SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

RORY KALIN,

Plaintiff,

vs.

HUMBOLDT COUNTY PUBLIC DEFENDER'S OFFICE, COUNTY OF HUMBOLDT, MAREK REAVIS, LUKE BROWNFIELD, GREGORY J. ELVINE-KREIS, and DOES 1-50, inclusive,

Defendants.

CASE NO. CV2000357 [LEAD], CV2000902 [NON-LEAD]

ORDER ON COUNTY OF HUMBOLDT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION

INTRODUCTION

The County of Humboldt, and County employees Marek Reavis and Luke Brownfield filed a motion for summary judgement as to all causes of action or in the alternative, summary adjudication. In support, a statement of undisputed facts as well as declarations of Brownfield, Reavis, Kelly Barns (Human Resource employee) and Scott Smith, Esq. (authenticating various exhibits). A properly indexed volume of evidence was also submitted.

Plaintiff filed his opposition with various objections to exhibits which the Court has ruled upon. Plaintiff filed a short, separate statement of undisputed facts and an indexed volume of evidence.

The County defendants filed a reply and the Court heard argument on December 8, 2023.

For the reasons set forth below, the Court grants the motion for summary judgment on all remaining causes of action in the Third Amended Complaint as to defendants Brownfield, Reavis and the County of Humboldt.

STATEMENT OF FACTS[1]

Plaintiff was hired by the Humboldt County Public Defender's Office on October 23, 2017, as a Deputy Public Defender III. (Def's SUF #1, with errata.) Defendant Marek Reavis was appointed Humboldt County Public Defender in April 2018. (SUF #3.) Luke Brownfield was the Assistant Public Defender under Marek Reavis, essentially the number-two person in the office. Brownfield became the appointed Public Defender in July 2021. (Brownfield Decl. para 1.)

In October 2018 Reavis agreed to promote plaintiff to a deputy public defender IV. Plaintiff had received a positive performance review as recently as October 30, 2018. (Plaintiff's Exh. C.)

During the relevant time periods in 2018 and 2019 plaintiff was seeing Dr. William Vicary M.D. for generalized anxiety disorder. (Plaintiff's Exhibit AA, pp13-16.) He was being prescribed Xanax, Restoril, Cymboalta, and Wellbutrin. His anxiety Dr. Vicary estimated as moderate to severe. Dr. Vicary also testified that in 2018-19 "he's bumping up on the top end [of those with Generalized Anxiety Disorder] of how anxious he is despite being on substantial doses of medications." (Defendants' Exhibit AA, p 29.). Plaintiff never told anyone at the County of Humboldt including defendants Brownfield and/or Reavis that he was suffering from

[1] The facts set forth here are those that are material to the determination of the motion and which have been demonstrated from admissible evidence submitted by the parties. (See Evidentiary Objections resulting in striking plaintiff's exhibits C, M, N, O, P and Q.) References to "SUF" are to the Statement of Undisputed Facts submitted by the County defendants. Plaintiff did submit a short list of undisputed facts but they are not material to the Court's ultimate determinations.

an anxiety disorder or that he was taking medication for that anxiety disorder. (pp. 537-38, 544, Kalin depo, plaintiff's exhibit Y.)[2] (SUF #7.)

On April 11, 2019, plaintiff was hit in the head by a golf ball while visiting southern California. (SUF #8.) He informed defendants Brownfield and Reavis via text message of the event and he gave them and office staff doctors' notes verifying he had suffered a concussion from the accident. One note with a date of service of April 13, 2019 stated he should "be on brain rest protocol for a week [from April 11, 2019] or 'until resolution of his symptoms." (Defendant's Exh. A.) This note did not provide any specifics regarding what, if any, restrictions would be required for plaintiff to return to work.[3] Plaintiff also did not inform anyone at his office of employment that he did not feel ready to go back to work. (p.45, Kalin Depo. Plaintiff's Exhibit CC.). He did not tell anyone he needed any sort of accommodation when he returned to work approximately one week after his injury. (Reavis Decl. ¶7.)

On or before April 24, 2019, Reavis sent plaintiff home from work due to concerns about his head injury and how it may be affecting his work performance. (SUF #10; Kalin depo, pp 175-76 part of defense Exhibit Y.) Plaintiff went to see his medical provider on April 24, 2019. (pp. 172 of Kalin depo, Exhibit Y; SUF 11.) He admitted that he was experiencing sensations of dizziness, queasiness and trouble mentally focusing. (pp. 172 of Kalin depo, Exhibit Y; SUF 11.) He also complained that he "hits the wall" in the afternoons. (*Ibid.*)[4]

Plaintiff's physician provided two letters regarding plaintiff's return to work, both of which were provided to the County. One letter reflected that plaintiff had been seen on April 24, 2019. It further stated that he "is able to return to work on April 30, 2019 without restrictions." (Defendant's Exh. B.) The second letter, authored by the same physician, stated he could return

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[2] The evidentiary objections raised by plaintiff to SUF #6 and #7 are overruled. The citations from plaintiff to portions of the record contravening SUF #7 do not address the fact alleged.

