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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT HILL, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant.	B214210 (Los Angeles County Super. Ct. No. BC365011)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Carmen A. Trutanich, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Appellant.

Pine & Pine, Norman Pine, Beverly Tillett Pine, Janet R. Gusdorff; Law Offices of Gregory W. Smith and Gregory W. Smith for Plaintiff and Respondent.

In this employment retaliation action, defendant and appellant City of Los Angeles appeals from a judgment after a jury trial awarding $3,127,500 in favor of plaintiff and appellant Robert Hill (Hill). The City contends substantial evidence does not support the finding the adverse employment actions were motivated by retaliatory intent. As the record contains substantial evidence supporting the finding, we affirm.

PROCEDURAL BACKGROUND

On January 18, 2007, Hill, a police officer with the Los Angeles Police Department, filed a complaint for damages against the City and other defendants, alleging violation of Government Code section 12940, subdivision (h), and violation of Labor Code, section 1102.5.[1] He alleged defendants retaliated against him by engaging in harassment and creating a hostile work environment because he complained to Captain Sean Kane and other superiors in the Los Angeles Police Department (the Department) that Sergeant Gilbert Curtis made racial statements against African-Americans and Hispanics, and that Curtis stole from the Explorer Program.[2]

On September 22, 2008, the jury found on the cause of action under Government Code section 12940, subdivision (h) that: (1) Hill engaged in a protected activity by complaining that Curtis made racial comments; (2) Hill's complaint was a motivating reason for the adverse employment actions; and (3) the City's adverse employment actions caused Hill harm. As to the cause of action under Labor Code section 1102.5, the jury found: (1) Hill disclosed information of racial slurs or misuse of funds to a government or law enforcement agency; (2) after disclosing such information, the City subjected Hill to an adverse employment action; (3) the City did not have a legitimate

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[1] Hill alleged as a third cause of action wrongful discipline in violation of public policy, but this cause of action was dismissed on summary adjudication.

[2] Hill also sued three individual defendants: Curtis, Kane, and Michael Berkow. The trial court granted summary judgment dismissing the individual defendants from the case.

and nondiscriminatory reason for the adverse employment action; and (4) the City's adverse employment action caused harm to Hill. The jury found Hill sustained $127,500 in economic damages and $3 million in noneconomic damages.

The City made a motion for a new trial and a motion for judgment notwithstanding the verdict. In the motion for judgment notwithstanding the verdict, the City contended, inter alia, that substantial evidence does not support the finding that Hill's participation in a protected activity was a motivating factor for any adverse employment treatment. According to the City, "there is no evidence or suggestion that the decision makers for [Hill's transfer or assignments] had any knowledge of Hill's purported protected activities."

The City's motions were denied on January 26, 2009. This timely appeal followed.

STATEMENT OF FACTS[3]

Background

Hill joined the Department in 1983 as a patrol officer. He was assigned to the Newton Division in 1989 and was promoted to senior lead officer in 1996. Senior lead officer is a coveted position of added responsibility. Promotion to senior lead officer is limited to a few select officers. Hill was hardworking, aggressive, and generally considered by his superiors to be a good officer.

Curtis was in charge of all senior lead officers at Newton and was Hill's direct supervisor. Hill felt Curtis was an incompetent supervisor, a poor excuse for a human being, a thief, a liar, a racist, and a bigot. Curtis was responsible for a youth cadet program at Newton called the Explorer Program.

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3 In accordance with the applicable standard, we recite the facts in the light most favorable to the judgment. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111.)

Kane was the commanding officer of Newton, responsible for all activities at the division. Hill was not a direct subordinate of Kane, but he was under Kane's supervision.

Cayler Lee Carter, Jr., was deputy chief of the Department. Prior to his retirement in June 2007, he oversaw Operation Central Bureau, supervising 1800 officers in a residential population over one million people. Newton Division and Northeast Division were within his bureau. He was Kane's direct supervisor. Carter and Curtis were very good friends.

Hill Complains that Curtis Stole From the Explorer Program and Made Racial Remarks

Hill first heard Curtis make inappropriate racial comments in 2003. Hill confronted Curtis about some of these comments.

