Baron v. Laemmle

2003 | Cited 0 times | California Court of Appeal | April 28, 2003

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After he was terminated, John Baron sued Robert Laemmle, Laemmle Theatres, and Phoenix Theatres, Inc. (Respondents) alleging causes of action for disability discrimination, including failure to reasonably accommodate, retaliation for reporting alleged statutory violations in the construction of a theatre, age discrimination, breach of implied contract, and intentional infliction of emotional distress. Respondents argued that they had good cause to terminate Baron because, after a six-month leave of absence, he failed to report a return to work date. The trial court agreed and granted summary judgment in favor of Respondents.

We reverse the judgment with directions that the court enter a new order granting summary adjudication of Baron's causes of action for age discrimination and intentional infliction of emotional distress. Questions of material fact preclude the grant of summary adjudication on the remaining causes of action.

FACTUAL BACKGROUND

Robert Laemmle (Laemmle) is the sole owner and President of Phoenix Theatres, Inc. and Laemmle Theatres LLC (Laemmle Theatres). Laemmle Theatres was formed in 2000. Prior to its incorporation, Robert Laemmle used Laemmle Theatres as a fictitious business name.

From 1967 to 1999, John Baron (Baron) worked for at least one of the Respondents (which one(s) is disputed). Baron held several positions, including ultimately that of general manager. According to Baron, his responsibilities as general manager included supervising operations and personnel at all theatres, recruiting and hiring employees, supervising construction projects, assisting with insurance issues and litigation, participating in union labor contract negotiations, assisting with drafting of theatre leases, and evaluating the purchase of major equipment. In 1988, Baron completed an "employment application/employee data sheet." Laemmle Theatres was written in large letters at the top of the employment application, which included a provision stating that employment would be "at will."

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In November 1998, Baron reported what he perceived to be defects in the construction of a new theatre, Playhouse 7, to officials representing the City of Pasadena. According to Baron, the first time he reported to Laemmle that he intended to contact authorities, Laemmle "expressed his extreme displeasure toward my intention to inform the Pasadena authorities about construction problems." According to Laemmle, when he was informed of the problems he "requested that Mr. Baron identify and discuss the alleged defects with the project's architect and contractor, [and] Mr. Baron refused."

In addition to his November 1998 report, Baron met with Pasadena City officials on February 2, 1999 and delivered a report to them. Baron also filed an unsuccessful writ petition to compel an inspection after the theatre had been completed. [1]

On April 12, 1999, Baron was given an organizational chart indicating that his employment responsibilities included "Maintenance, Repair, Janitorial, Night Emergencies." Baron characterizes these responsibilities as different from his former responsibilities and labels the change a demotion. Respondents characterize the change as a reorganization, which affected five other management-level employees. Baron's salary and job title remained the same.

On April 14, 1999, after taking several weeks of leave to care for his ailing father and attend his father's funeral, Baron took a leave of absence to recover from the onset of rheumatoid arthritis. He "informed Laemmle Theatres that he required a medical leave of absence to accommodate his severe rheumatoid arthritis."

On July 14, 1999 Baron, told Laemmle that he was unable to return to work, but that he would report on his disability status after his next doctor's appointment. According to Laemmle: "Greg Laemmle [Laemmle's son and colleague] and I met with Mr. Baron on July 14, 1999, to discuss his leave of absence and anticipated return to work. In the meeting, Mr. Baron told us that he was still unable to return to work, but that he would follow up with us after his next doctor's appointment. We told Mr. Baron that his absence was causing a significant strain on company operations."

On July 22, 1999, Laemmle wrote Baron that, under the Family Medical Leave Act, he was entitled to 12 weeks of unpaid leave. "All told, you have been out for the better part of 1999 and this has caused quite a strain on our ability to operate this company efficiently. We can no longer cover your responsibilities in an interim fashion based upon your job responsibilities. As we discussed last week, we NEED to fill your post as quickly as possible so that the other members of the office staff can return to focusing on their respective areas of responsibility. We can no longer afford to cover for your absence in this position." Laemmle volunteered to refrain from filling a manager -level position "for a month (or more) as it is easier for us to cover for an absence there on an interim basis. As we discussed, this position would be held open at your current salary (well in excess of a normal manager's salary) and we would also be willing to work with you on changing certain procedures and expectations as to accommodate any lingering effects from your current medical condition or

potential flare-ups in the future." Laemmle further wrote: "John, you indicated that you would get back to us after your next doctor's appointment to give us an update, at this point we have not yet heard from you. . . . We can hold the . . . management position open for an additional six (6) weeks until August 31, 1999." [2] Laemmle also informed Baron the cost of his group medical insurance would be paid through October 13, 1999.

