

No. _____

IN THE
Supreme Court of the United States

JOSHUA HORN,
Petitioner,
v.

WAL-MART STORES, INC., STORE 1903.
Respondent.

On Petition for Review to
the California Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOSHUA HORN
P.O. BOX 1388
Penn Valley, CA 95946
(530) 432-6657
In Forma Pauperis/Pro Se
Counsel for Certiorari

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sutter)

JOSHUA HORN,

C089684

Plaintiff and Appellant,

(Super. Ct. No.
CVCS160001624)

v.

WAL-MART STORES, INC.,

Defendant and Respondent.

Plaintiff Joshua Horn appeals following defendant Wal-Mart Stores, Inc's successful motion for summary judgment. On appeal, Horn raises an array of contentions under headings including: (1) "Trial Court's Retaliation/Abuse of Discretion"; (2) "Trial Court's Racial and Disability Discrimination"; (3) "Trial Court's Refusal to Uphold the California Constitution and Willful Neglect of Duty"; (4) "Trial Court's Willful Misinterpretation of [the California Rules of Court]"; and (5) "Trial Court's Employees['] Breach of Oath and/or Affirmation." (Capitalization omitted.)

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Pleadings

In 2016, Horn, acting in pro per, sued Wal-Mart for fraud and wrongful termination. Two years later, he filed an amended complaint adding counts for Americans with Disabilities Act discrimination, racial discrimination, retaliation, intentional negligence, and intentional infliction of emotional distress.

Six months after that, the trial court granted Wal-Mart's motion for summary judgment. The court's written order noted Horn had filed no evidentiary objections to Wal-Mart's evidence submitted in support of its motion. And Horn had filed no response to Wal-Mart's statement of undisputed material facts.

The court concluded summary adjudication was appropriate for all counts, for reasons including that Wal-Mart undisputedly made no false misrepresentation of fact to Horn, and Horn suffered no resulting damages; Wal-Mart's actions were taken for a legitimate business reason, and Horn could not show Wal-Mart's actions were pretextual; certain claims were time barred; and the Workers Compensation Exclusivity Act barred other claims.

Between the time Horn filed suit and the time Wal-Mart was granted summary judgment, Horn unsuccessfully moved to transfer venue,¹ Walmart successfully moved to compel discovery and for sanctions, and Horn brought multiple motions to continue.

¹ In early 2019, Horn moved to transfer venue, averring he "suffered from racial discrimination, and from habitual judicial misconduct being condoned by this Court's Staff . . . as well as multiple judges of this Court" He wrote: "This Court clearly does not have adequate judicial resources to try Mr. Horn's case." Wal-Mart opposed the motion as untimely, lacking in evidence that the trial court should be disqualified, lacking a timely preemptory challenge, and lacking evidence that a venue change would convenience witnesses and promote the ends of justice. Horn did not file a response to Wal-Mart's opposition, and a subsequent minute order reflected the motion had been "submitted without argument," and denied.

Horn appealed from entry of judgment following the grant of summary judgment.²

DISCUSSION

On appeal, Horn is proceeding in pro per, as he did before the trial court. Pro per litigants are required to follow the rules of appellate procedure; they are treated like any other party and receive no greater consideration. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) Horn's briefing suffers from a number of flaws.

I. Sanctions

Under the headings, "Trial Court's Retaliation/Abuse of Discretion," and "Trial Court's Racial and Disability Discrimination," Horn challenges the award of sanctions as part of Wal-Mart's motion to compel.³ We find no error. (Capitalization omitted.)

² While Wal-Mart acknowledges judgment is final and thus appealable, it argues the underlying orders Horn challenges on appeal (the change of venue, discovery sanctions, and the motions to continue) are neither final nor appealable. Wal-Mart thus asks that portions of Horn's briefs pertaining to those orders be struck. Not so. Horn may challenge these orders as part of his appeal from the judgment. (Code Civ. Proc., § 906 ["the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party"; *Wassmann v. South Orange County Community College District* (2018) 24 Cal.App.5th 825, 852 [notice of appeal encompasses all nonappealable orders made before entry of judgment]; *Ash v. Hertz Corp.* (1997) 53 Cal.App.4th 1107, 1112 [when transfer motion denied, aggrieved party may obtain review from final judgment].)