In September or October 2004, Hill complained to Kane on several occasions that Curtis paid Explorer Program expenses with his personal credit card and then was reimbursed, so that he could earn airline miles for his personal use. Hill believed this was grand theft. Hill also complained to Kane that Curtis made derogatory racial comments. Hill reported that Curtis stated, referring to a church group, "If God really gave a fuck, he wouldn't have made them Black." According to Hill, Curtis also said, "I can't believe [w]e're here today. If these people would stay at home and teach their kids, we wouldn't be . . . here today." In December 2004, Hill told Kane that Curtis referred to certain Hispanic officers as "dumb, fucking wetbacks" and to an African-American senior lead officer as a "lazy the 'N' word."

Hill also complained about Curtis stealing from the Explorer Program and making racially derogatory remarks at a meeting Kane called of all senior lead officers on December 14, 2004. Nine of the ten senior lead officers at the meeting expressed dissatisfaction with Curtis's supervision and treatment of them.

The Department had a zero tolerance policy concerning use of inappropriate racial language. Contrary to the Department policy, Kane did not initiate an investigation of Hill's allegation Curtis used racial slurs.[4]

Both Kane and Internal Affairs conducted an investigation of the theft allegation. During the investigation, Kane told Curtis that Hill had concerns about Curtis's use of a credit card and the Explorer account without oversight. The investigations concluded there was no misconduct, but Kane instituted an approval process for purchases over $250.[5]

Confrontation Between Hill and Curtis on February 17, 2005

On February 17, 2005, Hill missed a roll call because he was at a medical appointment. He had not given prior notice to Curtis. When Hill arrived at the station, Curtis took him into a meeting room to talk about Hill's absence from roll call. Curtis went into a "rant," stating, "I'm your supervisor. You don't have to like me, but you will do what I tell you. I will tell you when and where. I'll tell you when you can go to [a medical appointment], . . . and if you don't like it, put your fucking keys on the desk and get the fuck out." Hill responded, "I don't respect you, never have. Never will. You're a thief." Curtis then walked out saying, "We'll see. You're the rat. Not me." A "rat" can mean an officer who informs management or Internal Affairs about another officer's misconduct. Hill thought Curtis's remark referred to the fact that Hill had reported Curtis's misconduct to Kane.

The same day, Curtis reported to Kane that Hill had approached him menacingly, with his hands clenched, and stated, "I'll fuck you up."

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4 Kane testified Hill never complained to him that Curtis made racially derogatory remarks.

5 The investigation revealed Curtis made purchases for the Explorer Program using his own credit card and then received reimbursement based on the receipts.

Without interviewing Hill to get his side of the story, conducting an investigation of other possible witnesses, or filling out the form that is used for reporting when one officer complains about another, Kane took Curtis straight to Carter's office. Curtis told Carter that Hill took a fighting stance and threatened him. Kane did not tell Carter that Hill had complained that Curtis stole from the Explorer Program and made derogatory racial comments. Carter was not aware of these complaints, and no one brought them to Carter's attention.

Kane sent Hill home with pay for a "cooling off," stating Curtis had reported serious misconduct. Kane refused to listen when Hill tried to tell him his version of the incident. Kane ordered Hill to report to Behavioral Sciences Services (BSS) on February 18, 2005, for an assessment. BSS found that Hill was not dangerous, and Hill returned to work at Newton as a senior lead officer under Curtis's supervision.

Investigation of Curtis's Complaint of Being Threatened by Hill

Kane directed Curtis to speak to investigators at Internal Affairs about the incident on February 17th and have a tape-recorded interview. Curtis's complaint was sustained by the commanding officer. A Board of Rights[6] process was initiated to review the determination.

Hill's Complaint of Curtis's Misconduct and Retaliation; Investigation

On about February 21, 2005, Hill reported to the Inspector General's Office that Kane had not properly handled Hill's report of Curtis's misconduct. Hill complained that Kane had informed Curtis of Hill's misconduct report and Curtis retaliated against Hill by filing a false complaint against Hill. Hill told the investigator Curtis made ethnic

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6 A Board of Rights is the Department's internal tribunal to hear allegations of serious misconduct against a police officer. A Board of Rights is made up of two superior officers of the rank of captain or above and one community member.

remarks and mismanaged funds, and he provided names of witnesses who heard Curtis make the ethnic remarks. The witnesses were interviewed and each one stated he had not heard Curtis make ethnic or improper remarks. Because there was an earlier investigation, Internal Affairs did not open a new investigation of the allegation that Curtis misused Explorer funds.

