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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT FARRIS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B186104 (Los Angeles County Super. Ct. No. BC296004)

APPEAL from the judgment of the Superior Court of Los Angeles County. Joanne O'Donnell, Judge. Reversed and remanded.

Law Office of Mark J. Leonardo and Mark J. Leonardo, for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House and Clifton A. Baker, for Defendants and Respondents.

Robert Farris appeals from the summary judgment dismissing his lawsuit against his employer, Los Angeles County, and superiors in the county's probation department alleging they retaliated against him for exercising his rights under the Fair Employment and Housing Act. We reverse.

FACTS AND PROCEEDINGS

In 2000, appellant Robert Farris sued Los Angeles County and several officials and supervisors in the county's probation department in a lawsuit the parties call "Farris I." In that lawsuit, he alleged the defendants had discriminated against him because of his religion. In a nutshell, he alleged the defendants permitted religious art and activities on government property in violation of the separation of church and state. As an agnostic, appellant asserted that breaching the church-state barrier violated his religious beliefs. He further alleged that after he complained about the violations, the defendants pursued a years' long campaign of discrimination, harassment, and retaliation against him. (For a more detailed discussion of Farris I, see our opinion in *Farris v. Los Angeles County*, case No. B186232, filed in conjunction with this opinion.)[1]

A few months after appellant filed his lawsuit in Farris I, respondent Los Angeles County transferred him from his then current job at Camp Afflerbaugh in the county's juvenile camp system to the department's Pomona field office. The chief of the department's administrative services bureau, Robert Smythe, told him the department was transferring him "because of the lawsuit." The department assigned appellant an adult caseload in his new position, but did not change his rank, salary, or benefits.

Believing the department had transferred him in retaliation for filing Farris I, appellant filed a second lawsuit, which the parties call "Farris II" and which is at issue in this appeal. In Farris II, appellant alleges a cause of action for retaliation under the Fair

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[1] The opinion in Farris I is actually the second decision we have issued in that case. Our earlier unpublished opinion was filed on April 26, 2005, case No. B159735.

Employment and Housing Act against respondents Los Angeles County and probation department officials Richard Shumsky, Richard Saenz, and Paul Higa.[2]

Respondents moved for summary judgment. Noting that appellant's pay, benefits, and rank did not fall when he moved to Pomona, they argued the transfer was not actionable. (But see *Burlington Northern and Santa Fe Ry. Co. v. White* (2006) 126 S.Ct. 2405, 2411-2412 [under Title VII, retaliation for engaging in protected activity can be broader than affecting terms, conditions, or status].) The court agreed, finding the transfer was not an adverse employment action under FEHA. The court further found that the transfer's attendant effects on appellant's shift assignments, commute, and job setting were not material changes to the terms and conditions of his employment. Consequently, appellant could not state a cause of action for retaliation, and the court entered judgment for respondents. This appeal followed.

DISCUSSION

Appellant contends respondents violated the Fair Employment and Housing Act when the department transferred him from the juvenile probation camp to the Pomona field office in retaliation for filing Farris I. An employee may state a cause of action for retaliation under FEHA if he suffers an adverse employment action because he engaged in activity that FEHA protects. (*Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1229; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453; Gov. Code, § 12940, subd. (h).) The parties agree appellant's filing of Farris I was a protected activity. In addition, respondents concede that Smythe's comment that the department transferred appellant because he filed Farris I is evidence of retaliation. The court found appellant's cause of action failed, however, because neither the transfer nor its accompanying effects constituted an adverse employment action.

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[2] He also alleged causes of action for harassment and discrimination but agreed to the trial court's dismissal of those claims and does not pursue them on appeal.

The trial court erred, possibly because it did not have the benefit of our Supreme Court's decision in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, which issued a month after the trial court entered summary judgment. Under *Yanowitz*, the law looks at all the circumstances surrounding an alleged adverse employment action. The law does not slice and dice an employer's treatment of the employee, focusing on single acts in isolation. Instead, it considers the employer's actions toward the employee as a package. *Yanowitz* explained:

> "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. . . . Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute. [¶] It is therefore appropriate that we consider plaintiff's allegations collectively." (*Id.* at pp. 1055-1056; *Taylor v. City of Los Angeles Dept. of Water and Power, supra*, 144 Cal.App.4th at p. 1231 [same].)

