

**DAYSI RIVAS-SMITH, Plaintiff and Appellant, v. LOS ANGELES
COUNTY, et al., Defendants and Respondents.**

B174456

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE
DISTRICT, DIVISION FIVE**

2005 Cal. App. Unpub. LEXIS 8908

September 29, 2005, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC263388. Richard C. Hubbell, Judge.

DISPOSITION: Affirmed in part and reversed in part.

COUNSEL: Mancini & Associates, Marcus A. Mancini, Christopher Barnes; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiff and Appellant Daysi Rivas-Smith.

Office of the County Counsel, Raymond G. Fortner, Millicent Lynn Rolon; Greines, Martin, Stein & Richland LLP, Martin Stein, Carolyn Oill, and Lillie Hsu for Defendants and Respondents County of Los Angeles, Los Angeles County Sheriff's Department, and Deputy John Fernandez.

JUDGES: MOSK, J.; KRIEGLER, J., ARMSTRONG, J. concurred.

OPINION BY: MOSK

OPINION:

INTRODUCTION

Defendants and respondents County of Los Angeles, Los Angeles County Sheriff's Department (Sheriff's Department), and Deputy John Fernandez (Deputy Fernandez) (collectively [*2] defendants) obtained summary judgment against plaintiff and appellant Daysi Rivas-Smith (plaintiff), who filed a complaint seeking damages for discrimination, harassment, and retaliation she allegedly suffered during her employment at, and in her termination from, the Sheriff's Department. Judgment was granted on the ground that plaintiff failed to judicially challenge the Los Angeles County Civil Service Commission's (Commission) administrative decision that found her termination was appropriate. Plaintiff argues on appeal that the trial court erred in granting summary judgment. Because plaintiff failed to meet her obligation to judicially challenge the Commission's decision, she is bound by its finding that her termination was appropriate and, therefore, her claim that she was terminated for discriminatory and retaliatory reasons and not for an appropriate reason necessarily fails. The Commission's decision did not address plaintiff's claim that, apart from her termination, she was harassed at work because of her, and her husband's, race and, therefore, the Commission's

decision as to her termination is not binding on her subsequent action for harassment except to the extent that [*3] the grounds for termination (the issues related to plaintiff's deficient job performance and defendants' responses thereto) are the basis for the harassment claim. Accordingly, we affirm the judgment as to plaintiff's claims for discriminatory and retaliatory discharge and reverse the judgment as to plaintiff's claim for harassment.

BACKGROUND n1

n1 We set forth the facts consistent with our obligation to "view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

In 1997, plaintiff began working for the Sheriff's Department as a court services specialist. Plaintiff's primary function was to serve legal process and, when required, to testify in court about such service.

Deputy Fernandez was one of plaintiff's [*4] supervisors. According to plaintiff, Deputy Fernandez was unreasonably critical of her due to her race and her husband's race. Plaintiff is part Black and part Hispanic. Plaintiff's husband is Black.

According to plaintiff, Deputy Fernandez and other employees made racially biased statements in her presence. Deputy Fernandez allegedly harassed her by, among other things, checking up on her; verifying if she was really sick when she took sick leave; not allowing her son to participate in "bring your child to work day"; threatening to write her up when she requested time off to care for her sick daughter, and then reprimanding her when she left her daughter home alone; and falsely accusing her of conducting personal business during company time.

Deputy Fernandez also allegedly imposed work conditions on plaintiff that he did not impose on other, non-Black employees in her position. For example, Deputy Fernandez closely scrutinized plaintiff's log book, and he modified her schedule so that she could only go to the office at the beginning and end of the day which did not allow her sufficient time to complete her work. Plaintiff reported Deputy Fernandez's treatment to his superiors. [*5]

In July 2000, plaintiff received a performance evaluation that rated her as "Improvement Needed." The stated reasons for her evaluation included her failure to keep accurate field logs, failure to serve papers timely, failure to meet expectations about the quantity of her work, and her failure to be on time. Plaintiff was given an improvement plan that specified how her performance needed to improve. While plaintiff was on the improvement plan, the Sheriff's Department placed her under surveillance, which allegedly demonstrated that she falsified her work logs and court documents.