Decision to Loan Hill to Northeast Division

On March 9, 2005, Hill was loaned to Northeast. It was Carter's decision to loan Hill to Northeast, based on information from Kane and Curtis about the February 17th incident.

Hill felt the decision to loan him to another division was the result of his report of Curtis's misconduct. Pursuant to the Department policy, an officer shall not be transferred or given a lesser job assignment once he has reported what he believes to be misconduct. However, Hill did not believe Carter retaliated against him, because Carter did not know Hill had reported misconduct. When asked if Carter retaliated against him, Hill testified, "Under his own testimony saying that he had no knowledge I had reported misconduct, that answer to me would be no."

Assignments and Circumstances While on Loan to Northeast Division

Hill maintained the rank and pay of senior lead officer, but he was assigned to patrol, not to a senior lead officer role, for the next two and a half years. Hill's early assignments were to hand out equipment in the kit room and work at the front desk, jobs normally given to rookie patrol officers. He was not given the opportunity to work as a senior lead officer even when a position opened up.

Several captains told Hill to be careful and there was a target on his back, which Hill took to mean that higher-ups were looking to terminate him. The commanding

officer at Northeast, when Hill first arrived, asked Carter if Hill was going to be alright on the complaint against him. Carter replied, "Oh, no, Moe. . . . We got him this time[.]"

Hill's performance evaluation for the period March 9, 2005, to November 30, 2005, was altered to reflect a poorer performance. After Hill complained, the evaluation was revised to indicate a better performance.

In February 2006, the fiancé of an officer who had been killed in the line of duty, selected Hill to accompany her to a ceremony in Washington, D.C., honoring the fallen officer. Her selection was vetoed by Chief Bratton, because Hill did not "represent the Department in a positive way."

Although Hill had been under the supervision of the Risk Management Executive Committee (RMEC)[7] continuously since 2001, it was not until December 2006 that RMEC imposed a restriction prohibiting him from training less experienced officers. RMEC's decisions concerning how Hill should be restricted were made by the captains in his division, Internal Affairs, the deputy chiefs, and the chief of police. Hill was told by a captain, "You know what's going on, Bobby. You know why they're doing what they're doing to you, and it's not up to me to change it. All I can do is make . . . your job here . . . more comfortable, but we really know what's going on."

Board of Rights Adjudication of the Allegation Hill Threatened Curtis

In the late winter or early spring of 2007, the Board of Rights found Hill not guilty of the allegation Hill threatened Curtis. Carter did not return Hill to Newton, because that would have returned Hill to Curtis's supervision.

In June 2007, an RMEC subcommittee recommended to the full committee that Hill be taken out of RMEC. However, the full committee disagreed, and Hill was kept in RMEC.

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[7] RMEC consisted of 14 to 15 high-ranking members of the Department who designed personalized intervention programs to rehabilitate officers whose behavior presented a risk of liability.

Administrative Transfer to Northeast Division and Assignment to Senior Lead Officer Position

Hill was administratively transferred to Northeast on February 3, 2008. Carter did not have anything to do with the decision to administratively transfer Hill to Northeast. An administrative transfer usually means there was an issue with the officer at the prior division. Hill was given an open senior lead officer position at Northeast.

Injury to Hill

Hill was so demoralized by being loaned to Northeast that he decided he would not seek a promotion to sergeant and would retire earlier than he had planned. Hill lost his friends, self-confidence, and ability to promote. He hated going to work and contemplated suicide, because he was perceived as a rat. Hill was assigned home on leave for six months for stress in March 2006, after receiving a diagnosis of major depressive disorder, single episode. At Northeast, he worked 60 to 80 fewer hours of overtime per month compared to when he worked at Newton.

DISCUSSION

Substantial Evidence

The City contends its motions for judgment notwithstanding the verdict and a new trial should have been granted, because the verdict is not supported by substantial evidence that the decision-makers who took the adverse employment actions were motivated by retaliatory intent.