Baron responded on July 29, 1999 as follows: "while it is my desire to return to my job as General Manager as soon as possible, neither I nor my doctor can say exactly when that will be medically possible. [¶] When I saw my doctor last week, he told me that he would have to evaluate my progress from month to month. As you can see from the attached SDI form, he has put down October 31st as the approximate recovery date." [3] Baron continued: "I should think it would be possible for you to temporarily assign my job responsibilities to a number of others on the company staff for the next several months until I recover from my current disability and can safely return to work."

During his deposition, Baron was asked if his doctor had said October 31st "certainly was not a date to rely on . . . ." Baron responded, "That's correct. My doctor told me that you take these things one day at a time and month to month and you cannot predict the course of recovery in rheumatoid arthritis." When asked if it was "something that you or he realistically believed would be a return to work date," Baron responded "[w]e had no idea. He said it could be earlier than that. It could be later than that."

Laemmle responded to Baron's letter on August 6, 1999, explaining "it is our intention to immediately fill your position with a permanent replacement. [¶] As I said in my previous letter, we will continue to hold the Town Center position open for you at your current salary. . . until August 31. . . Even if you can not return to work on that date, your prognosis at that time may be such that we can reasonably expect an imminent return. However, if an imminent return is still unlikely, we will have to fill even this position with a permanent hire. [¶] When and if you are medically and physically able to return to work, and if there is no position available for you; I promise that you will be given priority consideration for any future position that becomes available for which you are qualified."

In a declaration, Baron states that "[i]n late August or early September 1999, I encountered Robert Laemmle and others from Laemmle's office on the sidewalk near the Royal Theatre. I told them that I was getting better. I told them I was not medically able to come back to work yet, but that I hoped to do so soon."

On October 11, 1999, counsel for Baron wrote Robert Laemmle and, among other things, indicated that Baron hoped to return to "his normal job in the near future."

Prior to October 13, 1999 Baron "had not advised anyone at Laemmle that [he was] able to return to work . . . ." [4]

On October 13, 1999, Laemmle wrote Baron "[o]ver the past few months we have made repeated requests that you update us as to the status of your condition and anticipated return to work date. However, we have not heard from you at all over the past few weeks. As of today, you have been on leave of absence for reasons of medical disability for 26 consecutive weeks. Add to this the four weeks of FMLA leave which you took prior to your medical disability and you are well in excess of the allowed twelve weeks required under the Family Medical Leave Act." The letter continued: "This is official notice of the termination of your employment status effective Wednesday, October 13, 1999."

In the same letter, Robert Laemmle wrote, "the company has no standard severance package. On the other hand, the company has never had an employee of such long standing who we have had to terminate for reasons of medical disability."

On November 10, 1999, Baron's physician cleared him to return to work, but Baron did not advise Laemmle of this fact.

PROCEDURAL BACKGROUND

Following his termination, Baron sued Laemmle, Phoenix Theatres, Inc., and Laemmle Theatres. The operative pleading alleges causes of action for retaliation for disclosing information on violation to a government or law enforcement agency, retaliation for making complaints about workplace safety to an employer and a governmental agency, breach of implied contract of continued employment, age discrimination, disability discrimination including failure to reasonably accommodate, and intentional infliction of emotional distress. Laemmle Theatres is alleged to be a "fictitious business name under which defendant Robert Laemmle and several of his wholly-owned corporations own and/or operate motion picture theatres in Los Angeles County, California."

Respondents moved for summary judgment or in the alternative summary adjudication (Motion). They argued that the reason for Baron's termination was that he was absent from work for six months, and despite requests for information failed to provide a return to work date. Respondents relied heavily on what they characterized as Baron's admission that he would have continued to be employed had he been able to work.