In January 2001, plaintiff was given an unsatisfactory performance evaluation. According to the evaluation, her work had deteriorated during the six months she had been on the improvement plan. Based on the unsatisfactory evaluation, plaintiff's employment was terminated effective January 15, 2001. On January 30, 2001, plaintiff filed an appeal of her termination and a request for a hearing with the Commission.

On September 28, 2001, plaintiff filed complaints against defendants with the California Department of Fair Employment and Housing alleging violations of the Fair Employment and Housing Act (FEHA) [*6] (*Gov. Code, § 12900, et seq.*). On December 11, 2001, having received "right to sue" letters, plaintiff filed a complaint against defendants in superior court alleging causes of action

for "Discrimination, Harassment and Retaliation Based on Perceived Race in Violation of *Government Code* § 12940 Et. Seq." (first cause of action); "Violation of Civil Rights [*California Civil Code* § 52.1(b)]" (second cause of action); and "Association Discrimination in Employment [*California Government Code* § 12940" (third cause of action).

Some two months later, on February 22, 2002, the Commission began hearings on plaintiff's appeal of her termination. The hearings continued on June 11, 2002, and concluded on July 29, 2002. Plaintiff contended that her performance problems were due to a lack of training and that the Sheriff's Department should have used progressive discipline rather than terminating her employment. Written closing statements were filed on August 12, 2002.

On August 16, 2002, the hearing officer issued a recommended decision. In her recommended decision, the hearing officer [*7] stated, "The record in this case contains overwhelming evidence that the unsatisfactory evaluation, which formed the basis of the decision to discharge [plaintiff], was appropriate." The hearing officer concluded, "The Department has the right to expect employees to do the job they were hired to do. [Plaintiff] was told her work was unsatisfactory. She responded by working less and lying more. Under these circumstances, the discharge was warranted."

On August 29, 2002, the Commission announced its proposed decision to accept the hearing officer's findings and recommendation. Plaintiff was given notice that she could file objections to the proposed decision and that if no objections were received by September 18, 2002, the decision would become final. In the same notice, plaintiff was notified that if no objections were filed, she could seek superior court review of the decision, and that any such review had to be commenced within 90 days of the decision.

Plaintiff did not file objections to or seek superior court review of the Commission's decision. Instead, she elected to abandon the administrative proceeding, forego judicial review, and proceed solely on her pending action [*8] in the superior court.

Defendants moved for summary judgment. They argued that plaintiff's civil action was barred by her failure to seek review of the Commission's finding that her discharge was appropriate, that a civil rights action under the "Unruh Civil Rights Act" may not be maintained for employment discrimination, and that Deputy Fernandez was not a proper defendant to plaintiff's first and third causes of action for employment discrimination. The trial court granted summary judgment, ruling that plaintiff's failure to judicially challenge the Commission's finding that the Sheriff's Department's decision to discharge plaintiff was appropriate was fatal to plaintiff's complaint.

DISCUSSION

I. 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 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 [*9] is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 *Cal.App.4th* 218, 222.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (*Code Civ. Proc.*, § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 *Cal.4th* 826, 849, 853.)

II. Exhaustion of Judicial Remedies

A public employee who believes she has suffered employment discrimination may elect either to pursue remedies provided by the FEHA or to pursue administrative civil service remedies. (*Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1141-1142, citing *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1087 ([*10] *Schifando*)). A public employee who elects to pursue administrative remedies must challenge adverse findings made in the administrative proceeding through a writ of mandate in the superior court or she will be bound by those findings in a subsequent action raising discrimination claims under the FEHA. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 69-70, 76 (*Johnson*)).

"This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. [Citation.] Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' [Citation.]" (*Johnson, supra*, 24 Cal.4th at p. 70, italics in original.)

Here, plaintiff was terminated allegedly for poor performance. She appealed her termination to the Commission and pursued her administrative [*11] remedies. Administrative hearings were held and the hearing officer found that plaintiff's termination was warranted. After the Commission notified plaintiff that she could seek review of its decision, once final, in the superior court, plaintiff elected to forego judicial review and to proceed solely on her pending action in the superior court. Plaintiff's failure to seek review of the Commission's decision by writ of mandate resulted in the Commission's decision being binding in plaintiff's FEHA action. (*Johnson, supra*, 24 Cal.4th at pp. 65, 69-70, 76.)