[3] Plaintiff's factual "disputes to SUF #8 and #9 are not grounded in the record cites provided.

[4] Plaintiff's evidentiary objections to SUF 11 are overruled. The correct citation to the record is provided herein. The evidentiary objections to SUF #12, #13 and #14 are also overruled.

to work but that he was limited to working six hours per day and could not stand for more than four hours. These limitations were to remain in place until May 3, 2019. (SUF #12.)

In May 2019, Judge Kaleb Cockrum expressed to Marek Reavis during a private conversation in Cockrum's chambers that he had "grave concerns" about plaintiff's performance in his courtroom. Judge Cockrum described plaintiff's professional performance as "horrible" and further stated that plaintiff was not a very good lawyer. (SUF #13.) Immediately after this conversation, Reavis went to Judge Kelly Neel's courtroom to speak with her. Judge Neel was a former deputy public defender. Reavis trusted her opinions. She stated that plaintiff had recently conducted voir dire in a jury trial in her courtroom and that it was the worst she had ever seen. She "was shocked and, quite frankly, aghast at Mr. Kalin's performance." In his jury selection he was "combative and hostile." "I believe I probably told Reavis it was the worst I'd ever seen." (SUF #14; pp 29-30 of defendant's Exhibit Z.) She further stated that plaintiff made arguments that were entirely unsupported and badly misstated the facts. (SUF #14.) Reavis also spoke with Commissioner Greenleaf and Judge Christopher Wilson. Judge Wilson told him, without giving specifics, that his experience "tracked with" what Neel and Cockrum had described. (SUF #16.)[5] Greenleaf made statements that Reavis interpreted to mean that plaintiff was argumentative in her courtroom. (SUF # 16.)

Assistant Public Defender Brownfield received complaints from staff and other attorneys in the office during this time as well. Attorneys complained that plaintiff argued with judges over unimportant matters and was unable to read the room. Brownfield also received a complaint from a former juror that that plaintiff had been rude and demeaning to the jury. (SUF #18.) These complaints and observations were communicated to Reavis. (Reavis decl ¶¶ 13-14.)

[5] The hearsay objections to all of these conversations are overruled because the statements of Cockrum, Neel, Greenleaf and Wilson are not offered for the truth but for the effect on the listener, to wit, Reavis.

Assistant Public Defender Brownfield also personally observed plaintiff repeatedly talk over judges, despite them telling him to stop. Brownfield also recalled during the spring of 2019 that plaintiff badly mishandled a case that resulted in it being elevated from a misdemeanor to a felony because plaintiff had turned over his investigation to the district attorney that apparently was not exonerating or mitigating. (Brownfield decl. ¶2; SUF #19.)[6]

In mid-May 2019, and based on these events and complaints, Reavis and Brownfield decided to remove plaintiff from felony assignments and demote plaintiff to a Deputy Public Defender III. (SUF 20.) Brownfield requested that the decision to demote plaintiff not be relayed to him until after the Memorial Day weekend. (SUF 21; Brownfield dec ¶6.) Brownfield and his wife had become friends with plaintiff and his wife and had asked them to attend an annual Memorial Day camping trip that was approaching. (SF 21.)[7] The camping trip took place at Lake Shasta and defendant Judge Elvine-Kreis attended with his wife among others. (SUF 22; Reavis Decl. ¶6.) During the trip, the group rented a pontoon boat, and several people went out on the lake including plaintiff, Brownfield, and defendant Elvine-Kreis. (Brownfield decl.¶8.) Plaintiff testified that at one point he heard Elvine Kreis say very loudly, "I can't believe you haven't fired this guy yet." (Defs'Exhibit Y, depo of 4/8/22, p 265-66.) While out on the lake, there was drinking and at one point, people were pushing each other into the lake. There were about twenty (20) people in the lake at one point. Brownfield observed Elvine-Kreis push the plaintiff into the water. (Reavis decl.¶8.) While on the boat, Elvine-Kreis called plaintiff a "Jew-boy". (SUF 22.) Brownfield did not hear this remark. Brownfield was on the same boat and according to plaintiff, within earshot of Elvine-Kreis when Elvine-Kreis made

[6] The evidentiary objections to SUF #18 and 19 are overruled.

[7] The evidentiary objections to SUF's 20 and 21 are over-ruled.

this remark. (SUF 22.; Brownfield decl. ¶8.) Marek Reavis did not attend this trip and therefore was not present when Elvine-Kreis made these statements. (Reavis decl.)

On or around June 14, 2019, Reavis and Brownfield met with plaintiff and advised him he was being demoted. (Reavis decl.¶10, SUF 24) Prior to this demotion, Marek Reavis was never made aware of any antisemitic remarks made by Elvine-Kreis during the Memorial Day camping trip. (SUF 23.)[8] From that point forward, plaintiff was assigned only to misdemeanors. (Def. Exh. G at 205-206.)

