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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LAVERNE HINES, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B208389 (Los Angeles County Super. Ct. No. BC372596)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Mancini & Associates, Marcus A. Mancini, Timothy Gonzales; Benedon & Serlin, Gerald M. Serlin and Kelly R. Horwitz for Plaintiff and Appellant.

Office of the County Counsel Transporation Division, Mary E. Reyna; Greines, Martin, Stein & Richland, Martin Stein and Barbara S. Perry for Defendant and Respondent.

In this disability discrimination action under the Fair Employment and Housing Act (the FEHA), Government Code section 12900 et seq.,[1] plaintiff and appellant Laverne Hines appeals from a summary judgment in favor of defendant and respondent Los Angeles County Metropolitan Transportation Authority (MTA). Hines contends: (1) triable issues of fact exist that MTA refused to hire her based on her perceived disability; and (2) MTA's use of the Bus Operator Candidate Assessment Test (BOCAT) violated Equal Protection. Because Hines failed to show her obesity was caused by a physiological condition, no triable issue of fact of perceived disability discrimination exists and summary judgment was properly granted. As Hines failed to raise the Equal Protection issue in the trial court, the issue is forfeited. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Hines applied to MTA for employment as a bus driver in July 2006. Hines passed the written test and appraisal interview for the job. A pre-employment physical examination revealed her body mass index (BMI) was 57.55 percent, based on her height of 5 feet 3 inches and weight of 324 pounds. All bus driver applicants whose BMI exceeded 35 percent[2] were required to undergo the BOCAT, a functional seat test.[3] Hines took the BOCAT on November 30, 2006. Hines failed the operator compartment checklist and candidate performance checklist because her torso touched the steering wheel and her thighs hung over the sides of the seat, preventing her from accessing

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[1] Hereinafter, all statutory references will be to the Government Code, unless otherwise specified.

[2] Individuals whose BMI is 30 percent or more are considered obese, and individuals whose BMI is 40 percent or more are considered extremely obese.

[3] Applicants whose height was 5 feet 2 inches and below or 6 feet 2 inches and above were also required to undergo the BOCAT.

certain bus controls without shifting her body to the side. She retook the BOCAT on December 7, 2006, and failed again, because her thighs hung over the seat.

Hines' obesity was related to dietary and sedentary lifestyle factors, which were amenable to modification at will. There was no genetic or a physiological cause for her obesity.

Hines brought this action against MTA on June 12, 2007, alleging in the first cause of action perceived and/or physical disability (obesity) discrimination, harassment, and retaliation in violation of the FEHA.[4] In a second cause of action, she alleged perceived and/or genetic characteristics (obesity) discrimination, harassment, and retaliation in violation of the FEHA.[5] Hines alleged MTA refused to hire her because of her obesity.

On January 18, 2008, MTA moved for summary adjudication of the individual causes of action and summary judgment. Citing *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050 (*Cassista*), MTA contended obesity is not a disability under the FEHA unless it has a physiological cause, and Hines cannot show MTA discriminated against her based on a perceived or actual disability because obesity, absent a medical cause, is not a disability.

In her opposition to the summary judgment motion, Hines contended a showing that MTA regarded her obesity as a physical disability sufficed to maintain an action based on perceived disability discrimination pursuant to the FEHA, even though her obesity had no medical cause. Hines argued that, in enacting section 12926.1, subdivision (d), in 2000, the Legislature superseded the holding of *Cassista* by allowing

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4 Hines subsequently dropped the theory that her obesity was a covered disability.

5 She subsequently conceded that the second cause of action was not viable.

plaintiffs to pursue a perceived disability cause of action when the physical condition has no medical cause.[6]

The summary judgment motion was heard on April 10, 2008. As framed by the issues presented in the motion and response, the trial court noted that "the sole issue presented. . . is whether there are triable issues of material fact with respect to [Hines'] cause of action for perceived disability discrimination." The trial court ruled that there were no triable issues of material fact, reasoning as follows: "The Supreme Court held [in *Cassista*] that being overweight is not a covered disability unless the person's weight 'is a result of a physiological condition or disorder affecting one or more of the body systems.' The Supreme Court also held that the fact that the employer 'perceived' the employee as being overweight did not matter, because being overweight, in and of itself, was not a 'covered disability' under the FEHA." "[Hines'] contention that [MTA] discriminated against her because it perceived her to be obese and/or to have an elevated BMI fails because her obesity is not protected under FEHA. [¶] . . . [H]er obesity must have been caused by an underlying condition[.]" Finding section 12926.1, subdivision (d), not on point to the analysis in this case, the trial court granted summary judgment in MTA's favor. Hines timely appealed.

DISCUSSION

Standard of Review

"Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On appeal

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6 Hines also contended she could proceed under a theory of perceived disability discrimination based on section 12926, subdivision (k)(5) (regarded as having a physical impairment that is potentially, but not presently, disabling). However, the trial court sustained MTA's objections to her evidence that her obesity was potentially disabling, and she does not pursue this theory on appeal.

from a summary judgment**,** we make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]' (*Iverson v. Muroc Unified School Dist*. (1995) 32 Cal.App.4th 218, 222-223.)