The trial court granted Respondents' Motion. The court found that each cause of action could be decided as a matter of law and also found that Baron was employed only by Phoenix Theatres, Inc. The court sustained several of Respondents' evidentiary objections to Baron's declaration in opposition to summary judgment. The court awarded costs of $19,643 to Respondents.

CONTENTIONS

Baron argues that he demonstrated a prima-facie case of retaliation, disability discrimination, and

age discrimination. He argues that Respondents' reasons for terminating him are both illegal and pretextual. Baron also maintains that the trial court erred in granting summary adjudication on his causes of action for intentional infliction of emotional distress, breach of implied contract, and in finding that he was employed only by Phoenix Theatres, Inc. Finally, Baron challenges the award of costs. Respondents dispute each of Baron's contentions.

DISCUSSION

We review the trial court's grant of summary judgment de novo. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860.) We must view the evidence, and all "`inferences' reasonably drawn therefrom [citation], . . . in the light most favorable to the opposing party." (Id. at p. 843, quoting Code Civ. Proc., § 437c, subd. (c).)

We consider each cause of action separately and then turn to the issue of who was Baron's employer. Because we find triable issues of material fact and reverse the grant of summary judgment, we need not consider Baron's challenge to the amount of costs awarded by the trial court.

I. Disability Discrimination and Failure to Reasonably Accommodate

In the operative pleading, Baron alleged both that he was terminated because of his disability and that Respondents failed to reasonably accommodate him. As explained below, he has raised triable issues of material fact on both claims.

A. Failure to Reasonably Accommodate

The Fair Employment and Housing Act (FEHA) requires that an employer reasonably accommodate a disabled employee and engage in an interactive process with the employee to reach such reasonable accommodation. (Gov. Code § 12940, subds. (m) & (n).) [5] As explained in Prilliman v. United Air Lines, Inc. (1997) 53 Cal.App.4th 935, 949, 950: "`The employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.'" (Id. at p. 950, quoting Goodman v. Boeing Co. (1995) 127 Wn.2d 401.)

To the extent Respondents discuss the issue of reasonable accommodation, they appear to argue in the alternative that (1) they were not required to reasonably accommodate Baron because he never requested such accommodation or (2) that they reasonably accommodated him.

While Baron never used the phrase "reasonable accommodation," those "magic words" are not required to trigger the interactive process. (Prilliman v. United Airlines, supra, 53 Cal.App.4th 935, 953; Fjellstad v. Pizza Hut of America, Inc. (8th Cir. 1999) 188 F.3d 944, 952 fn. 5.) More than once (in two letters and one oral communication), Baron expressed his desire to continue working despite his arthritis. Baron's communications at least arguably triggered Respondents' duty to take positive steps to accommodate him. (Fjellstad v. Pizza Hut of America, Inc ,supra, 188 F.3d 944, 952 fn. 5 ["The notice must merely make it clear to the employer that the employee wants assistance for his or her disability."].) Indeed, in his declaration Laemmle states "Mr. Baron informed Laemmle Theatres that he required a medical leave of absence to accommodate his severe rheumatoid arthritis" undermining Respondents' argument that Baron never requested an accommodation. (Emphasis added.) Respondents simply have not shown as a matter of law that Baron did not request a reasonable accommodation.

In a related contention, Respondents argue that the only request Baron made for a reasonable accommodation was an "implicit" request that Respondents keep his position open indefinitely. If that contention were accurate, Baron's request would be unreasonable because an employer is not required to wait indefinitely for an employee to return to work. (Hanson v. Lucky Stores, Inc. (1999) 74 Cal.App.4th 215, 226-227.) But, Respondents contention is not accurate for purposes of the Motion because it views the facts in the light most favorable to Respondents ignoring all contrary evidence. (See Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 843 [facts must be interpreted in the light most favorable to party opposing summary judgment].) For example, Respondents disregard the evidence that Baron asked that Respondents reassign his work for "several months," and that on October 11, 1999, Baron's attorney indicated Baron would return to work shortly. When the evidence is viewed in the light most favorable to Baron, it does not show that Baron requested only an implicit indefinite leave.