Citing *Schifando, supra*, 31 Cal.4th at pages 1079-1080 and 1092, plaintiff contends that she was not required to exhaust internal administrative remedies before proceeding with her FEHA action. Plaintiff's reliance on *Schifando* is misplaced. The issue before the court in *Schifando* was whether a government employee must exhaust *both* the remedies provided by the FEHA and the administrative remedies provided by its employer before filing an FEHA discrimination claim in superior court. (*Id. at pp. 1079-1080.*) The court held that the employee may elect between the remedies [*12] and need not exhaust both. (*Id. at pp. 1080, 1086 & fn. 3, 1092.*) The court made clear that its holding did not disturb its prior holding in *Johnson, supra*, 24 Cal.4th at page 72, that an employee is required to exhaust judicial remedies by challenging administrative findings in a writ of administrative mandamus petition in superior court. (*Schifando, supra*, 31 Cal.4th at p. 1090.)

Having determined that plaintiff is bound by the Commission's decision that her termination for poor performance was appropriate, the issue we next resolve is which of plaintiff's FEHA claims are impacted by the Commission's decision. Plaintiff's first and third causes of action are identical in all material respects (but for the third cause of action's incorporation of the second cause of action n2) and allege that plaintiff "was terminated not for legitimate business reasons, but in retaliation for complaining of harassment and discrimination", and that she was harassed because of her race and her "association with [her] husband, children, and co-workers who are African-American."

n2 Plaintiff conceded, in her opposition to defendants' motion for summary judgment, that she could not maintain her second cause of action for an alleged violation of the Unruh Civil Rights Act for alleged employment discrimination. She acknowledges that concession on appeal.

[*13]

Plaintiff's FEHA claim that she was terminated for retaliatory and discriminatory reasons is in direct conflict with the Commission's determination that she was terminated for poor performance. Because the Commission's determination is binding on plaintiff's FEHA termination claims, plaintiff's termination claims fail. (*Johnson, supra*, 24 Cal.4th at pp. 66-67, 71 [summary judgment on employee's FEHA claim was appropriate because the administrative decision that he was terminated for economic reasons was binding].) That plaintiff was terminated because of poor performance means she was not terminated for retaliatory or discriminatory reasons.

Plaintiff's harassment claim itself, however, was not before the Commission. Plaintiff's harassment claim concerns the manner in which she was treated while employed at the Sheriff's Department and not the legitimacy of her termination. (See *Aguilar v. Avis Rent A Car System, Inc. (1999)* 21 Cal.4th 121, 129-130 [for conduct to be actionable as "harassment," it must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment" [Citation.]]") The **[*14]** sole issue before the Commission was whether plaintiff's termination for poor performance was appropriate. Because the Commission's findings did not address any alleged harassment, they do not have a binding effect on plaintiff's FEHA harassment claim, except to the extent that the grounds for termination (the issues related to plaintiff's deficient job performance and defendants' responses thereto) are the basis for the harassment claim. (See *Johnson, supra*, 24 Cal.4th at pp. 65, 69-70, 76 [the failure to challenge administrative findings by a writ of mandate action in the superior court renders such findings binding in a later civil action]; see also *id. at p. 81* (conc. opin. of Werdegar, J.) ["Even if the administrative findings go unchallenged, they may not preclude a FEHA claim because they are not factually inconsistent with it."].) Defendants did not argue in their summary judgment motion that plaintiff's harassment cause of action was otherwise deficient. Accordingly, the trial court erred in granting summary judgment as to that cause of action.