Standard of Review

"A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.] [¶] The moving party may appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict, or both. [Citation.] As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

When an appellant contends "a new trial should have been granted [because] the verdict is contrary to the evidence[,] [w]e will reverse the trial court's denial on this ground only in those instances when, as a matter of law, there is no substantial evidence in support of the verdict." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.)

We view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) "Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) The testimony of a single witness may constitute substantial evidence in support of the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard v. Owens Corning, supra,* at p. 631.)

Law on Retaliation

Government Code section 12940 provides in pertinent part: "It shall be an unlawful employment practice . . . [¶] . . . [¶] (h) For any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

Labor Code section 1102.5, subdivision (b) provides: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

The plaintiff must show he or she engaged in a protected activity, the employer took an adverse employment action which was motivated by retaliation, and the employer's action caused the plaintiff harm. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) To establish retaliatory motivation, the plaintiff must prove by "nonspeculative evidence, an actual causal link between prohibited motivation and [the adverse employment action]." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433-434.)

An employer may be liable for retaliation even though the ultimate decision-maker who took the adverse employment action was ignorant the employee had engaged in a protected activity, if the supervisor who initiated the proceedings against the employee acted with retaliatory animus and the cause for taking the adverse employment action was not independently investigated. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100, 113-116, 119.) "[S]o long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge." (*Id*. at p. 100.) As an illustration of this rule, "[a] supervisor annoyed by a worker's complaints about sexual harassment might decide to get rid of that worker by, for instance, fabricating a case of misconduct, or exaggerating a minor instance of

misconduct into one that will lead to dismissal. Another manager, accepting the fabricated case at face value, may decide, entirely without animus, to discharge the plaintiff. It would be absurd to say that the plaintiff in such a case could not prove a causal connection between discriminatory animus and his discharge." (*Id*. at pp. 108-109.) The chain of causation can be broken by the decision-maker "taking a truly independent action." (*Id*. at p. 114, fn. 14.)

Evidence of Retaliation by the City

Evidence in the record, and reasonable inferences therefrom, supports the conclusion that, while Carter, the ultimate decision-maker, was ignorant Hill had engaged in protected activity, the decision to loan Hill to Northeast was motivated by the retaliatory animus of Kane and Curtis,[8] and the causal link between the prohibited motivation and the decision to loan was not broken by reliance on an independent investigation.

Hill's complaints to Kane and Curtis that Curtis made inappropriate racial remarks and stole from the Explorer Program were protected activity. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1043.) In violation of the Department's zero tolerance policy and of the Department's procedure for handling reports, Kane failed to initiate an investigation of Hill's complaint about Curtis's racial remarks.

Kane told Curtis about Hill's complaint that Curtis was stealing. Hill complained directly to Curtis about Curtis's racial remarks. Curtis called Hill a "rat." These facts constitute substantial evidence that Curtis knew Hill complained about his racial remarks and accused him of stealing.

With knowledge of Hill's protected activity, Curtis falsely alleged to Kane that Hill threatened him. Despite knowing that dissatisfaction with Curtis was nearly universal among the senior lead officers, Kane relied exclusively on Curtis's version of

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[8] It is undisputed in the appeal that Curtis and Kane had retaliatory animus.

events. Kane did not ask Hill for his side of the story. Kane did not interview witnesses to the incident. Kane did not follow the regular procedure for initiating an investigation in cases where one officer reports misconduct by another officer. Instead, Kane had Curtis tell Carter about the incident.

Kane and Curtis did not inform Carter about Hill's complaints of racial and fiscal misconduct by Curtis, and Carter was unaware of the complaints. There was no independent investigation of Curtis's allegations before Carter made his decision to loan Hill to Northeast based solely on one-sided, untrustworthy information obtained from supervisors who were motivated by retaliatory animus.[9] Accordingly, substantial evidence supports the verdict that the City's adverse employment actions were motivated by retaliation.

CONCLUSION

The judgment is affirmed. Costs on appeal are awarded to respondent Robert Hill.

KRIEGLER, J.

We concur:

MOSK, Acting P. J. WEISMAN, J. *

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[9] To the extent that City argues that some of City's adverse employment actions were taken by other decision-makers, all the adverse employment actions flowed from Carter's decision to loan Hill to Northeast.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.