In addition to arguing Baron requested no accommodation, Respondents state that they made "many attempts to accommodate" Baron. That may be true. The record reveals Respondents held Baron's general manager position open from April 14th through August 6th. After they filled that position, Respondents held another management-level position (at the same salary) open from August 6 to October 13. Laemmle also promised to consider Baron for future positions that became available. The critical question is not whether Respondents made attempts to accommodate Baron, but whether their attempts were reasonable. While we do not hold that Respondents' attempts were unreasonable, on the record before us, Respondents have not shown as a matter of law either that their attempts were reasonable or that keeping open Baron's position for a longer period of time was unreasonable.

Finally, Respondents accuse Baron of refusing to cooperate. They assert "despite several requests for information regarding when Appellant would return to work, he refused to provide such information and did not return to work." Respondents also assert that "the Laemmles were forced to initiate contact with Appellant time and time again to inquire about his return to work." These assertions

are relevant as the obligation to search for a reasonable accommodation is bilateral. (Soldinger v. Northwest Airlines, Inc. (1996) 51 Cal.App.4th 345, 370.) Respondents' assertions are supported by Laemmle's letter in which he stated that "we have made repeated requests that you update us as to the status of your condition and the anticipated return to work date." But, Baron introduced conflicting evidence indicating that he spoke to Laemmle at the end of August or beginning of September and that his attorney provided an update on October 11, 2000. The trier of fact must sort out the conflicting evidence.

B. Disability Discrimination

To analyze Baron's allegations of discrimination, both parties apply the burden shifting analysis first announced in McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792. Under this procedural mechanism, the plaintiff bears the initial burden of establishing a prima-facie case of discrimination. (Guz v. Betchel National, Inc. (2000) 24 Cal.4th 317, 355. The employer then must offer a legitimate nondiscriminatory reason for the adverse employment decision. (Id. at pp. 355-356.) Legitimate reasons "in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." (Id. at p. 358.) Finally, if the employer satisfies this burden, the plaintiff has "the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (Id. at p. 356.)

A plaintiff can establish a prima facie case of disability discrimination by proving that: (1) plaintiff suffers from a disability; (2) he is otherwise qualified for his job; and (3) plaintiff was subjected to an adverse employment action because of the disability. (Deschene v. Pinole Point Steel Co. (1999) 76 Cal.App.4th 33, 44.)

The parties' dispute whether Baron was qualified. Respondents argue: "It is clear that Appellant was not a qualified individual under FEHA and is therefore barred from invoking FEHA's protections because Appellant was not able to work at all at the time of his termination. . . . The only way he could have been considered a qualified individual would be to show that he would have been able to continue his employ if Respondents had provided a reasonable accommodation. Appellant cannot show that he requested a reasonable accommodation. His implicit request that Respondents keep his position open indefinitely with no anticipated return to work date was per se unreasonable."

We need not decide the correctness of Respondents' legal argument because it is factually unsupportable in the context of the Motion. As we previously explained, Respondents argument is predicated on their view that Baron requested only an indefinite leave of absence - a view inappropriate for purposes of this Motion.

Respondents do not otherwise challenge Baron's prima-facie case, and therefore the burden shifted to Respondents to provide a legitimate nondiscriminatory reason for Baron's termination. Respondents argue that its legitimate non-discriminatory reason for the termination was that Baron

"had been out for six months and . . . had provided no anticipated return-to-work date." On its face, that reason is legitimate. (Cf. Walsh v. United Parcel Service (6th Cir. 2000) 201 F.3d 718 [affirming grant of summary judgment where an employee took a ten month leave of absence and refused to provide a return to work date after eight specific requests from employer].) Here, Baron does not dispute that attendance was a necessary part of his employment.

The burden then shifted to Baron to show that the alleged reason for termination was pretext for discrimination. Baron has satisfied this burden by pointing to Laemmle's letter in which he wrote "the company has never had an employee of such long standing who we have had to terminate for reasons of medical disability." This letter states that Baron was terminated because of his medical disability and that statement constitutes "specific, substantial evidence of pretext" from which a reasonable trier of fact could conclude that Laemmle terminated Baron because of his disability. (Horn v. Cushman & Wakefield Western, Inc. (1999)72 Cal.App.4th 798, 807; Cf. Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133, 151 [finding sufficient evidence to sustain jury finding of age discrimination where evidence that decision maker said plaintiff was "too damn old to do the job" and "was so old [he] must have come over on the Mayflower"].)

