

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

Jose M. NON, Plaintiff-Appellant,

v.

COMCAST, INC., DBA Comcast Cable Communications LLC, DBA Comcast Cable Communications Management, LLC, DBA Comcast Corporation, DBA Comcast Holdings Corporation and Comcast Cable Communications Management, LLC, Defendants-Appellees.

Jose M. Non, Plaintiff,

And Daniel Ray Bacon, Counsel of record for plaintiff, Appellant,

v.

Comcast, Inc., DBA Comcast Cable Communications LLC, DBA Comcast Cable Communications Management, LLC, DBA Comcast Corporation, DBA Comcast Holdings Corporation and Comcast Cable Communications Management, LLC, Defendants-Appellees.

No. 15-17259

Argued and Submitted July 10, 2017 San Francisco,
California Filed September 29, 2017

Appeal from the United States District Court for the

Northern District of California, Vince G. Chhabria,
District Judge, Presiding, D.C. No. 3:14-cv-01845-VC

Attorneys and Law Firms

Daniel Ray Bacon, Law Offices of Daniel Ray Bacon,
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Erin M. Doyle, Troy A. Valdez, Esquire, Valdez Law
Group LLP, Oakland, CA, for Defendants-Appellees

Before: BEA and N.R. SMITH, Circuit Judges, and
LYNN,* Chief District Judge.

Opinion

MEMORANDUM**

Jose Non appeals the summary judgment in favor of Comcast, Inc. Non claims that Comcast reprimanded and eventually fired him because of his race and nationality, in violation of California's Fair Employment and Housing Act ("FEHA") and California public policy. Non's attorney, Daniel Bacon, appeals the sanctions order entered against him. We have jurisdiction under 28 U.S.C. § 1291.

We affirm the summary judgment in favor of Comcast because Non failed to raise a triable issue of fact that he was performing according to his employer's legitimate expectations, which is required to establish a prima facie case of employment discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Vasquez v. Cty. of*

Los Angeles, 349 F.3d 634, 640 n.5 (9th Cir. 2003) (“Under *McDonnell Douglas*, unlawful discrimination is presumed if the plaintiff can show that ‘(1) [he] belongs to a protected class, (2) [he] was performing according to [his] employer's legitimate expectations, (3) [he] suffered an adverse employment action, and (4) other employees with qualifications similar to [his] own were treated more favorably.’ ”) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)). “California *921 courts use the familiar *McDonnell Douglass* burden-shifting test when analyzing disparate treatment claims under FEHA.” *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112 (9th Cir. 2011) (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, 1113 (2000)). Under the *McDonnell Douglass* burden-shifting test, the employee “bears the initial burden of establishing a prima facie case of employment discrimination.” *Id.* Once the employee has done so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* If the employer articulates a legitimate reason for its actions, the employee must raise a triable issue that the employer's proffered reason is pretext for unlawful discrimination. *Id.*

Under the Collective Bargaining Agreement (“CBA”) that governed the terms of Non's employment, Comcast can immediately terminate employees who commit “serious offenses.” The CBA defines “serious offenses” to include, *inter alia*: “Willful falsification of ... time sheets or other [Comcast] records ... [s]leeping during an employee's actual work hours ... [and] [c]arelessness, including violation of [Comcast's] safety rules and regulations, endangering the safety of oneself or others or endangering [Comcast's] property and equipment.”

In 2012, Comcast reprimanded Non twice for “serious offenses.” In 2013, Comcast eventually terminated Non for his third “serious offense” after an alarmed member of the public called Comcast to report that Non was asleep in his work truck with its engine running for about forty minutes. Because Non committed three “serious offenses” in a relatively short time span—any one of which could have formed the basis for his immediate termination under the CBA—he failed to raise a triable issue of fact that “[he] was performing according to [Comcast's] legitimate expectations.” *Vasquez*, 349 F.3d at 640 n.5; *See Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1208 (9th Cir. 2008).

The district court acted contrary to this court's precedent when it sanctioned Non's attorney Bacon without sufficient notice of the potential sanctions prior to the hearing on Non's motion to extend the deadline to complete discovery. *See United States v. Tillman*, 756 F.3d 1144, 1152 (9th Cir. 2014) (“What began as a status hearing about an e-mail exchange over vouchers ballooned into a full-blown hearing on attorney sanctions. ... The question here is not one of interpretation of fair notice; the reality is that, contrary to our precedent, there was no notice.”); *Cole v. U.S. Dist. Ct. for Dist. of Idaho*, 366 F.3d 813, 822 (9th Cir. 2004) (citing *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1198 n.4 (9th Cir. 1999)) (“[N]otice require [s] more than that [the attorney] be aware of the sanctionable conduct, but that the district court must provide notice of the potential sanctions and the reasons for the sanction.”). Although the district court held a hearing on the motion to extend the discovery deadline, the district court did not provide Bacon with any notice that it would impose—or even consider—

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sanctions at the hearing. Therefore, we reverse the sanctions order entered against Bacon.

