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8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF RIVERSIDE, PALM SPRINGS BRANCH
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11 CHRISTOPHER ROSS,

12 Plaintiff,

13 v.

14 COUNTY OF RIVERSIDE; PAUL
15 ZELLERBACH, as an individual and as the
16 District Attorney; SEAN LAFFERTY, as an
17 individual and as an Assistant District
18 Attorney; DAVID GREENBERG, as an
19 individual and as the Chief Deputy District
20 Attorney; JEFFREY VAN WAGENEN, as
21 an individual and as an Assistant District
22 Attorney; TRICIA FRANS DAL, as an
23 individual and as a Deputy District Attorney,

24 Defendants.
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29 The motion for summary judgment or, in the alternative, summary adjudication of
30 issues by Defendant COUNTY OF RIVERSIDE, a public entity, came on for hearing on
31 February 9, 2017, in Department PS2 of the above entitled Court, before the Honorable
32 David Chapman, Judge Presiding. The parties appeared by and through their respective
33 counsel of record.

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

FEB 28 2017

L. REYNA

MUS

MAR 01 2017

CASE NO.: P.S.C. 1403729

ASSIGNED FOR ALL PURPOSES TO
THE HONORABLE DAVID CHAPMAN
DEPARTMENT: PS2

~~PROPOSED~~ ORDER GRANTING
DEFENDANT'S SUMMARY
JUDGMENT/SUMMARY
ADJUDICATION OF ISSUES

DATE ACTION FILED: July 10, 2014

1 After full consideration of the admissible evidence, and the separate statements of
2 each party, and the authorities submitted by counsel, and counsel's oral argument, the Court
3 finds that Defendant is entitled to summary judgment on each and every cause of action, as a
4 matter of law, as follows.

5 **Issue No. 1: The County is entitled to judgment on the second cause of action for**
6 **disability discrimination because Ross cannot prove he could perform the essential**
7 **functions of his job.**

8 **Defendant has failed to establish the essential functions of Plaintiff's job.** "A prima
9 facie case for discrimination 'on grounds of physical disability under the FEHA requires
10 plaintiff to show: (1) he suffers from a disability; (2) *he is otherwise qualified to do his job*;
11 and, (3) he was subjected to adverse employment action because of his disability."

12 (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)
13 Emphasis added.

14 Defendant seeks to negate the second element. "'Essential functions' means the
15 fundamental job duties of the employment position the individual with a disability holds or
16 desires. 'Essential functions' does not include the marginal functions of the position." (Gov.
17 Code § 12926(f); see 2 Cal.C.Reg. § 11065(e).) In determining whether a particular function
18 is "essential," the following factors, among others, are relevant: Whether the reason for the
19 position is to perform the job function; Number of employees available among whom
20 performance of that function can be distributed; Whether the employee in question was hired
21 because of a specialized expertise in performing the function. (See Gov. Code § 12926(f)(1);
22 see 2 Cal.C.Reg. § 11065(e)(1).)

23 The following may be relevant evidence in determining whether a particular function
24 is "essential": Whether the employer regards the function as essential; Written job
25 descriptions prepared before the employer advertised or interviewed applicants for the job;
26 Amount of time spent on the job performing the function; Consequences of not requiring the
27 incumbent to perform the function; Terms of a collective bargaining agreement; Work
28 experiences of past incumbents on the job; Current work experience of incumbents in similar

1 jobs; and Reference to the importance of the job function in prior performance reviews.
2 (Gov. Code § 12926(f)(2); 2 Cal.C.Reg. § 11065(e)(2).)

3 Defendant argues that there is no dispute as to essential job functions because “Ross
4 testified that his responsibilities as a prosecutor in the homicide unit included ‘being
5 responsible for however many cases were assigned to him by his Grade V supervisor, Ms.
6 Fransdal and managing his cases including attending various types of court hearings and
7 trying cases. (Fact 5) Ross also understood that it was his supervisor Lafferty's view that not
8 being able to take cases and work on them and not being able to go to trial meant that the
9 prosecutor in the homicide unit was not able to do the core function of his or her job. (Fact
10 19) With regard to the essential functions of the filing unit, Ross testified that a prosecutor
11 must file a certain number of cases per day and per month. (Facts 17-18).” (Defendant’s
12 MOPA, 7:15-23.)

13 At best this is some evidence of some of Plaintiff’s job responsibilities. Defendant
14 makes no attempt to address the relevant factors.