In mid-June 17, 2019, plaintiff learned that Dr. Vicary was no longer allowed to prescribe controlled medications to plaintiff. (SUF 25.) The Drug Enforcement Administration had suspended Vicary's license that permitted him to prescribe controlled substances (Defs; Exh. AA, pp 64) Vicary retired from the practice of medicine sometime in 2019. (Def's Exh. AA p.10.)

On or about June 24, 2019, plaintiff was voluntarily hospitalized to assist him with safely stopping the medications that he had been taking. (SUF 26.) Between June 24, 2019 and January 2020, plaintiff remained on a medical leave of absence. During that time, the County of Humboldt received multiple notes from plaintiff's physician stating the plaintiff was being treated for a "medical condition." (SUF 27.) Neither Reavis nor Brownfield knew why plaintiff was on medical leave until the instant lawsuit was filed. (Reavis decl. ¶19; Brownfield decl. ¶13.) While plaintiff was out on leave, Reavis sent plaintiff two text messages asking when he would return to work. (Reavis decl. ¶20, defendant's exh. F; SUF 28.)

While plaintiff was out, Reavis became aware that plaintiff's files were virtually empty of notes or strategy details or other written work that naturally would have been included. (Reavis decl. ¶21.) Attorney Stepanian was hired to take over his files. (Plaintiff's exhibit H at p.43.)

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[8]The evidentiary objections to SUF #23, 24 and 26 are over-ruled.)

She found that plaintiff had been cancelling client meetings at the last possible moment and that clients were frustrated and unhappy. (SUF 28; Defense exh. BB.) She had to virtually start over with a majority of the 150 files she inherited due to the lack of notes or other pertinent information. (Defendant's Exh. BB, plaintiff's exh H at 45; SUF 29.[9]) She was "extremely concerned about Rory's performance. I can't recall who I specifically talked to about my concerns." (Plainitff's Exh H, p. 45.). Other attorneys expressed grave concerns about plaintiff's performance. (Def. Exh. G.)

Reavis himself examined plaintiff's written work and found multiple deficiencies. (SUF 30; Reavis Decl. at ¶22.) It was decided that plaintiff should be put on a performance improvement plan (PIP) upon his return to work. (SUF 31; Def. Exh. H.) Reavis was informed by Human Resources that a PIP was necessary before termination was allowed. (Reavis decl. ¶¶23, 24.) Implementation of the PIP involved having plaintiff occupy a workspace close to Reavis' office. (SUF 32.) The PIP stated that Reavis would supervise plaintiff and plaintiff would be assigned the caseload and court calendars Reavis carried to allow this to occur. Supervision included reviewing motions and filings "to ensure that performance of written work meets job expectations." (Def. Exh. H, at pp 15-16.) The PIP set forth a summary of the issues and referenced the reason for his demotion in June 2019. (Def. Exh. H at p 14.)

Reavis was informed that plaintiff would return to work on January 13, 2020. Reavis was not informed of any medical restriction affecting plaintiff's ability to work once he returned to work. (SUF #32.) On January 13, 2020, Brownfield and Reavis met with plaintiff and informed him of the PIP. (SUF #33.) After reviewing it, plaintiff stated he disagreed with it. An argument ensued and Reavis ultimately asked for plaintiff's keys to the office. (Reavis Decl; SUF 35.) On that same day Human Resources was informed by plaintiff that 'he was going to be extending his

[9] The evidentiary objections to SUF's 28, 29, 30, 31 and 32 are overruled.

medical leave of absence." (Barns' decl. ¶¶ 2.) Human Resources also received that same day a letter from a medical provider for plaintiff. (Barns' decl.¶2.) The letter stated, "[plaintiff] came back to work today and the conditions he returned to exacerbated his underlying medical condition; therefore he needs further medical leave." (Def. Exh. J.)

Plaintiff was not terminated on January 13, 2020. (SUF 36.)[10] His medical leave was extended and a position at the Public Defender's office remained open for "his eventual return." (Barns' decl. at ¶3.) The position remained open for more than one year. (Reavis decl ¶28; Brownfield decl. ¶15.) The position was still open when Brownfield took over the office as Public Defender in July 2021. (Brownfield Decl ¶15.)