The grant of summary adjudication on Baron's cause of action for disability discrimination was error. In reaching this conclusion, we reject Respondents' oft repeated assertion that Baron admitted "had he been able to work, he would have continued to be employed by Laemmle" to the extent Respondents rely on it (1) as evidence of Baron's "own understanding of why is no longer working for Respondents" or (2) as evidence that Respondents terminated him for a legitimate reason.

During his deposition, Baron was asked "[s]o if you hadn't had this onset of this arthritic condition, would you have continued to work at Laemmle Theatres?" He responded "Yeah. If I didn't have rheumatoid arthritis, I believe I would have been working normally." He was later asked "And if it had not been for that medical condition as far as you were concerned, you would have continued working?" Baron responded "I would have been working, yes, I think so." Counsel then asked, "[e]ven though it was in a situation that was not a hundred percent to your pleasure as you've described it as you perceived certain areas being taken away from you; is that right? Baron responded, "Yes. I would have continued working as far as I could see." Baron was asked "[d]o you have any reason to believe that you would not have been reinstated to your position of general manager if you had returned within the 12- week period of time that's specified in the California Family Medical Leave Act?" Baron responded "No. I would have assumed I would have been coming back as general manger." When Baron was asked "[d]o you have any reason to believe you would not be employed by Laemmle Theatres if you hadn't gone out on a leave of absence, . . ." Baron responded "Yes. As I testified yesterday, I was starting to see things happen in early 1998 which were veiled threats to fire me -- . . . - and there were - once I talked to the city of Pasadena, there was a distinct change and there was a demotion and lessening of job responsibilities. And I felt that these were preludes to perhaps firing me. There were threats and . . . intimidations."

Baron's statements, when viewed in context of the questions posed, do not amount to an admission that he believed the only basis for his termination was his absence from work. Baron testified that absent his arthritis he "would have been working normally" and "would have continued working as far as [he] could see." When pressed, he acknowledged that he would have been working even though he perceived that his responsibilities had been taken away from him. "A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." (Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 482.) Viewing the facts in the light most favorable to Baron, his deposition reveals that he acknowledged he would have been working normally even though he believed his responsibilities had changed. It does not indicate Baron admitted he was terminated for a legitimate reason.

II. Retaliation

In their Motion, Respondents argued that Baron could not establish a prima facie case of retaliation, which is comprised of three elements: (1) plaintiff engaged in a protected activity; (2) plaintiff was thereafter subjected to adverse employment action and (3) a casual link between the two. (Morgan v. Regents of the University of California (2000) 88 Cal.App.4th 52, 69.)

The first element is not challenged for purposes of summary judgment.

With respect to the second element - adverse employment action - a recent split of authority has developed regarding whether a "materiality test" or a "deterrence test" should be applied to determine the meaning of "adverse employment action." Under the materiality test, an adverse employment decision includes ultimate acts such as termination and demotion but also extends to substantial adverse changes in the terms and conditions of employment. (Thomas v. Department of Corrections (2000) 77 Cal.App.4th 507, 510-511; Akers v. County of San Diego (2002) 95 Cal.App.4th 1441, 1455.) Under the deterrence test, "`an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.'" (Yanowitz v. L'Oreal USA, Inc. (2003) 106 Cal.App.4th 1036, 1061, quoting Ray v. Henderson (9th Cir. 2000) 217 F.3d 1234, 1243.) Under either test a termination and demotion constitute adverse employment actions - they are ultimate acts and would deter a reasonable employee from engaging in the protected activity. (Thomas v. Department of Corrections, supra, 77 Cal.App.4th at pp. 510-511; Yanowitz v. L'Oreal USA, Inc., supra, 106 Cal.App.4th 1036, at pp. 1060-1061.)

The third element - a causal link-is the most vigorously disputed. "`"The causal link may be established by an inference derived from circumstantial evidence, `such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'"'" (Morgan v. Regents of the University of California, supra, 88 Cal.App.4th at p. 69, quoting Jordan v. Clark (9th Cir. 1988) 847 F.2d 1368, 1376.) In evaluating this third element, we consider separately the termination and alleged demotion. With respect to the alleged demotion, we also consider Respondents' contention that Baron was not

demoted.