³ Under a separate heading, "Discovery Disputes Between Parties," Horn writes that during status conference proceedings in September and November 2018, the trial court stated that "some judges allowed parties to contact them whenever there was a dispute and assist them in resolving them, and that he was not one of those said judges." Horn adds that the "trial court offered no other means of resolution to Mr. Horn's discovery disputes." (Capitalization omitted.) We decline to address this contention. For one, the statement is not reflected in the record. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186 ["[A]ppellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided"].) For another, Horn has failed to establish that this was error.

A. Additional Background

The day after Horn moved to transfer venue, Wal-Mart moved to compel discovery responses and sought monetary sanctions for misuse of the discovery process. Through a declaration, Wal-Mart represented that it had incurred \$2,750 in attorneys' fees in preparing the motion, \$60 in filing fees, and anticipated incurring \$3,910 total in bringing the motion. Wal-Mart also cited Code of Civil Procedure sections 2030.290 and 2031.300⁴, which require the imposition of monetary sanctions when motions to compel responses to interrogatories or production requests are unsuccessfully opposed.

Horn did not file an opposition. A subsequent minute order reflects the motion was submitted with argument and taken under submission.

The trial court granted the motion, ordering Horn to respond to Wal-Mart's interrogatories, production requests, and request for admissions. It found Horn had "abused and misused the discovery process by asserting objections without substantial legal or factual justification and by failing to respond to defendant's relevant discovery requests." It ordered Horn to pay Wal-Mart \$1,750 in attorney fees and \$60 in costs.

B. Analysis

On appeal, Horn challenges the trial court's ruling on multiple grounds. He writes that Wal-Mart's counsel "failed to provide adequate legal fee quantification via any

(*People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 10 [declining to address claim without argument or citation to relevant authority].)

Also under this heading "Plaintiff's motion for transfer," plaintiff appears to challenge the denial of his motion to transfer venue. He writes that his "motion for transfer was ignored by the trial court and was never fully addressed or ruled on." (Capitalization omitted.) We decline to address this contention, again for lack of argument or citation to relevant authority. We note, however, that Horn failed to respond to Wal-Mart's opposition to the motion, which cited numerous deficiencies, and the motion was submitted without argument at the hearing.

⁴ Undesignated statutory references are to the Code of Civil Procedure.

method such as the Lodestar method” He avers the ruling was in retaliation for filing a complaint with the Commission on Judicial Performance. He argues the trial court “failed to substantiate why and how it came to its decision,” and failed to provide “any case law, citation, statutory authority or publication of any kind expressing judicial authority.” He also maintains the trial court ignored this court’s decisions regarding low-income litigants, which purportedly “establish a precedent that prohibits courts from imposing improper and/or unduly burdensome sanctions, penalties and/or legal fees/costs against self-represented litigants of low-income with an inability to pay.”

Horn cites no authority supporting his claim that the order of sanctions was error. Indeed, a trial court is required to award sanctions following a successful motion to compel discovery responses, unless it finds the party subject to sanctions acted with substantial justification or other circumstances make the imposition of sanction unjust. (§§ 2030.290; 2031.300; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404 [“If a party fails to serve a timely response, and the propounding party moves for and obtains a court order compelling a response, the trial court must impose a monetary sanction against the delinquent party unless that party acted with ‘substantial justification’ or the sanction would otherwise be unjust”].)

And Horn offers no explanation — neither here nor before the trial court — as to how he acted with substantial justification or how sanctions were unjust, beyond his frivolous suggestion the trial court acted in retaliation or his vague references to this court’s decision regarding low-income litigants and the lodestar method.⁵ None of these undermine the ruling.

⁵ The lodestar method — whereby the trial court determines the reasonable hours spent multiplied by the reasonable hourly rate, “based on a careful compilation of the time spent and reasonable hourly compensation of each attorney involved in the presentation of the case” — is the primary method for establishing attorney’s fees in statutory fee-

This contention therefore fails.

II. Motions to Continue

Under the headings, “Trial court’s refusal to uphold the California Constitution and willful neglect of duty,” and “Trial Court’s [Willful] Misinterpretation of [the California Rules of Court],” Horn appears to challenge the trial court’s denial of his motions to continue. We find no error. (Capitalization omitted.)

A. Additional Background

Horn filed his original complaint in 2016. Two years later, Wal-Mart moved for summary judgment. In response, Horn moved to “dismiss” Wal-Mart’s motion for summary judgment, arguing the motion was premature and should be dismissed to allow Horn to conduct discovery.

In early November 2018, the trial court granted Horn’s request to conduct discovery and reset the summary judgment hearing, then scheduled for January 28, 2019, to April 15th, “to allow plaintiff to complete the necessary discovery and to file appropriate opposition to pending Motion.”