AFFIRMED IN PART; REVERSED IN PART.

The parties shall bear their own costs associated with this appeal.

Filed 10/08/15

UNITED STATES DISTRICT COURT NORTHERN
DISTRICT OF CALIFORNIA

JOSE M NON, Plaintiff,

v.

COMCAST INC., et al., Defendants.

Case No. [14-cv-01845-VC](#)

ORDER GRANTING COMCAST'S MOTION FOR
SUMMARY JUDGMENT

United States District Court
Northern District of California

The Court grants Comcast's motion for summary judgment. Even assuming that Non has made out a prima facie case of discrimination, he hasn't raised a triable issue of fact as to pretext.

Non appears primarily to argue that he wasn't sleeping on the job, and that he didn't lie to Comcast about sleeping on the job. But, under FEHA, "[i]t is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue." *King v. United Parcel Serv., Inc.*, 60 Cal. Rptr. 3d 359, 368 (Ct. App. 2007). And Non has presented no evidence to suggest Comcast "did not honestly believe" the report from an anonymous caller that Non slept for about forty minutes at the golf course in his truck with the engine running, and that he lied about it in the ensuing investigation. If Non had, during the investigation, given Comcast cause to suspect that the caller's report

was inaccurate or fabricated, that would be a different matter. But the facts discovered in the investigation only corroborated the caller's account, which in turn supported Comcast's honest belief that Non committed the misconduct and then lied to cover it up.

Non also argues that Comcast treated similarly situated employees more leniently in disciplinary proceedings. Although "[a] showing that [Comcast] treated similarly situated employees outside [Non's] protected class more favorably would be probative of pretext," *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003), Non hasn't raised a triable issue of pretext with the evidence he's presented. It's true that similarly-situated employees need only "be similar in material respects," and that "[m]ateriality depends on the context and is a question of fact that cannot be mechanically resolved." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011). But the fact that materiality "cannot be mechanically resolved" does not mean it must go to a jury even when no reasonable trier of fact could resolve the question in the plaintiff's favor. Here, no reasonable trier of fact could conclude that the five other Comcast employees whom Non identifies are materially similar to him, because they "did not engage in problematic conduct of comparable seriousness to that of [Non]," *Vasquez*, 349 F.3d at 641. Although they violated the same broad policy that Non was accused of violating, their actual misconduct was different from Non's. None of the five employees was caught sleeping on the job by a member of the public, and there is no indication that they lied to Comcast throughout their disciplinary investigations.

Moreover, the only two employees whose misconduct might start to look anything like Non's – one employee who took a longer-than-reported break at a Wendy's, and another who left work to attend to a family emergency – didn't share Non's supervisor. That's not dispositive, but it can be relevant. *Hawn v. Executive Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010). Here, it's quite probative, because there is no evidence that the respective supervisors knew of the others' disciplinary decisions, and there is no evidence that the supervisors' decisions were reviewed by the same people in the company.

Non has, at most, shown that two other Comcast employees – whose misconduct was not as serious as his – were treated differently by supervisors who weren't responsible for Non's termination. In the absence of any other evidence of discrimination, that's not enough to raise a triable issue of fact on Non's discrimination claims. Thus, Comcast is entitled to summary judgment.

IT IS SO ORDERED.

Dated: October 8, 2015

VINCE CHHABRIA United States District Judge

12/21/17

United States Court of Appeals,
Ninth Circuit.

JOSE M. NON,
Plaintiff-Appellant,

v.

COMCAST, INC., DBA Comcast Cable
Communications LLC, DBA Comcast Cable
Communications Management, LLC, DBA Comcast
Corporation, DBA Comcast Holdings Corporation and
COMCAST CABLE COMMUNICATIONS
MANAGEMENT, LLC,
Defendants-Appellees.

No. 15-17259

D.C. No. 3:14-cv-01845-VC

ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and
LYNN,* District Judge.

Appellant's petition for panel rehearing is denied.

Footnote

* The Honorable Barbara M. G. Lynn, Chief United
States District Judge for the Northern District of
Texas, sitting by designation.