I. Termination

Baron failed to show a causal connection between his whistle blowing conduct and his termination because Baron himself argues that the reason for his termination was either his medical disability or his absence from work. To be sure, Baron claims that these reasons constituted discrimination on the basis of his disability. But evidence that he was fired because of his disability does not support the inference that that he was terminated because he was a whistleblower. (Visser v. Packer Engineering Association, Inc. (7th Cir. 1991) 924 F.2d 655, 657 [evidence that an employer fired an employee because the employee was a whistleblower does not tend to show the employee was fired because of his age].)

Other than pointing to evidence supporting a claim of disability discrimination, Baron points out that on February 17, 1999, Laemmle wrote Baron "[w]e were very disappointed that despite assurances from us . . . you chose to go directly to the City Council before we had an opportunity to have our meeting and had the benefit of our input." Baron does not explain how that letter shows that his protected conduct played a role in his termination. Nor does he show that this letter, written eight months before his termination, had any bearing on his termination. While circumstantial evidence may be sufficient to show causation, Baron has not provided any evidence supporting the inference that he was terminated because of his protected conduct.

II. Demotion

Respondents fail to show as a matter of law that no demotion occurred. A demotion may be evidenced by "significantly diminished material responsibilities. . . ." (Thomas v. Department of Corrections, supra, 77 Cal.App.4th 507, 511.) Here, Baron provides evidence that his responsibilities initially included supervising operations and personal, recruiting and hiring employees, and as a result of the organizational chart included only overseeing only janitorial services, night emergencies, maintenance , and repair. This evidence is sufficient to raise a triable issue of material fact that Baron was demoted.

Baron's deposition testimony does not contain an admission compelling a different conclusion as Respondents argue. During his deposition, Baron was asked "Mr. Baron, at any time after you were handed this chart, did anybody say to you, John, we don't want you working on this particular task or this particular project . . . ." Baron responded as follows: "This chart, the first one on 3-26, was handed to me by Robert Laemmle and Greg Laemmle. And it was clear to me from the meeting that we had when they gave me this chart that I would be doing maintenance repairs, janitorial and night emergences and I would not be doing the other things that were assigned to other people." Counsel recognized that Baron perceived that his responsibilities had changed when she asked in a follow-up question: "I understand what was clear to you based on what you saw. [¶] My question, Mr. Baron -

and I'm asking you to answer my question; otherwise we're going to have to strike your testimony as non-responsive." Baron responded: "No. No one told me anything of that nature." [6] When read in context, Baron's testimony does not reveal an admission that his job responsibilities remained constant. It indicates an acknowledgement that no one said he should refrain from working on a particular task. Stated otherwise, Baron's deposition testimony relied on by Respondents concerns only the statements made to him, not the organizational chart.

Respondents also challenge the third element of a prima facie case - a causal connection between the protected activity and the adverse employment action. Respondents assert "[t]he alleged `demotion' occurred long after the alleged `whistle-blowing' activities and after Playhouse 7 opened, and therefore, was not likely to deter Appellant's activities." Respondents' characterization is not is not entirely accurate (at least not when the facts are viewed in the light most favorable to Baron as required in this procedural posture) because it focuses only on Baron's first communication with Pasadena City Officials not on any of his later communications with the officials, which were shortly before the alleged demotion. There is enough evidence to establish a prima facie case of retaliation. A reasonable factfinder could infer that Baron was demoted because he engaged in a series of protected activities including delivering a report to a city official two months before the alleged demotion.

Baron provided enough evidence to establish a prima facie case that he was demoted because of his whistleblowing conduct. The burden then shifted to Respondents to articulate some legitimate, non-retaliatory reason for the adverse action. (Sada v. Kennedy Medical Center (1997) 56 Cal.App.4th 138, 155.) Respondents provided no reason. Thus, they are not entitled to summary adjudication of this cause of action.