A lateral job transfer is not, by itself, an actionable adverse employment action. (*Akers v. County of San Diego, supra*, 95 Cal.App.4th at p. 1457 ["a transfer into a comparable position does not meet the definition of an adverse employment action under FEHA."].) But appellant offers evidence that several injurious consequences flowed from his involuntary transfer. First, the length and arduousness of his commute increased. At the camp, he worked one continuous 56 hour shift each week, meaning he made only one weekly 32 mile round trip to work. But at the Pomona field office, he worked a conventional 8 hour shift, increasing his commute to five round trips a week. Moreover, because Pomona was six miles farther from home than the camp, his weekly mileage rose from 32 miles to 220. Furthermore, the change from one uninterrupted shift to five daily shifts complicated the child care arrangements he shared with his wife, who was a nursing student, and prevented him from working as a substitute teacher in the public schools. His move to Pomona also changed his work assignments and their

setting. At the camp, he supervised juveniles in a live-in facility. In Pomona, he worked at a desk in an office helping adults.

Respondents note that an employee's displeasure with an employer's decisions does not necessarily make those decisions adverse. (*Yanowitz, supra,* 36 Cal.4th at p. 1051, fn. 9.) Respondents contend authorities have held that the sorts of job changes that accompanied appellant's transfer to Pomona are not adverse actions. Their contention fails, however, because their authorities involved single alterations, not a set of adjustments as occurred here. For example, *Grube v. Lau Industries, Inc.* (7th Cir. 2001) 257 F.3d 723, concluded that a different work shift was not adverse, but the new shift was the employee's only complaint. (*Grube*, at p. 728.) In fact, another authority cited by respondents implicitly concedes that a shift change joined to other job modifications could be adverse. (*Benningfield v. City of Houston* (5th Cir. 1998) 157 F.3d 369, 377 [transfer to night shift not an adverse action, while allowing for possibility it could be if other changes accompanied it].) And although *Grande v. State Farm Mut. Auto. Ins. Co* (E.D. Pa. 2000) 83 F.Supp.2d 559, concluded that forcing a different commute to work was not an adverse action, it too recognized that such a change when added to other alterations could be adverse. (*Id.* at pp. 563-564.)

Respondents also contend that even if the department transferred appellant with, as Smythe's comment suggests, a retaliatory motive, they are not liable if they can prove the department would have transferred appellant even without such a motive. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67-68 (*Morgan*).)[3] They assert appellant's purportedly repeated violations of department rules and disruptive conduct at Camp Afflerbaugh prove "beyond dispute" that the department would have transferred him even if he had not filed Farris I. In support, respondents point to the many problems the department claimed it had with appellant, such as his profane

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[3] Although *Morgan's* statement of its general legal principle helps respondents, its facts do not because they are distinguishable. In *Morgan* the employer escaped liability by showing the decision makers who took action against the employee did not know the employee had engaged in protected activity. (*Id.* at pp. 70, 73)

language toward supervisors, his unauthorized independent investigation of reported child abuse at the camp which he leaked to the news media, his improper communication with camp wards, and at least two suspensions for misconduct in five years.

Respondents' contention is unavailing. The facts they recite may demonstrate, if true, that the department had the option to transfer appellant, but they don't *prove* the department would necessarily have done so. Their facts do not preclude as choices open to the department in dealing with appellant, among other things, demoting or firing him, not promoting him, imposing other discipline such as retraining or suspension, or even doing nothing. When the evidence of retaliatory intent is direct as in Smythe's statement, it need not be very substantial to defeat summary judgment. (*Morgan, supra,* 88 Cal.App.4th at pp. 68-69.) Smythe's admission, if believed by a trier of fact, makes appellant's case, rendering the department's claim that it would have transferred appellant even without a retaliatory motive a triable issue of fact which we may not resolve at summary judgment.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings. Appellant to recover his costs on appeal.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

BOLAND, J.