Between January 13, 2020 through January 15, 2021, the Humboldt County Human Resources Department received multiple notes from plaintiff's physician advising that plaintiff was being treated for a medical condition and setting dates for plaintiff's eventual return. (SUF 37; def. Exh. K and Exh L., Exh. N.)[11] In a letter dated May 15, 2020 the County was informed about the nature of plaintiff's condition. (Def. Exh. L.) That letter did not seek or suggest any necessary accommodation for work. On July 6, 2020 HR sent plaintiff a letter asking for additional information about his condition so that it could assess a possible reasonable accommodation for his condition upon his then-expected return in July 2020. (Barnes' Decl. at ¶6; Def. Exh. M.) Another letter of the same type, seeking to provide workplace accommodation, was sent on December 1, 2020 and again on January 11, 2021. (Def. Exh. O and Def. Exh. P.) On March 15, 2021, the County of Humboldt asked plaintiff to participate in

[10] Lacy Mitchell, support staff in the Public Defender's office, testified that it was her impression plaintiff was being fired but that she was confused and only heard "snippets" of the conversation. (Plaintiff's exhibit L at pp 19-20.) Her "impression" does not create a dispute about this material fact in light of the magnitude of other evidence.

[11] The date of January 13 in the original SUF #37 and #38 supplied by defendants reflected the year as 2021 but it corrected to 2020 by an errata memoranda.

an interactive process meeting and when plaintiff refused, he was "medically separated" (terminated) from his employment with the County. (SUF 40, Def. Exh. X.)

From January 13, 2020, through January 15, 2021, plaintiff received multiple employee benefits from the County of Humboldt. (SUF 38.)[12]

Unbeknownst to the County, plaintiff started receiving Social Security benefits by the summer of 2020 for his "permanent disability." (SUF #39.)

STANDARDS ON SUMMARY JUDGMENT

A defendant moving for summary judgment must show that the plaintiff's action has no merit by demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the claim. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) When plaintiff has pleaded multiple theories, the defendant has the burden of showing that there are no material facts requiring trial on any of them. (*Doe v. Good Samaritan Hosp.* (2018) 23 Cal.App.5th 653, 662-63.) The moving party on a motion for summary judgment bears the burden of proving there is no triable issue of fact and that it is entitled to judgment as a matter of law. The defendant may meet the defendant's burden of showing that an essential element of the plaintiff's claim cannot be established by presenting evidence that the plaintiff "does not possess and cannot reasonably obtain needed evidence." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 110.) A defendant meets this burden by presenting evidence which, if not contradicted, would constitute a preponderance of the evidence that an essential element of the plaintiff's case cannot be established *(Kids' Universe v. In2Labs (2002)* 95 Cal. App. 4th 870, 879*)* Once the defendant has met its burden, plaintiff must show by admissible evidence that a triable issue of one or more material facts exists as to plaintiff's causes of action *(Saelzer v. Advanced Group 400 (*2001) 25 Cal. 4th 780).

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[12] Evidentiary objections to SUF #35, 36, 37 and 38 are overruled. The "dispute" to SUF 40 is illusory.

EVIDENTIARY OBJECTIONS

On November 27, 2023, plaintiff filed objections to evidence submitted in support of the motion for summary judgment. At the hearing on the motion, the court denied each of the objections finding the hearsay statements were offered for a relevant, non-hearsay purpose (Objections 1-12.) The statement to which an objection was lodged in Objection 1 is also a statement of plaintiff and therefore admissible as a party admission.

On December 1, 2023, defendants filed objections to certain items in plaintiff's index of evidence. Plaintiff's Exhibit C was not properly authenticated by the Fakhoury Declaration and therefore the objection is sustained. Exhibit M was not properly authenticated by the Fakhoury declaration and therefore the objection is sustained. Exhibit N was not properly authenticated by the Fakhoury declaration and therefore the objection is sustained. Exhibit O was not properly authenticated by the Fakhoury declaration and therefore the objection is sustained. Exhibit P was not properly authenticated by the Fakhoury declaration and therefore the objection is sustained. Exhibit Q is not properly authenticated by the Fakhoury declaration and on its face is incomplete and therefore the objection is sustained. Exhibits C, M, N, O, P, and Q contained in plaintiff's index of evidence therefore are stricken and will not be considered by the Court in its evaluation of the motion.

Plaintiff set forth many boilerplate evidentiary objections to defendant's statement of undisputed facts. Without exception, the relevance objections are overruled. The hearsay objections are acknowledged but the statements are offered not for their truth but either to explain the effect on the listener or to explain subsequent conduct by Reavis, Brownfield and or the County of Humboldt. The remaining boilerplate objections are without merit and without exception are overruled.

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ANALYSIS

A. Causes of Action One (Religious Discrimination) and Two (Racial Discrimination) - Govt. Code §12940(a)

California Courts apply the three-stage *McDonnell Douglas* burden-shifting test for trying claims of discrimination in employment. (*Nakai v. Friendship House Ass'n of Am Indians, Inc.* (2017) 15 Cal.App.5th 32,39.) The plaintiff has the initial burden of establishing a prima facie case of discrimination. The plaintiff must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion." (*McDonnell Douglas Corp v. Green* (1973) 411 U.S. 792.) If the plaintiff can establish a prima facie case, then the burden shifts to the employer to present evidence of a legitimate, non-discriminatory reason for the adverse employment action. (*Foroudi v. The Aerospace Corp* (2020) 57 Cal.App.5th 992, 1007.) Once the employer makes this showing, the burden shifts back to the employee to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Ibid.*)

Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it "remains subject to careful scrutiny." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) The employee's "subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*Ibid.*) The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, "an actual causal link between prohibited motivation and termination." (*Id.* at pp. 433–434; *see also Featherstone v.*

Southern California Permanente Medical Group (2017) 10 Cal.App.5th 1150, 1159.)To meet their burden, the employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer "that the employer did not act for [the asserted] nondiscriminatory reasons." (*Ibid* internal quotations omitted.)