15 **However, as discussed below in the discussion of issue No 2. B., there is no triable**
16 **issue of fact that Plaintiff was not disabled.** As noted above, the first element of a cause of
17 action for disability discrimination is that Plaintiff was disabled. Although Defendant failed
18 to make the argument that Plaintiff was not disabled in its motion as to this, the second cause
19 of action, Defendant did as to Plaintiff’s other causes of action. Defendant’s failure to move
20 for summary adjudication as to the second cause of action on the grounds that Plaintiff is not
21 disabled does not bar the court from granting summary adjudication of the second cause of
22 action on this ground. The courts have inherent power to grant summary judgment on
23 grounds not explicitly raised by the moving party “when the material fact is undisputed and
24 entitles the moving party to judgment as a matter of law.” (*Juge v. County of Sacramento*
25 (1993) 12 Cal.App.4th 59, 69—the trial court is not required “to close its eyes to an
26 unmeritorious claim” simply because the operative ground was overlooked by the moving
27 party; see also *Marlton Recovery Partners, LLC v. County of Los Angeles* (2015) 242
28 Cal.App.4th 510, 517518.)

1 The situation here is different from that in the cases cited above because the argument
2 that Plaintiff was not disabled was raised by Defendant, just not as to this particular cause of
3 action. As a result, Plaintiff has had the opportunity to address the argument.

4 **Issue No.2: The County is entitled to judgment on the fourth cause of action for**
5 **failure to provide a reasonable accommodation because:**

6 **A. Ross cannot prove he could perform the essential functions of his job. See**
7 **discussion of issue No. 1 above.**

8 **B. Ross cannot prove he had any functional limitations and was entitled to any**
9 **accommodation.**

10 **There is no triable issue of fact that Plaintiff was not disabled.** Under the FEHA,
11 “physical disability” includes having a physiological disease, disorder, or condition that, by
12 affecting the neurological or musculoskeletal body systems, special sense organs or skin,
13 “limits” a “major life activity.” (Gov. Code § 12926, subd. (k)(1)(A), (B).) “Limits” is
14 synonymous with making the achievement of a major life activity “difficult.” (*Id.*, subd.
15 (k)(1)(B)(ii).) “Major life activity” is construed broadly and includes physical, mental, and
16 social activities, and working. (*Id.*, subd. (k)(1)(B)(iii).) “[W]orking” is a major life activity,
17 regardless of whether the actual or perceived working limitation implicates a particular
18 employment or a class or broad range of employments.” (§ 12926.1, subd. (c).) Whether a
19 major life activity is limited “shall be determined without regard to mitigating measures such
20 as medications, assistive devices, prosthetics, or reasonable accommodations, unless the
21 mitigating measure itself limits a major life activity.” (§ 12926, subd. (k)(1)(B)(i).)

22 An actual or existing disability is not necessary. The FEHA defines “disability” to
23 include: (1) “[h]aving a record or history of a disease, disorder, condition, cosmetic
24 disfigurement, anatomical loss, or health impairment [that constitutes a physical disability],
25 which is known to the employer”; (2) “[b]eing regarded or treated by the employer ... as
26 having, or having had, any physical condition that makes achievement of a major life
27 activity difficult”; or (3) “[b]eing regarded or treated by the employer ... as having, or
28 having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or

1 health impairment that has no present disabling effect but may become a physical
2 disability.” (§ 12926, subd. (k)(3)-(5).)

3 In deciding whether employees' limitations render them “disabled” under the FEHA,
4 the comparative baseline is any of the following: what most people in the general population
5 can perform with little or no difficulty; what members of the individual's peer group can
6 perform with little or no difficulty; what the individual would be able to perform with little
7 or no difficulty in the absence of disability. (2 Cal.C.Reg. § 11065(l)(3)(A); see also *Arteaga*
8 *v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 345-346.)

9 The facts regarding Plaintiff's claimed disability are few and not disputed. Essentially,
10 Plaintiff complains that he was being evaluated for a possible neurodegenerative disease and
11 was told generally to avoid stress. (See Scherwin Decl. in Support of Plaintiff's Opp., Exh. 1,
12 Ross Depo: 82:24-83:6.) Accordingly, Plaintiff was possibly disabled because he suffered from
13 a neurological condition that limited his ability to work.

14 However, there is no evidence that Plaintiff suffered from a neurological or other
15 condition that limited his ability to work. Plaintiff's doctors ultimately concluded that
16 Plaintiff did not have any of the neurological disorders that they had tested him for, but that
17 he suffered from an autoimmune disease with “no signs or symptoms.” (*Id.* at 82:614.) And
18 it is undisputed that Plaintiff never told Defendant that he was actually suffering from any
19 disorder, much less, described in any concrete way how any condition actually limited his
20 ability to work.