III. Age Discrimination

Baron alleged that he was demoted and terminated because of his age. A prima facie case of age discrimination generally requires the employee show that: "(1) at the time of the adverse employment action, the employee was 40 years of age or older; (2) some adverse employment action was taken against the employee; (3) at the time of the adverse action the employee was satisfactorily performing his or her job; and (4) the employee was replaced in his or her position by a significantly younger person." (Muzquiz v. City of Emeryville (2000) 79 Cal.App.4th 1106, 1116.)

Baron argues that in addition to establishing a prima facie case, he has shown that he testified sometime in early 1998; Robert Laemmle made a remark that "`"older people have to make way for younger people in an organization."'"

With respect to his termination, assuming Baron could establish a prima facie case of age discrimination, he has not provided evidence that would be adequate to sustain a jury finding of liability for age discrimination. (See Reeves v. Sanderson Plumbing Products, Inc. (2000) 530 U.S. 133,

148.) There is overwhelming evidence that Baron was terminated either because of his disability (as Baron contends) or because of his absence from work (as Respondents contend). In the light of this overwhelming evidence, Laemmle's stray remark that older people have to make way for younger people in an organization, which did not refer specifically to Baron, is insufficient to raise the inference that age played any role in Baron's termination. (Ibid. ["an employer would be entitled to a judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"]; Russell v. McKinney Hosp. Venture (5th Cir. 2000) 235 F.3d 219, 229 fn. 19 [stray remark with no link to potentially relevant time frame will not defeat summary judgment in an overwhelming case].)

This case is like Rothmeier v. Investment Advisers, Inc. (8th Cir. 1996) 85 F.3d 1328. For purposes of summary judgment, an employee established a prima facie case of age discrimination. (Id. at p. 1332.) The employer provided legitimate reasons for the termination. (Id. at pp. 1332-1333.) The employee then acknowledged "that he `was discharged because [his employer] wanted to cover up its SEC problems and keep the millions of dollars it legally collected' in violation of SEC regulations." (Id. at p. 1337.) The court found incompatible the claim that the employee was fired because he chose investigate SEC problems and the claim that he was fired because of his age. (Id. at p. 1338; see also AKA v. Washington Hosp. Center (1998) 156 F.3d 1284, 1291.)

The same reasoning applies to Baron's claim that he was demoted because of his age. Even assuming Baron could establish a prima facie case of age discrimination, he has not provided any evidence upon which a trier of fact could conclude that he was demoted because of his age. Indeed, Baron does not even argue that Laemmle's remark relates to his alleged demotion or permits the inference that the alleged demotion was based on Baron's age. He argues only that "[a] trier of fact could infer that age was one of several motives for termination."

IV. Breach of Implied Contract

The trial court granted summary judgment on Baron's cause of action for breach of implied contract because it found, as a matter of law, Respondents had good cause to terminate Baron. On appeal, Respondents argue "[t]here is no dispute that Appellant was terminated for good cause because the Superior Court found no age discrimination, disability discrimination or retaliation to support a breach of the purported implied contract. Thus whether there was an implied contract is irrelevant."

Respondents showing is insufficient to find that, as a matter of law, there was no implied contract. [7] Contrary to Respondents' argument, there is a dispute whether Baron was terminated for good cause, and Baron has raised triable issues of material fact precluding summary judgment. Because the remainder of Respondents' argument depends on an unsupportable premise, it too fails. The trial court erred in granting summary adjudication of this cause of action.

V. Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) severe or extreme emotional distress suffered by the plaintiff; and (3) injuries to the plaintiff that were actually and proximately caused by the defendant's outrageous conduct. (Christensen v. Superior Court (1991) 54 Cal.3d 868, 903.)

As Respondents point out, the trial court sustained their objections to Baron's evidence that he suffered from severe or extreme emotional distress. Baron states "[t]he Court's order erroneously sustains objections to Baron's testimony in his declaration concerning the nature and extent of emotional distress." Baron's assertion is insufficient to demonstrate error. He provides no legal argument and cites no grounds for admitting the evidence excluded by the trial court. Consequently, we find the issue to be waived. (Associated Builders & Contractors, Inc. v. San Francisco Airport Com. (1999) 21 Cal.4th 352, 366 fn. 2 [issue not properly raised where party fails to provide any analysis or argument in support of assertion].) The trial court properly granted summary adjudication on this cause of action because there is no admissible evidence he suffered from severe or extreme emotional distress.