If the "employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344, italics omitted.)

Plaintiff here cannot state a prima facie case for discrimination against these defendants. Public Defender Reavis was not in attendance at the Memorial Day event and was not made aware of Elvine-Kreis's antisemitic or demeaning comments towards plaintiff. There is a lack of evidence that Brownfield heard the remarks except for plaintiff claiming he was "within earshot" when they were made. The evidence showed approximately 20 other people were present and no other witness testimony was brought forward demonstrating anyone other than plaintiff heard the statements. Even if Brownfield heard them, there is no evidence he conveyed that information to Reavis. There is no evidence Elvine-Kreis's insults played any role in the decision to demote plaintiff in June of 2019. [13]

Reavis had promoted plaintiff in October 2018 and demoted him in June of 2019. "Where the same actor is responsible for both the hiring and firing of a discrimination plaintiff,

[13] Judge Elvine-Kreis was not plaintiff's employer nor an agent of his employer. There was no evidence submitted that Elvine-Kreis had any input into the hiring, demotion or PIP actions affecting plaintiff.

and both actions occur with a short period of time, a strong inference arises that there was no discriminatory motive." (*Horn v. Cushman & Wakefield Western* (1999) 72 Cal.App.4th 798, 809.)

Defendants correctly point out that plaintiff's primary theory is that the 2019 demotion and all subsequent employment actions were taken because Reavis and/or Brownfield felt obligated to be punitive towards plaintiff due to Elvine-Kreis's antisemitic behavior at the Memorial Day event. The problem is that there is little evidence to support the claim that either Brownfield or Reavis would be beholden to Elvine Kreis in such a manner. Other than Brownfield's friendship with Elvine-Kreis, there is no basis from which to infer Brownfield or Reavis would take his antisemitic remarks and interpret them as a reason to carry out employment-related hostilities against the plaintiff. The theory is far too speculative.

This is especially true because there is no evidence that anyone at the Public Defender's office even knew about Elvine Kreis's behavior at the Memorial Day event. Only plaintiff's testimony at the fifth session of his deposition suggested as much. His earlier testimony was that he had decided not to tell anyone at work about the Judge's remarks. (Kalin Depo (6/12/23) compared with Exhibit Y, 4/8/2022, pages 272-77:

Q: Did you ever tell Brownfield that Elvine-Kreis had made antisemitic remarks about you?

A: No.

He further testified that he never spoke to anyone at the Public Defender's office about Elvine-Kreis's statements until after he filed the lawsuit. (Exhibit Y. pp. 277-78.)

Plaintiff argues that Reavis knew plaintiff was Jewish. (See Opp at p. 21.) Even so, there is no evidence that Reavis took adverse employment action against plaintiff because of his religion.

A plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact, nor do uncorroborated and self-serving declarations. (*Foroudi v. The Aeorspace Corp., supra*, 57 Cal App.5th at 1007.) The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination. (*Ibid.*) There are no material facts in dispute relating to this cause of action; plaintiff is unable to sustain a prima facie showing of racial or religious discrimination.

Assuming plaintiff could make out such a claims, the County (the Public Defender) had legitimate, non-discriminatory reasons for demoting plaintiff, and instituting a PIP and ultimately separating him from employment. It is uncontroverted that while plaintiff was on leave, Reavis and Brownfield learned of facts showing plaintiff was performing his job in a sub-standard and professionally incompetent fashion. (See defendants' Exh. G.) The County HR office required a PIP which was developed and shared with plaintiff. There is no evidence in the record that a racial or religious animus was the motive for either the demotion or the PIP. It is further uncontroverted that his ultimate separation from employment was due to his failure to participate in the required interactive process designed to provide a workplace accommodation. The County's decision to terminate for failure to participate in the interactive process was made before they were aware plaintiff was already receiving disability benefits from Social Security.

It is important to note that there are no material facts supporting an argument that plaintiff was terminated in January 2020 when he was presented with the PIP. He continued to receive employment benefits for over a year. County HR continued to communicate with him about returning to work. His medical providers informed the County he was on medical leave. The fact that Reavis demanded his keys and required him to leave the office after plaintiff informed Reavis that his medical leave would be extended does not constitute a termination.