In March 2019, Horn moved for a continuance. He wrote that he had a worker’s compensation trial hearing (also involving Wal-Mart) to prepare for and attend, which had been moved from February to April. He added: “It will be several months before I will be able to adequately prepare my response to the Defendant’s motion for summary judgment due to my conflicting engagement in a separate trial hearing . . .”

Wal-Mart opposed the motion, arguing it was untimely noticed, and Horn had failed to provide a declaration that essential facts may exist and why additional time is needed to obtain them as required under section 437c subdivision (h). It also argued that good cause had not been shown in that the case had been pending for more than two

shifting cases. (*Glaviano v. Sacramento City Unified School Dist.* (2018) 22 Cal.App.5th 744, 750–751.)

years, Horn had had 175 days to oppose the motion for summary judgment, and a previous continuance had been provided.

The motion was submitted without argument and denied as untimely noticed.

Three days later, Horn filed an ex parte motion for a continuance. He again wrote in his declaration: "It will be several months before I will be able to adequately prepare my response to the Defendant's motion for summary judgment due to my conflicting engagement in a separate trial hearing and the trial date's continuation from the previously set trial date was unanticipated by myself."

Wal-Mart opposed the motion, arguing that under Rule of Court Rule 3.1204,⁶ Horn had failed to state the date, time and place of the presentation of his application and made no attempt to determine if Wal-Mart would appear to oppose the application. It further argued it was Horn's lack of diligence that prevented the case from moving forward.

Denying the ex parte motion, the trial court cited the failure to comply with ex parte notice requirements.

Later at the summary judgment hearing, Horn again requested a continuance over Wal-Mart's objection. In its written order, the trial court explained that Horn's "oral request for another continuance was denied. Plaintiff had already been granted a two and one-half month continuance of the original hearing date of this motion to complete discovery to oppose this motion, and there was no good cause shown by plaintiff to grant a second continuance."

B. Analysis

On appeal, Horn contends the trial court abused its discretion in denying his motion to continue. He argues the refusal to reschedule the hearing "provid[ed] the

⁶ Undesignated references are to the Rules of Court.

Defendant's legal counsel an advantage while presiding with a clear bias and favoritism toward the Defendant's legal counsel." He takes issue with the court's reliance on the fact that a continuance had previously been granted, arguing he had not asked for an extension, rather the extended deadline had been given at the court's "own discretion," and Horn's motion to dismiss was never ruled on.

He goes on to argue: "The trial court's refusal to interpret the [Code of Civil Procedure and Rules of Court] expeditiously, inexpensively, without encumbrance of character, without impropriety and/or discrimination, as the Plaintiff was clearly involved in a separate trial matter less than seventy-two (72) hours apart from the Defendant's motion for summary judgment hearing; shows that the Court has a sub-standard business practice for the Plaintiff that is different from its standard business practice for the Defendant." We find no error.

" 'In seeking a continuance of a summary judgment motion, a plaintiff has essentially two options. The first option is to comply with section 437c, subdivision (h), which states, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.' ' ' (§ 437c, subd. (h); *Levingston v. Kaiser Foundation Health Plan, Inc.* (2018) 26 Cal.App.5th 309, 315 (*Levingston*).)

" 'Where a plaintiff cannot make the showing required under section 437c, subdivision (h), a plaintiff may seek a continuance under the ordinary discretionary standard applied to requests for a continuance.' ' ' (*Levingston, supra*, 26 Cal.App.5th at p. 315.) " 'This requires a showing of good cause.' ' ' (*Ibid.*) On appeal, we will uphold the refusal to grant a continuance unless the trial court has abused its discretion. (*Ibid.*)

Here, Horn has made no showing under section 437c, and we find no abuse of discretion in denying an eleventh-hour discretionary continuance. After two years, Horn was afforded a significant extension. And though he maintains it was the trial court's own discretion that gave rise to that continuance, the fact remains, that continuance was ordered after Horn represented that more time was needed to conduct discovery. Nothing else Horn has argued in support of his contention convinces us that the trial court exceeded its discretion.

The contention therefore fails.