"Although '[t]he purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843), our Supreme Court has warned that the summary judgment 'procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact' (*Eagle Oil & Ref. Co. v. Prentice* (1942) 19 Cal.2d 553, 556). Accordingly, declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and all doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865-866.)" (*Trop v. Sony Picture Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143-144.)

Perceived Disability Discrimination

Hines contends there is a triable issue that she had a physical disability within the meaning of FEHA, in that she had a perceived physical disability as defined in section 12926, subdivision (k)(4).[7] She contends evidence that MTA believed her to be

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[7] Hines does not contend she had an actual physical disability as defined in section 12926, subdivision (k)(1).

obese and mistakenly believed her obesity prevented her from safely operating a bus was sufficient to make out a prima facie case of perceived physical disability. We disagree with the contention. The statute creates a cause of action for perceived physical disability only if the perceived physical condition is the result of a physiological cause. As there is no evidence her obesity had a physiological cause, she failed to demonstrate the existence of a triable issue of material fact, and summary judgment was properly granted.

"Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc*. (1992) 2 Cal.4th 593, 601.) The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent. (*Ibid*.)" (*Green v. State of California* (2007) 42 Cal.4th 254, 260.)

The plaintiff has the burden "to prove that he or she is a member of a protected class set forth in FEHA (such as a person with a disability)[.]" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255-256 (*Jensen*).) Under the FEHA, it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person[.]" (§ 12940, subd. (a).)

Prior to an amendment effective January 1, 2001, section 12926, subdivision (k), defined physical disability in pertinent part as: "(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: [¶] (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. [¶] (B) Limits an individual's ability to participate in major life activities. [¶] (2) Any other health impairment not described in paragraph (1) that

requires special education or related services. [¶] (3) Being regarded as having, or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2)."

Construing section 12926, subdivision (k), in 1993, the Supreme Court in *Cassista* held that in both actual and perceived disability discrimination cases, the plaintiff's physical condition is not covered under the FEHA unless it is the result of a physiological condition or disorder. (*Cassista*, *supra*, 5 Cal.4th at pp. 1061, 1065-1066.) Obesity does not "qualify as a protected 'handicap' or 'disability' within the meaning of the FEHA [(§ 12926, subd. (k))] [unless] medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity." (*Cassista*, *supra*, at p. 1052.) "[T]o qualify as physically 'disabled' under the [1993] statute the claimant must have, or be perceived as having, a 'physiological' disorder that affects one or more of the basic bodily 'systems' and limits the claimant's ability 'to participate in major life activities.'" (*Id*. at p. 1059.) "[T]he touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which affects a major body system and limits the individual's ability to participate in one or more major life activities." (*Id*. at p. 1061.)

The plaintiff in *Cassista* was obese. When her application to work in a food store was rejected, she sought relief under the FEHA for actual and perceived disability discrimination, arguing in part that "[e]ven if weight does not qualify as an actual handicap or disability within the meaning of the FEHA, . . . one might still qualify as a handicapped individual if one is 'regarded' as such." (*Cassista*, *supra*, 5 Cal.4th at p. 1065.) The Supreme Court rejected the argument: "the current statute provides that 'physical disability' includes, 'Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).' (§ 12926, subd. (k)(3).) [¶] Plaintiff's argument is unavailing. As the language of the statute makes clear, it is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight. The applicant must be 'regarded as having or having had' a condition

"*described in paragraph (1) or (2),*" to wit, a physiological disease or disorder affecting one or more of the bodily systems. . . . In other words, the condition, as perceived by the employer, must still be in the nature of a physiological disorder within the meaning of the FEHA, even if it is not in fact disabling. [Citations.] [¶] Applying the foregoing principles to the case at bar, we conclude that plaintiff failed to establish a prima facie case of employment discrimination by demonstrating she fits within the class of handicapped or disabled persons protected by the FEHA. The record is devoid of any evidence that plaintiff's weight is the result of a physiological condition or disorder affecting one or more of the body systems. [Citations.] Indeed, plaintiff alleged in her complaint and maintained at trial that despite her weight she is a healthy, fit individual. Thus, she demonstrated neither an actual nor a perceived handicap within the meaning of the FEHA." (*Cassista*, *supra*, at pp. 1065-1066.)

In response to portions of the opinion in *Cassista* which are not pertinent to this appeal, the Legislature amended the statute in 2000, inter alia, to clarify that the disabling condition only needed to "limit," not "substantially limit" life's major activities. (See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1027 (*Colmenares*).) As amended,[8] section 12926, subdivision (k), currently defines physical disability in pertinent part as: "(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: [¶] (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. [¶] (B) Limits a major life activity. For purposes of this section: [¶] (i) 'Limits' shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. [¶] (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life

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8 (Assem. Bill No. 2222, Stats. 2000, ch. 1049, eff. Jan. 1, 2001 (AB 2222).)

activity difficult. [¶] (iii) 'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working. [¶] (2) Any other health impairment not described in paragraph (1) that requires special education or related services. [¶] . . . [¶] (4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult."