Plaintiff has not put forward any material facts showing the reasons given for defendant's actions were pretextual for religious or racial discrimination. The motion for summary adjudication on counts one and two is granted.

B. Cause of Action Three (Disability Discrimination) – Govt. Code §12940(a)

The FEHA makes it an unlawful employment practice to discriminate against any person because of a physical or mental disability. (Govt. Code § 12940(a).) A prima facie case for discrimination "on grounds of physical disability under the FEHA requires plaintiff to show: (1) he suffers from a disability; (2) he is otherwise qualified to do his job; and, (3) he was subjected to adverse employment action because of his disability. On a motion for summary judgment brought against such a cause of action the plaintiff bears the burden of establishing a prima facie case of discrimination based upon physical disability, and the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer has done so the plaintiff must offer evidence that the employer's stated reason is either false or pretextual, or evidence that the employer acted with discriminatory animus, or evidence of each which would permit a reasonable trier of fact to conclude the employer intentionally discriminated. (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886, citing *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.)

Plaintiff is unable to state a claim for physical disability based on his mental health or anxiety condition because he nor his providers ever informed the County about his physical or mental condition until May 15, 2020. By this time, a reasonable inference is that plaintiff had already applied for permanent medical disability because he admitted to starting to receive those benefits in July 2020. Neither Brownfield nor Reavis ever knew the reason why plaintiff was on an extended medical leave after his initial departure in June 2019. In other words, they were

unaware that he had an anxiety condition; therefore, there is no evidence showing they or the County took adverse action against the plaintiff because of his anxiety related condition.

The Court reaches the same conclusion based on the facts surrounding golf ball related concussion. Plaintiff returned to work in April 2019 after taking about a week off for concussion protocol. He was sent home on April 24 because of concerns about his health and how it was affecting his work. This was not an adverse employment action. He stayed out from work to further recover until early May 2019. He then returned to work with recognized accommodations as to the number of hours he could work and/or stand. He asked for no further accommodation. There was no evidence presented that this injury or its effects were ever again raised by plaintiff. There has been no evidence presented that his demotion in June 2019 was related to his injury suffered in April. He had been allowed all the leave requested and his accommodation had been honored.

The evidence demonstrates that plaintiff's demotion was based on information learned by Reavis and Brownfield about his performance in the courtroom, and the quality of representation he was providing clients to whom he was assigned. Plaintiff has not presented material facts showing the asserted reasons for the demotion were a pretext for a discriminatory animus related to a physical disability. The same is true about the PIP. The PIP itself sets forth the reasons why it was needed. (See defendant's Exhibit H.) Neither Reavis nor Brownfield were aware of the reason for the extended medical leave and there is no evidence showing a connection between the implementation of the PIP and a physical disability or other protected criterion. Plaintiff has not provided material facts showing the contrary.

Discrimination occurs when the employer "treats some people less favorably than others because of their [disability or other statutorily prohibited characteristic or trait]." [T]he plaintiff must prove the ultimate fact that the defendant engaged in intentional discrimination." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 342.) Based on the undisputed material facts, this

cause of action cannot be established. The motion for summary adjudication in favor of the County of Humboldt defendants is granted.

C. Causes of Action Four and Five (Failure to Accommodate or Engage in Interactive Process) – Govt. Code §§12940(m)(1) and (n)

The fourth cause of action alleges a violation of Government Code section 12940(m)(1) which makes it an unlawful employment practice for an employer to fail to make reasonable accommodations for the known physical or mental disability of an employee. Only an employer with knowledge of an employee's disability that is affecting the employee's ability to perform the essential functions of the job is required under FEHA to engage in an interactive process and find a reasonable accommodation to allow the employee to perform the essential functions of the job. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013.)

There is no evidence that the County had notice that plaintiff wanted or required an accommodation to return to work after he left on his extended medical leave in late June 2019. There is no evidence the County even knew the reason for the medical leave. His diagnosis was not revealed to the County until a medical provider's letter was sent in July 2020. Prior to that, all medical providers informed the County about was that plaintiff had a "serious medical condition and estimated dates for return to work. None of the providers' correspondence mentioned accommodations. Plaintiff never told the County about any mental health or substance use related conditions for which he sought or required an accommodation.

Regarding the golf ball related concussion in April 2019, plaintiff returned to work initially without informing the Public Defender's Office or the County that he needed any accommodation. After plaintiff was sent home from work on April 24, 2019, for concerns about his health affecting his work, he supplied a letter to the County advising to limit his hours of work and hours that he could stand. The record shows that he returned to work after May 3, 2019 and that these accommodations were made; there is no evidence to the contrary.

The fifth cause of action claims the County 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. Ritualized discussions are not necessarily required." (*Wilson v. County of Orange, supra,* 169 Cal.App.4th at p. 1195.) The interactive process imposes burdens on both the employer and employee. The employee must initiate the process unless the disability and resulting limitations are obvious. "Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, ... the initial burden rests primarily upon the employee ... to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (*Taylor v. Principal Financial Group, Inc.* (5th Cir.1996) 93 F.3d 155, 165.)