21 Moreover, although Plaintiff describes Greenberg's agreement to not assign him any
22 new cases while he was being evaluated as an “accommodation,” that description is a legal
23 conclusion used to imply that Defendant had recognized his disability. Greenberg had simply
24 recognized that Plaintiff was going to be taking time off to travel to his medical
25 appointments. In fact, Greenberg had suggested that Plaintiff transfer to filings but Plaintiff
26 responded that “a filing quota would be too stressful and difficult to perform *given my*
27 *upcoming appointments at the Mayo Clinic in Arizona.*” (Ross Decl., ¶¶ 29, 30.) Emphasis
28 added. Plaintiff repeatedly made clear that his requests were based upon *the lack of time to*

1 *perform his job* necessitated by his need to travel to his medical appointments in Arizona. In
2 other words, Plaintiff was going to be out of the office regularly and could not, therefore,
3 handle additional cases or job in filing with a quota. Plaintiff's need to travel to his
4 appointments may raise issues otherwise related to Plaintiff's employment. That need is not
5 by itself a basis for a disability claim.

6 **C. The accommodation Ross requested was not reasonable as a matter of**
7 **law.**

8 Moot as this is an alternative argument.

9 **Issue No. 3: The County is entitled to judgment on the third cause of action for**
10 **failure to engage in the interactive process because Ross did not interact in good faith.**

11 As discussed above, there is no triable issue of fact that Plaintiff was not disabled

12 **Issue No. 4: The County is entitled to judgment on the fifth cause of action for**
13 **disability harassment because none of the conduct alleged by Ross constitutes**
14 **harassment as a matter of law.**

15 As discussed above, there is no triable issue of fact that Plaintiff was not disabled.

16 **Issue No. 5: The County is entitled to judgment on the second cause of action for**
17 **disability retaliation because there were no protected acts and no adverse employment**
18 **actions.**

19 As discussed above, there is no triable issue of fact that Plaintiff was not disabled.

20 **Issue No.6: The County is entitled to judgment on the sixth cause of action for**
21 **failure to prevent discrimination, harassment, and retaliation if the Court finds for the**
22 **County on the Issue Nos. 1 and 5 (disability discrimination and retaliation second cause**
23 **of action); and Issue No. 4 (disability harassment fifth cause of action).**

24 As discussed above, there is no triable issue of fact that Plaintiff was not disabled.

25 **Issue No. 7: The County is entitled to judgment on the first cause of action for**
26 **violation of Labor Code section 1102.5 because Ross cannot prove that he engaged in**
27 **protected activity.**

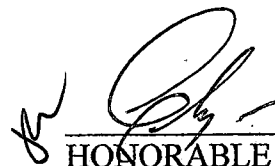
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Plaintiff did not report a violation of law. Labor Code section 1102.5(a) states: An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. The only possible violation alleged is that Lafferty instructed Plaintiff not to turn over to defense counsel in a murder case a recorded confession by another person. See *Brady v. Maryland*, (1963) 373 U.S. 83—prosecutors have an affirmative duty, as a matter of constitutional law, to disclose all known exculpatory evidence to the accused in a criminal proceeding, and failure to do so violates due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

However, Plaintiff offers evidence only that Lafferty told him that he, Lafferty, would take care of it, not that Lafferty did not do so. (Ross Decl. ¶¶ 74-76.) Moreover, Plaintiff was not complaining to Lafferty that the subject defendant's right *had been* violated.

Defendant posed objections to various evidence proffered by Plaintiff in opposition to the Motion. The Court overrules each and every one of Defendant's objections to Plaintiff's evidence.

DATED: 2-28-17



HONORABLE DAVID CHAPMAN
JUDGE OF THE SUPERIOR COURT

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa, CA 92626-7670.

On February 14, 2017, I served the foregoing document(s) described as **[PROPOSED] ORDER GRANTING SUMMARY JUDGMENT**

☒ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

☐ **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

☐ **(BY ELECTRONIC MAIL)** by causing the foregoing document(s) to be electronically mailed and served on the individual(s) listed on the attached mailing list.

☒ **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for collection and delivery to a courier authorized by GSO to receive said documents, with delivery fees provided for. I am readily familiar with the practices of WOODRUFF, SPRADLIN & SMART for collection and processing of documents for overnight delivery, and said envelope(s) will be deposited for receipt by GSO on said date in the ordinary course of business.

☐ **(BY FACSIMILE)** I caused the above-referenced document to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated on the attached service list.

☐ **(BY PERSONAL SERVICE)** I delivered such envelope(s) by hand to the offices of the addressee(s).

☒ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 14, 2017, at Costa Mesa, California.


Juliet Hyung

CHRISTOPHER ROSS v. COUNTY OF RIVERSIDE, et al.
SUPERIOR COURT FOR COUNTY OF RIVERSIDE, PALM SPRINGS BRANCH
CASE NO.: P.S.C. 1403729
ASSIGNED FOR ALL PURPOSES TO:
HONORABLE DAVID CHAPMAN, DEPT. P52
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