Defendants also contend that plaintiff's complaint does not allege a cause of action for **[*15]** harassment and that plaintiff "has not come close to demonstrating" that any harassing conduct was so severe as to alter the terms and conditions of her employment or that racial animus motivated the harassment. Plaintiff's complaint, however, alleged that supervisors and at least one other employee made comments she perceived as racially biased against Black people and that her supervisor intentionally created a hostile working environment for her. Moreover, because defendants' motion for summary judgment did not assert that plaintiff's harassment cause of action was factually insufficient, plaintiff had no reason to address the factual sufficiency of her claim, and she was under no obligation to "demonstrate" the severity of any alleged harassment in opposition to that motion. (*Roger H. Proulx & Co. v. Crest-Liners, Inc. (2002)* 98 Cal.App.4th 182, 194 [only if the party moving for summary judgment meets its initial burden of making a prima facie showing of the non-existence of any triable issue of material fact does the burden of production shift to the opposing party to make a prima facie showing of the existence of a triable issue of material fact]; see also **[*16]** *Johanson Transportation Service v. Rich Pik'd Rite, Inc. (1985)* 164 Cal. App. 3d 583, 588, 210 Cal. Rptr. 433 [while a reviewing court considers the validity of a grant of summary judgment and is not bound by the trial court's stated reasons, appellate review of a summary judgment generally will not consider an argument or theory raised for the first time on appeal, unless the question is one of law to be applied to undisputed fact].) It should be noted that plaintiff cannot recover under her harassment claim any earnings, past or future, or other relief to which she would have been entitled if there had been a discriminatory or other wrongful termination because the issues surrounding her termination and the loss of her employment have been decided against her.

Finally, relying on, among other cases, *Swartzendruber v. City of San Diego (1992)* 3 Cal.App.4th 896, 904-908, disapproved on another ground in *Johnson, supra*, 24 Cal.4th at page 72, defendants claim that res judicata and collateral estoppel bar relitigation of any claim with respect to the propriety of her termination that was, or could have been, litigated in the proceeding

[*17] before the Commission. We need not decide this issue, having affirmed the grant of summary judgment as to plaintiff's FEHA claim that she was terminated for retaliatory and discriminatory reasons on the ground that she failed to challenge the Commission's decision that her termination was warranted in a petition for writ of mandate.

Defendants do not make a res judicata and collateral estoppel claim with respect to plaintiff's harassment cause of action, which is based on alleged acts that were independent of her termination. Instead, as noted above, defendants claim that plaintiff did not state a claim for harassment apart from her termination. n3 The Commission's proceeding only dealt with plaintiff's termination. The record does not indicate that plaintiff raised, or could have raised, a claim independent of her termination claim, and defendants have not argued that the Commission's proceeding bars claims unrelated to *termination*.

n3 Plaintiff did allege that one of the reasons that she was terminated was that she had complained about harassment. This relates to her termination claim - not to her claim for harassment.

[*18]

DISPOSITION

The judgment is affirmed as to plaintiff's claims for discriminatory and retaliatory discharge and reversed as to her claim for harassment. The parties are to bear their own costs on appeal.

MOSK, J.

KRIEGLER, J.

ARMSTRONG, J.

CONCUR BY: KRIEGLER

CONCUR:

KRIEGLER, J., Concurring.

I concur in the judgment, with the understanding of the limitations plaintiff will face in pursuing her harassment cause of action when the case is returned to the trial court for further proceedings. The Los Angeles County Civil Service Commission found that plaintiff was lawfully terminated, and we affirm that finding in this opinion. Because plaintiff was lawfully terminated, the actions of her supervisors in building a case to support her termination cannot be used to establish a prima facie case of harassment. Moreover, should plaintiff prevail on her harassment cause of action, the measure of damages cannot include lost wages, or interest thereon, because she was lawfully terminated.

Although plaintiff will necessarily be limited as to what evidence she may rely on to prove harassment, it does not follow that the county will be under similar constraints. To the contrary, plaintiff's [*19] dismal job performance remains fair game in the county's defense of plaintiff's claim of harassment. With these understandings, I concur.

KRIEGLER, J.

DISSENT BY: ARMSTRONG

DISSENT:

ARMSTRONG, J., Dissenting.

I respectfully dissent.

I believe the judgment must be affirmed in all respects because the Supreme Court in the case of *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 held that a public employee is bound by adverse findings made in an administrative proceeding if those findings are not challenged through a petition for a writ of mandate in the superior court. My colleagues also rely on *Johnson* but they reach a conclusion different from mine. Their view is that *Johnson* bars all forms of employment discrimination prohibited by FEHA except racial harassment. They reach this result even though "one form of employment discrimination is harassment on the basis of race" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129.)