VI. Identity of Baron's Employer

In their separate Statement, Respondents listed the following "facts": (1) "Throughout Baron's employment he was paid by Phoenix Theatres, Inc." and (2) "'Leammle Theatres' did not exist as a legal entity during Baron's employment." Based on these facts, Respondents argued, in their motion for summary judgment, that both Laemmle Theatres and Robert Laemmle were entitled to summary judgment as a matter of law, and the trial court agreed.

By showing that Baron was paid by Phoenix Theatres, Inc., an undisputed fact, Respondents raised a rebuttable presumption that Phoenix Theatres, Inc. was Baron's employer. (Gov. Code § 12928 ["there is a rebuttable presumption that "employer," as defined by subdivision (d) of Section 12926 and by paragraph (2) of subdivision (d) of Section 12926, includes any person or entity identified as the employer on the employee's Federal Form W-2 (Wage and Tax Statement)"].) [8] The record contains rebuttal evidence including Baron's business card indicating he was employed by Laemmle Theatres and his employment application using the name Laemmle Theatres. Because rebuttal evidence was provided, the W-2s are insufficient to show, as a matter of law, that Baron was employed only by Phoenix Theatres, Inc.

Finally, while Laemmle Theatres did not exist at the time Baron was employed, Robert Laemmle used the name as a fictitious business name; he conducted business as Laemmle Theatres. A fictitious business entity is not a separate legal entity. (Pinkerton's Inc. v. Superior Court (1996) 49 Cal.App.4th 1342, 1348.) The designation doing business as is descriptive of the person or corporation who does business under some other name. (Ibid.) Once the true name of a person or corporation is discovered the proceedings should be conducted in that true name. (Id. at p. 1349.) Here, the true name of the

employer is Robert Laemmle and the trial court erred in granting summary adjudication in his favor. While a supervisor is not individually liable for discrimination under FEHA, (Reno v. Baird (1998) 18 Cal.4th 640, 663), Robert Laemmle is not being sued in his capacity as a supervisor but in his capacity as a person doing business as Laemmle Theatres, i.e. as the employer.

DISPOSITION

The judgment is reversed. The trial court is directed to enter an order granting summary adjudication (1) on the cause of action for age discrimination and (2) on the cause of action for intentional infliction of emotional distress. Baron is entitled to costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

RUBIN, J.

BOLAND, J.

1. Division Two of this Court, in a nonpublished opinion, affirmed the dismissal of Baron's petition for writ of mandate to compel the building official to inspect the theatre on the grounds that certain inspections were not required. (Baron v. City of Pasadena (July 11, 2002) B149533.)

2. Baron purports to dispute this fact, but only adds additional portions of the letter.

3. Baron purports to dispute this fact that on July 29, 1999 he and his doctor did not known when he would be able to return to work. The quoted language is directly from his letter.

4. Baron purports to dispute this fact, but the record reveals no contradictory evidence.

5. "[U]nlike the federal ADA provisions, subdivision (m) does not require that reasonable accommodation for disability be made only where the person is `a qualified individual' able to perform the essential functions of the job as defined in 42 U.S.C. section 12111, nor is there any requirement in subdivision (m) that the employee has a right to assert the duty of reasonable accommodation only where some kind of adverse employment action is taken against the employee." (Bagatti v. Department of Rehabilitation (2002) 97 Cal.App.4th 344, 360- 361.)

6. When Baron was expressly asked about the chart, he answered, "I felt I was being demoted and I had done nothing wrong and I was being stripped of authority and I was being - my job responsibilities were being dispersed to a number of younger people than I was, and it was - I viewed it as an attempt to put me off in a corner. Demote me."

7. In what they characterize as a "Summary Of Argument" Respondents state that "there can be no breach of contract

claim because Appellant was an at will employee." We are aware that Baron signed an application containing an at will employment provision, but decline to consider a basis for summary judgment that was not included in the separate statement, nor relied on by the trial court, nor supported by legal authority in this court.

8. There is no merit to Respondents argument that this issue is waived as Baron included it in his opposition to the Motion even though he did not cite this provision, which Respondents also did not cite it in the trial court.