III. Summary Judgment

Finally, under the heading "Trial Court's Employees['] Breach of Oath and/or Affirmation,"⁷ there appears to be a challenge to the order of summary judgment. Horn writes that he "seeks reversal on the trial court's ruling on the Defendant's motion for summary judgment, recommendation to the Commission on Judicial Performance for suspension and removal of the [trial court judge]."⁸ (Capitalization omitted.) He adds that, "the evidence shows exactly how the trial court's ruling is founded on legal error and judicial misconduct," and goes on to say: "The trial court, by violating the Appellant's civil, constitutional and ADA rights has neglected its duty to public society and to the

⁷ Under this heading, Horn principally discusses how, while attempting to file his notice designating the record on appeal, he was "met by stonewall discrimination." He refers to numerous court clerks and asserts there was "a collective effort put forth on behalf of the trial court to collectively disallow the Plaintiff to achieve fair administration of justice" We do not reach this contention as it is outside the record on appeal. We are governed by the record, and we must disregard statements of facts having no support in the record. (*Mitchell v. City of Indio* (1987) 196 Cal.App.3d 881, 890.)

⁸ Contentions regarding the "recommendation to the Commission on Judicial Performance for suspension and removal of the trial court's judge . . ." are not properly before us.

state of California in addition to failing and/or refusing to uphold and defend the U.S. Constitution.”

To the extent Horn is challenging the grant of summary judgment, we simply note that “‘ “[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citation.]” [Citation.] Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff’s claims.’ ” (*Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal.App.5th 119, 123.)

Here, however, Horn makes no reference to the undisputed facts or their effect on his claims. Given that Horn has, at best, raised a perfunctory challenge to the ruling, we conclude this claim too fails. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [“Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived”].)⁹

⁹ In his reply brief, Horn appears to raise an additional contention that Wal-Mart filed “fabricated evidence” showing Horn was allowed to return to work after recovering from his work-related injury. No citation to the record is provided. Having no obligation to consider contentions raised for the first time in a reply brief, and seeing no good cause to do so here, we decline to reach this contention. (*People v. Baniquid* (2000) 85 Cal.App.4th 13, 29 [“a point raised for the first time [in the reply brief] is deemed waived and will not be considered, unless good reason is shown for failure to present it before”].)

DISPOSITION

The judgment is affirmed. Horn shall pay Wal-Mart's costs on appeal. (Cal. Rules of Court, rule 8.278.)

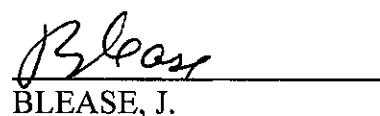


MURRAY, J.

We concur:



RAYE
RAYE, P. J.



BLEASE
BLEASE, J.

STATE OF CALIFORNIA
California Court of Appeal,
Third Appellate District

E-NOTICE

STATE OF CALIFORNIA
California Court of Appeal, Third Appellate District

Case Name: **CVCS160001624 | Horn v. Wal-Mart Stores, Inc.**

Case Number: **C089684**

Lower Court Case Number: **CVCS160001624**

My email address used to e-notify: **truefilingadmin@truefiling.com**

I notified by email a copy of the following document indicated below:

Title of papers e-notified: **C089684 - Opinion - OPINION FILED - 10/1/2020**

PERSON SERVED	EMAIL ADDRESS	DATE / TIME
Conley, James	james.conley@ogletree.com	10-01-2020 11:55:42 AM
Service Tracking Id: 45b3965248244b66bae446e28cfcc6c8		
Schubert, Jill	jill.schubert@ogletree.com	10-01-2020 11:55:42 AM
Service Tracking Id: 63111f4e63e54a898cf039bf96a260e0		
K. Peterson, Court of Appeal, Third Appellate District	truefilingadmin@truefiling.com	10-01-2020 11:55:42 AM
Service Tracking Id: d7cace50545b4ceda8a163380a6904a2		

This eNotice was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

10-01-2020

Date

Andrea K. Wallin-Rohmann, Clerk

Clerk/Executive Officer

K. Peterson

Deputy Clerk

Court of Appeal, Third Appellate District

Court

APP-12

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Horn v. Wal-Mart Stores, Inc.
C089684
Sutter County
No. CVCS160001624

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

✓ Joshua Horn
P.O. Box 1388
Penn Valley, CA 95946

James Taylor Conley
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
500 Capitol Mall, Suite 2500
Sacramento, CA 95814

Jill L. Schubert
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
500 Capitol Mall, Suite 2500
Sacramento, CA 95814

Honorable Perry Parker
Judge of the Sutter County Superior Court
1175 Civic Center Blvd.
Yuba City, CA 95993
(By email)

APP-13



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SUTTER
CLERK'S MINUTES:

Horn
Vs.
Walmart Stores, Inc Store #1903

Case No.: CVCS16-0001624

**Motion: Summary Judgment /
Summary Adjudication**

Date: 04/15/2019 9:00 AM

Judicial Officer: Perry Parker
Court Reporter:

Courtroom Clerk: Brenda Johnson

Appearances:

Horn, Joshua Plaintiff
Webber, Kelsey A. Attorney for
Defendant

Future Hearing(s):

PARTIES ARE ORDERED TO RETURN ON:

October 07, 2019 9:01 AM Status Conference
Parker, Perry
Courtroom 1

Exhibit(s):

Proceedings: DEFENDANT WALMART'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE
SUMMARY ADJUDICATION OF ISSUES

Matter called at 9:01 a.m.