Hines contends the 2001 amendments overruled *Cassista*'s holding that obesity is not a covered condition in a perceived disability discrimination case unless it has a physiological basis. We disagree with the contention. Under the prior version of the statute, construed by the court in *Cassista*, a plaintiff was required to prove that the condition (obesity) perceived by the employer had a physiological basis in order to qualify as a covered impairment and both affects a bodily system and limits participation in major life activities. (*Cassista*, *supra*, 5 Cal.4th at pp. 1065-1066; § 12926, subd. (k)(3) [1993].) The 2000 amendment eliminated the requirement that the condition must affect a bodily system and changed the requirement that the "condition limit 'major life activities' to the singular 'a major life activity'" (*Colmenares*, *supra*, 29 Cal.4th at p. 1027), but did not alter the requirement that the condition have a physiological cause. (See § 12926, subd. (k)(4).)

Section 12926.1, which was added by AB 2222 when section 12926, subdivision (k), was amended in 2000, does not indicate the Legislature intended to overrule *Cassista*'s holding that, in perceived disability discrimination cases, the perceived condition must have a physiological cause. Section 12926.1 provides in pertinent part: "(d) Notwithstanding any interpretation of law in *Cassista*[,] the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act of 1990, (2) to require a 'limitation' rather than a 'substantial limitation' of a major life activity,[**9**] and (3) by enacting paragraph (4) of subdivision (i) [mental disability] and paragraph (4) of

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9 The Supreme Court noted that the opinion in *Cassista* contains misleading dictum that disabilities are not protected unless they "substantially" limit a major life activity. (*Colmenares*, *supra*, 29 Cal.4th at pp. 1028-1029.)

subdivision (k) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity."

With regard to subdivision (d)(3) of section 12926.1, the 2000 amendment to section 12926, subdivision (k) broadened the coverage of perceived disability discrimination from a list of conditions that affect an enumerated bodily system to "any physical condition." (Compare §§ 12926, subd. (k)(3) [(1993)], 12926, subd. (k)(4) [(2001)].) However, nothing in section 12926.1, subdivision (d), indicates that the Legislature intended to radically alter the definition of covered conditions for perceived disability discrimination lawsuits by including conditions which have no physiological basis. Indeed, subdivision (c) of section 12926.1 suggests otherwise: "Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease." All these examples of physical disabilities have a physiological basis.

The sole authority Hines cites to support her contention that she does not have to show that her obesity had a physiological cause is *Jensen*, *supra*, 85 Cal.App.4th at pages 259-260. *Jensen* is inapposite. In *Jensen*, the plaintiff contended her employer failed to offer a reasonable accommodation for her mental disability, posttraumatic stress syndrome, or, in the alternative, "her claim should go forward whether or not her disability meets the statutory definition because she was 'regarded as disabled' by [her employer] when it engaged in efforts to accommodate her." (*Id.* at pp. 256, 259.) The decision in *Jensen* did not address whether plaintiff had to show that a regarded-as-disabling condition had a physiological cause. (*Id*. at pp. 259-260.)

To the extent Hines contends the trial court erred in holding the FEHA required her to show the MTA "believed that her obesity was the result of a physiological

condition,"[10] Hines mischaracterizes the record. The trial court correctly held the FEHA required her to show her obesity resulted from a physiological condition; the trial court did not require a showing the MTA believed her obesity was the result of a physiological condition. Hines similarly mischaracterizes the perceived disability discrimination holding in *Cassista*. The Supreme Court did not hold that a plaintiff must prove "the defendant believed" the plaintiff's obesity was due to a physiological disorder. The Supreme Court held that "the condition, as perceived by the employer, must . . . be in the nature of a physiological disorder within the meaning of the FEHA even if it is not in fact disabling." (*Cassista*, *supra*, 5 Cal.4th at pp. 1065-1066.) That is, a plaintiff's obesity, which the employer regards as disabling, must be a condition caused by a physiological disorder, as opposed to being the result of the plaintiff's lifestyle. Moreover, as *Cassista* did not hold a plaintiff must show the employer believed the perceived disability has a physiological cause, Hines' further contention that the 2000 amendments superseded such holding is without merit.

Equal Protection

Hines contends MTA's BOCAT requirement, as applied, violates Equal Protection, in that obese job applicants are required to pass the BOCAT, but employees who become obese after they are hired are not. Hines did not raise an Equal Protection issue in her complaint or in the trial court, and the appellate record is not sufficiently developed to allow for the type of factually intense analysis commanded by this contention. We therefore decline to consider the constitutional claim and hold it is forfeited.

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[10] Hines states, "[t]he trial court wrongly expected her to show that when MTA viewed her as obese and concluded she could not do the job of bus operator, it believed her obesity was the result of a physiological disorder."

DISPOSITION

The judgment is affirmed. MTA is awarded its costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.