"[I]t is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations experienced by the employee as a result of the disability. This distinction is important because the ADA requires employers to reasonably accommodate limitations, not disabilities." (*Taylor v. Principal Financial Group, Inc., supra,* 93 F.3d at p. 164.) "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.* (2006) 140 Cal.App.4th 34, 62, fn. 22 (*Gelfo*).)

Plaintiff presents no evidence to support this claim. As discussed above there were no requests for accommodation to return to work after his departure in June 2019. There was no request for an interactive process as contemplated by the statute. The only request was for medical leave. When the County initiated the interactive process as early as July 2020, plaintiff never responded to these entreaties until 2021 when he ultimately refused to participate.

There are no material facts in dispute as to counts four and five. Summary adjudication as to these causes of action is granted in favor of the County Defendants.

D. Cause of Action Six (Harassment/Hostile Work Environment) – Govt. Code §12940(j)(1) and (j)(3)

When the workplace is permeated with discriminatory intimidation, ridicule and insult that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the law is violated. (*Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21, 114 S.Ct. 367; *see also Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 409, *as modified.*) "A workplace may give rise to liability when it is permeated with discriminatory [religious based] intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Harris, supra*, 510 U.S. at 21.)

The evidence showing the totality of the circumstances is key. Frequency, severity, whether the discriminatory conduct is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance is some of the evidence to consider. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.)

Although the Third Amended Complaint alleges otherwise, there is no evidence that plaintiff was harassed or ridiculed in the workplace because he was Jewish. He never brought to the attention of those in his office the remarks made by Judge Elvine-Kreis at the party and there is no evidence offered in connection with this motion that those statements were discussed in the workplace much less was plaintiff harassed for being offended by them. There is no evidence

presented that he was "mocked" for any medical or physical condition or disability. Plaintiff claims he was contacted while on medical leave by Brownfield or Reavis asking when he was returning to work. Plaintiff's opposition states it was daily, but it does not cite the record to support this claim. Reavis admitted to sending two text messages (Defendant's Exh. F) after plaintiff left on medical leave in June 2019 but those messages are not harassing. Plaintiff has not set forth any evidence in connection with this motion that there was repeated harassment of any kind much less discriminatory (based on race, religion, or disability) in nature.

The lack of disputed material facts relevant to the cause of action demonstrate plaintiff cannot prevail on this claim and therefore the motion for summary adjudication is granted.

E. Cause of Action Seven and Eight – (Retaliation)-Govt. Code §12940(h); Labor Code §1102.5

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. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814–815, *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476, [adopting the title VII (Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.) burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802–805.) Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) 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. (*Ibid.*)

Regarding the eighth cause of action, the burden shifting provision does not apply to claims under Labor Code §1102.5, but the plaintiff must still provide a prima facie showing that

adverse employment actions were taken because of a retaliatory motive. (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703.) Plaintiff has not done so here.

The Third Amended Complaint alleges that the County defendants were aware of plaintiff's Jewish heritage, the antisemitic actions by Judge Elvine-Kreis and plaintiff's disabilities and medical conditions. (See ¶119 of TAC.) As discussed above, the County defendants were not informed of the actions or statements of Elvine-Kreis. Likewise, plaintiff's medical conditions or disabilities were also not shared with the County. Plaintiff has not put forward facts showing religious or racial discrimination took place in the workplace nor discrimination based on disability or medical condition.

The court has not been provided with any evidence plaintiff complained of any conduct as being discriminatory before his demotion in June 2019 or before the implementation of a PIP in January 2020. Plaintiff never brought to the attention of Reavis or County HR, Elvine-Kreis's antisemitic behavior at the May 2019 event, and there is no link between those statements and plaintiff's demotion in June 2019 or his PIP in 2020. Further, the reason for his ultimate termination was because he had been absent for approximately 18 months on medical leave and would not engage in the interactive process. Therefore, there is no factual premise upon which to base a claim of retaliation either under FEHA or the Labor Code as alleged in causes of action seven and eight. Summary adjudication in favor of the County defendants is granted.

F. Cause of Action Nine – (Retaliation for Taking Leave) – Govt. Code §12945.2 (CFRA)[14]

Dudley v. Department of Transportation (2001) 90 Cal.App.4th 255, 261, addresses the elements of a cause of action for retaliation in violation of the CFRA. *Dudley* sets forth the

[14] The California Family Rights Act, hereafter referred to as "CFRA."

elements as follows: "(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised [their] right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of the exercise of their right to CFRA leave. "Once an employee "establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. 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. (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885.)

For the same reasons that the other retaliation claims fail so does this claim. Summary adjudication as to the Ninth Cause of Action is granted as to these defendants.

