the HR staff to say she wished to rescind her resignation because she had been suffering from an adverse drug reaction at the time she had resigned. Staff told her to submit any documents she wished to have reviewed in connection with her rescission request. On January 14, 2014, Featherstone emailed HR claiming medication had caused her to "do abnormal things" resulting in a 72-hour hospitalization, and she submitted a doctor's note verifying the hospitalization due to an adverse drug reaction. The HR staff

concluded there had been no impropriety in SCPMG's acceptance of the resignation and they informed Featherstone the company would not allow her to rescind it.

Featherstone sued under FEHA for disability discrimination and failure to accommodate a disability, as well as for failure to engage in the interactive process. The trial court granted SCPMG's motion for summary judgment, and the appellate court affirmed for two reasons. First, the failure to allow a former employee to rescind a voluntary resignation is not an "adverse employment action" because the employment relationship has already ended at that point. The only exceptions identified by the court would be situations where there is evidence of constructive discharge surrounding the resignation or a contractual obligation that would require the employer to allow rescission. Second, Featherstone failed to raise a triable issue of fact as to whether the SCPMG employees who accepted and promptly processed her resignation knew of her alleged temporary disability at the time they took those actions.

PRIOR SALARY DATA CAN BE A "FACTOR OTHER THAN SEX" SUPPORTING LEGITIMATE PAY DISPARITIES WHERE THE PRIOR SALARY INFORMATION EFFECTUATES A BUSINESS POLICY AND IS USED REASONABLY BY THE NEW EMPLOYER

Rizo v. Yovino, 2017 U.S. App. LEXIS 7427 (April 27, 2017)

Plaintiff Aileen Rizo worked as a math consultant for the public schools in Fresno County. The County had a procedure (Standard Operating Procedure 1440) used to determine where on the applicable salary schedule to set the starting salaries of such employees. The procedure included consideration of a new employee's most recent prior salary, as well as factors such as advanced degrees the employee may possess. Rizo learned that all the male math consultants were a paid more than she was, and she complained to the County about it. The County responded that all salaries had been properly set under SOP 1440.

Rizo sued, alleging claims under the Equal Pay Act, Title VII, and FEHA. The County moved for summary judgment, arguing that Rizo's salary (while less than her male colleagues' salaries) was based on "any factor other than sex" – namely, her prior salary from previous out-of-state employment. The District Court denied the motion because it determined prior salary alone can never qualify as a factor other than sex: "A pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivate by a legitimate non-discriminatory business purpose."

On interlocutory appeal, the Ninth Circuit panel vacated the district court's order and remanded the case with instructions for the district court to evaluate the business reasons stated by the County under *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982). In *Kouba*, the court held that prior salary can be a permitted "factor other than sex," provided the employer shows it "effectuate[s] some business policy" and that the

employer uses prior salary "reasonably in light of [its] stated purpose as well as its other practices."

LOCAL GOVERNMENT EMPLOYER NOT REQUIRED TO MEET AND CONFER BEFORE PLACING CITIZEN-SPONSORED INITIATIVE MEASURE IMPACTING EMPLOYEE PENSIONS ON THE BALLOT

Boling v. Public Employment Relations Bd., 2017 Cal. App. LEXIS 329 (April 11, 2017)

In June 2012, the voters of City of San Diego approved a citizen-sponsored initiative, the "Citizens Pension Reform Initiative" (CPRI), which adopted a charter amendment mandating changes in the pension plan for certain City employees. Several employee unions filed unfair practice claims over the City's placement of the measure on the ballot without having met and conferred. The Public Employment Relations Board (PERB) determined City was obliged to "meet and confer" pursuant to the provisions of the Meyers-Milias-Brown Act over the CPRI before placing it on the ballot. PERB further determined that, because City violated this purported obligation, PERB could order "make whole" remedies that compelled City to disregard the CPRI.

The court of appeal disagreed, holding that the meet-and-confer obligations under the MMBA apply only to proposed charter amendments placed on the ballot by the governing body of a charter city. They do not apply when a proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. The city council had not approved the CPRI itself, but had acknowledged sufficient signatures had been gathered to qualify the measure for the ballot. The court concluded that the mayor (and others in the City's government) providing assistance to the proponents' campaign had not, through agency principles, transformed the CPRI from a citizen-sponsored initiative into a governing-body-sponsored ballot proposal within the ambit of *People ex rel. Seal Beach Police Officers Assn. v City of Seal Beach* (1984) 36 Cal.3d 591. Thus PERB's determination that the City committed an unfair labor practice by declining to meet and confer over the CPRI before placing it on the ballot was held to be in error. The court annulled PERB's decision and remanded the matter to PERB with direction to dismiss the complaints and order other appropriate relief consistent with the appellate court's opinion.