Plaintiff present: JOSHUA HORN

Defendant present: KELSEY WEBBER appears for WALMART STORES, INC. STORE 1903

Arguments presented by the plaintiff and defendant.

Plaintiff requests continuance.

Defendant objects to continuance.

Court takes the matter under submission.

APP- 14

FILED

MAY 09 2019

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SUTTER
CLERK OF THE COURT
By *John Doe* Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SUTTER

JOSHUA HORN,

Case No. CVCS 16-1624

Plaintiff

RULING ON MOTION FOR
SUMMARY JUDGMENT AND/OR
SUMMARY ADJUDICATION

-vs-

WAL-MART STORES, INC.,

Defendant

The motion for summary judgment and/or summary adjudication, filed by defendant Wal-Mart Stores, came on for hearing on April 15, 2019. Plaintiff's oral request for another continuance was denied. Plaintiff had already been granted a two and one-half month continuance of the original hearing date of this motion to complete discovery to oppose this motion, and there was no good cause shown by plaintiff to grant a second continuance. (See Minute Order dated November 5, 2018.) The matter was argued and submitted for decision.

Legal Standard

Summary judgment or summary adjudication is proper if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Cal. Civ. Proc. Code § 437c(c), (f)(1), (f)(2)). A defendant moving for summary judgment or summary adjudication bears the initial burden of setting forth evidence that one or more of the

APP-15

elements of the action or specific cause of action cannot be established or that there is a complete defense thereto. (Cal. Civ. Proc. Code § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 849). After defendant has produced such evidence, the burden shifts to plaintiff to show a triable issue of material fact. (*Aguilar, supra* at 849).

Evidentiary Objections

Plaintiff filed no evidentiary objections to the evidence submitted by defendant in support of this motion.

Request for Judicial Notice

On October 9, 2018, defendant filed a Request for Judicial Notice. Plaintiff filed no objections to the request. The request for judicial notice is granted.

Separate Statements of Material Facts

Defendant filed a Statement of Undisputed Material Facts on October 9, 2018. Plaintiff filed no responsive separate statement. The 87 Facts stated by defendant are supported by cited evidence and are undisputed. The allegations in the amended complaint are not evidence and, as such, do not create disputes as to any of the 87 Facts stated in the defendant's separate statement of facts. *College Hosp., Inc. v. Sup.Ct. (Crowell)* (1994) 8 Cal.4th 704, 720.

Fraud

To state this first cause of action for intentional fraud, plaintiff must allege:

1. An affirmative misrepresentation the fact was true (CC §§1710, 1572);
2. The representation was false;
3. Defendant's knowledge of falsity or that it was made recklessly without regard for its truth;
4. An intent to induce reliance;
5. Reasonable reliance by plaintiff; and
6. That reliance resulted in harm to plaintiff. *See CACI 1900.*

It is undisputed defendant made no false misrepresentation of fact to plaintiff. (Facts 24-33).

It is undisputed plaintiff suffered no resulting damages. (Facts 34 and 80).

The motion for summary adjudication as to the first cause of action for fraud is granted.

APP - 10

Wrongful Termination in Violation of Public Policy

To state this second cause of action, plaintiff must allege:

1. Plaintiff's employment by defendant;
2. Plaintiff's discharge;
3. The public policy that was violated and which was a substantial motivation reason for plaintiff's discharge; and
4. The harm caused by that discharge. (CACI 2430).

To defeat this cause of action, defendant argues this cause of action depends entirely on plaintiff's FEHA claims. Those FEHA claims fail for the reasons set forth in the discussion of the FEHA claims, alleged in the third, fourth, and fifth causes, below. (See undisputed Facts 1-87).

The motion for summary adjudication as to the second cause of action is granted.