G. Cause of Action Ten – Failure to Prevent Discrimination, Harassment or Retaliation – Govt. Code §12940(k)

An actionable claim under section 12940, subdivision (k) is dependent on a claim of actual discrimination: "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) Because the Court has concluded that summary judgment in defendants' favor should be granted regarding the harassment, retaliation, and discrimination claims, the tenth cause of action also cannot be established.

H. Causes of Action Eleven and Twelve – Violations of the Ralph and Banes Acts

At the hearing on December 8, 2023, plaintiff conceded that the arguments advanced by the county defendants regarding the eleventh and twelfth causes of action were meritorious. The Ralph Act (Civil Code §51.7) does not apply to public agencies and the provisions of Civil Code sections 52.1 (the Banes Act) does not apply because there is a complete absence of any

evidence that the plaintiff was threatened with physical violence. Summary adjudication is granted as to the Eleventh and Twelfth causes of action.

I. Cause of Action Thirteen – Intentional Infliction of Emotional Distress

This cause of action is alleged against the County and Reavis and Brownfield in their individual capacities. A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; *see also Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) A defendant's conduct is "outrageous" when it is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Potter*, at p. 1001, internal quotations omitted.) The defendant's conduct must be "intended to inflict injury or engaged in with the realization that injury will result." (*Ibid.*; *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.

The undisputed material facts show that actions and statements of Brownfield and Reavis do not meet this standard. Neither defendant was aware that plaintiff suffered from an anxiety disorder. The record is bereft of evidence that either defendant intended to cause emotional harm to plaintiff or that either took actions or engaged in conduct that was in reckless disregard of plaintiff's emotional health. The absence of any material facts showing such behavior requires this Court to find summary adjudication as to these individual defendants is appropriate here. Because the County's liability can only be based on the actions of Brownfield or Reavis, the Court's conclusion regarding their conduct results in summary adjudication for the County as well.

In addition, the actions taken by Reavis and Brownfield in demoting plaintiff and later instituting a PIP were discretionary actions and therefore they are entitled to immunity pursuant to Govt. Code §815.

Cause of Action Fourteen – Wrongful Termination

California requires a statutory violation upon which to base a claim of wrongful termination against a public entity. (Govt. Code §815.) Plaintiff's wrongful termination claims are based on violations of FEHA and the Labor Code as alleged in causes of action one through nine. The Court has granted summary adjudication on those claims in favor of the County defendants. Therefore, summary adjudication on this claim is proper as well.

The Court has previously ruled in this case that the County is immune for the common law wrongful termination claim originally plead. (See Order of June 10, 2021.) Therefore, it will not be addressed again here. The motion for summary adjudication as to Count fourteen as to the County of Humboldt is granted.

J. Cause of Action Fifteen - Negligent Hiring, Training and Supervision

In its order of April 24, 2023, the Court sustained without leave to amend the County of Humboldt's and the County Public Defender's Office demurrer to this cause of action. The fifteenth cause of action therefore was previously dismissed.

K. Cause of Action Sixteen – Breach of Mandatory Duty to Provide Training

In its order of April 24, 2023, the court sustained without leave to amend the County of Humboldt's and the County Public Defender's Office demurrer to this cause of action. The sixteenth cause of action therefore was also previously dismissed.

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L. Causes of Action Seventeen and Eighteen – Intentional and Negligent Interference with Prospective Economic Advantage.

Previously in this litigation, defendants Brownfield and Reavis demurred to the intentional and negligent interference with prospective economic advantage claims. The Court sustained their demurrers without leave to amend. (See Order of June 10, 2021.) The Third Amended Complaint alleges these causes of action against defendants Elvine-Kreis, Brownfield and Reavis. Because these claims as to Brownfield and Reavis were previously dismissed on demurrer, they will not be addressed here.

CONCLUSION

Based on the undisputed material facts put forth in connection with this motion, defendants Brownfield, Reavis and the County of Humboldt are entitled to summary judgment on all claims.

Dated: December 18, 2023

Ann Moorman

Ann C. Moorman, Judge Assigned
Superior Court of California

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, 825 5th St., Eureka, California, 95501; that I served a true copy of the attached ORDER ON COUNTY OF HUMBOLDT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Serena Warner and Ashley Riser – Angelo, Kilday & Kilduff, LLP, 601 University Avenue, Suite 150, Sacramento, CA 95825, and via email to swarner@akk-law.com

Patrik Griego - Janssen Malloy LLP, Court Operations Box #5, and via email to pgriego@janssenlaw.com

Johnny Rundell and Elias Fakhoury – Hershey Law, P.C., 16255 Ventura Blvd., Ste. 1205, Encino, CA 91436, and via email to jrundell@hersheylaw.com

Hon. Ann C. Moorman - Mendocino County Superior Court, via email (confidential email address) and shared court workspace

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 19th day of December 2023, at the City of Eureka, California.

Meara C. Hattan, Clerk of the Court

By _____

Deputy Clerk

Susan C. Edwards