FEHA Disability Discrimination Causes of Action

The third, fourth, and fifth causes of action fail because defendant has set forth undisputed facts which articulate a legitimate, non-discriminatory, non-retaliatory reason for the alleged adverse employment action. *McDonald Douglas Corp. v. Green* (1973) 411 US 792, 802-4. Plaintiff offers no evidence to show that defendant's reasons were pretextual. *Id.*

Defendant establishes that the third, fourth, and fifth causes of action for disability discrimination under FEHA each fail as a matter of law. (See Facts 1-23, 35-61, 66-71, 78-79, and 82-3.) Moreover, these causes of action fail as a matter of law because defendant's actions were taken for a legitimate business reason. (Facts 1-71-, 78-79). Finally, plaintiff cannot show defendant's actions were pretextual. (Facts 1-23, 35-61, 70-71, 81-83). Defendant also establishes it is undisputed these causes of action are each time-barred. (Facts 62-65).

The motion for summary adjudication as to the third, fourth, and fifth causes of action is granted.

Intentional Negligence

It is undisputed this sixth cause of action is barred by the Workers Compensation Exclusivity Act. (See Labor C. §3600; Fact 72). It is also undisputed this cause of action is time-barred. (Facts 24, 64-65, and 72).

APP-17

The motion for summary adjudication as to the sixth cause of action for fraud is granted.

Intentional Infliction of Emotional Distress

It is undisputed this seventh cause of action is barred by the Workers Compensation Exclusivity Act. (See Labor C. §3600; Fact 85). It is also time-barred. (Facts 43, 45-60, 65). This cause of action is simply an alternative legal theory to hold defendant liable for the same conduct which forms the basis of plaintiff's claims of disability and racial discrimination. As a result, it suffers the same fate as the third, fourth, and fifth causes of action in this motion. *Wang v. Tai Jing* (2010) 189 Cal.App.4th 1354.

The motion for summary adjudication as to the seventh cause of action is granted.

Prayer for Punitive Damage

Summary adjudication may also be granted as to a claim for punitive damages even though it does not dispose of an entire cause of action. CCP §437c(f)(1); *Catalano v. Sup.Ct. (Camenson)* (2000) 82 CA4th 91, 92, 97. A claim for punitive damages requires "clear and convincing" evidence that defendant has been guilty of "oppression, fraud or malice" in the commission of a tort. (CC § 3294(a)).

Thus, defendant may seek summary adjudication either that some element of the tort claim cannot be established, defendant's conduct does not constitute "oppression, malice or fraud" (as defined by CC § 3294(c)), or plaintiff's proof is not "clear and convincing" (CC § 3294(a))

Since the Court has granted a summary adjudication as to each of the stated causes of action, there are no existing causes of action to which a claim for punitive damages can attach. Therefore, this request by defendant to strike the prayer for punitive damages is moot. In an abundance of caution, and for that reason only, the motion is granted as to the punitive damages prayer since it is undisputed that:

1. No officers, directors, or managing agents of defendant committed any improper conduct toward plaintiff. (Facts 74-77, 86); and
2. Plaintiff cannot prove by clear and convincing evidence that the involved individuals for defendant acted with fraud, oppression, or malice. (Facts 1-71, 78-79, 81-83, 85, and 87).

The motion as to the prayer for punitive damages is granted.

APP-18

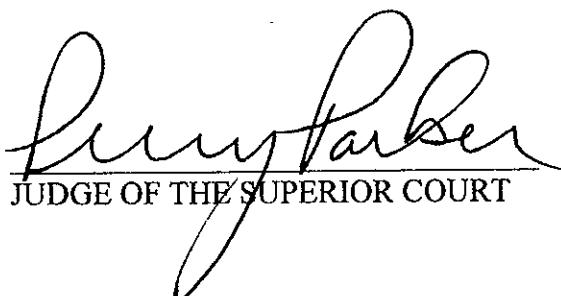
Conclusion

The motion for summary adjudication has been granted for each cause of action in the amended complaint, which was filed by stipulation, nunc pro tunc to February 21, 2018. (See Minute Order dated November 5, 2018). Therefore, the motion for summary judgment is also granted.

Counsel for defendant shall prepare an order and judgment consistent with this ruling and submit each to me for signature after establishing compliance with CRC, Rule 3.1312. Defendant shall recover reasonable costs according to proof.

The Clerk shall mail a copy of this ruling to plaintiff and counsel for defendant forthwith.

Dated: April 8, 2019



JUDGE OF THE SUPERIOR COURT

DEC 16 2020

Court of Appeal, Third Appellate District - No. C089684 Jorge Navarrete Clerk

S265294

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSHUA HORN, Plaintiff and Appellant,

v.

WAL-MART STORES, INC., Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APP-20