The final order of the Commission stated that the record in the "case contains overwhelming evidence that the unsatisfactory evaluation, which formed the basis of the decision to discharge [plaintiff], [*20] was appropriate." The officer presiding at the hearing concluded: "The Department has the right to expect employees to do the job they were hired to do. [Plaintiff] was told her work was unsatisfactory. She responded by working less and lying more. Under these circumstances, the discharge was unwarranted."

Plaintiff asks us to ignore these findings and to give her a chance to prove that her discharge was motivated by discrimination, retaliation and harassment. Plaintiff had that chance at the hearing and failed to introduce any evidence to support her claims of an unlawful racially motivated discharge. She is not entitled to a second chance. n4

n4 Plaintiff does not contend that the Department's administrative rules denied her a full and fair opportunity to litigate her defense that the Department's motive for her termination was racially biased or that her discharge violated FEHA.

Plaintiff contends that the administrative findings did not preclude her FEHA action because she did not litigate her claims [*21] for employment discrimination at the hearing. Her position is that the hearing was only concerned with whether she was competent to do her job and that she had no obligation to litigate there her claims for wrongful discharge based on her claim for racial employment discrimination asserted in her complaint. She misunderstands the law. "It has long been the law in California that any available defense should be asserted at the earliest opportunity and certainly at an administrative hearing. In *Bohn v. Watson* (1954) 130 Cal. App. 2d 24, 37, the court stated 'It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or "skeleton" showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court.' [Citation.]" (*Takahashi v. Board of Education* (1988) 202 Cal. App. 3d 1464, 1482, 249 Cal. Rptr. 578.) Plaintiff is not entitled to the unlimited de novo trial that she seeks.

On facts substantially similar to the facts here, *Takahashi* held: "[Plaintiff's]. . . civil rights case is based on plaintiff's wrongful treatment [*22] in the terms and conditions of employment because of her age, sex or race. This is all superimposed on a final state court determination that she was terminated from her employment for incompetence. Simply put, plaintiff cannot prevail against defendants on the basis that their conduct toward her that caused her termination was wrongful in the face of a final state court determination in the first action that the district had the right to terminate her for incompetency." (*Takahashi v. Board of Education* (1988) 202 Cal. App. 3d 1464 at p. 1482, 249 Cal. Rptr. 578.) The trial court properly found plaintiff was bound by the Commission's findings because she failed to exhaust her administrative remedy.

Relying on, among other cases, *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904-908, disapproved on another ground in *Johnson, supra*, 24 Cal.4th at page 72, defendants claim that res judicata and collateral estoppel bar relitigation of any claim with respect to the propriety of plaintiff's termination because of racial employment discrimination that was, or could have been, litigated in the proceeding before the Commission. [*23] Defendants are correct. "California courts employ the 'primary rights' theory to determine the scope of causes of action. (*Takahashi v. Board of Education, supra*, 202 Cal. App. 3d at p. 1474.) Under this theory, there is only a single cause of action for the invasion of one primary right. In determining the primary right, 'the significant factor is the harm suffered.' [Citation.]" (*Id.* at p. 904.) The primary right at issue here is the right to employment created by FEHA. The "public policy of this state is that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment" (*Aguilar v. Avis Rent A Car System, Inc., supra*, 21 Cal. 4th at p. 129.)

These principles are illustrated in *Swartzendruber*, where plaintiff, a police officer, was terminated for insubordination because she refused to wear her uniform while on duty. She challenged her termination through internal department procedures. The City's Civil Service Commission upheld the termination. She did not seek judicial review of the Commission's decision. Subsequently, she filed a lawsuit in which she alleged in the [*24] fifth cause of action, among other things, that her discharge was in violation of the federal civil rights statutes. Summary judgment was granted defendant on the grounds of res judicata. In affirming, the appellate court stated that: "Inasmuch as the primary right at stake was her right to continued employment and the harm suffered was loss of that employment, her fifth cause of action does not present a separate injury from that litigated before the Commission. *Swartzendruber* has merely restated her action for wrongful termination in constitutional terms. 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only claim for relief.' [Citation.] By invoking the Constitution and 42 *United States Code sections 1983* and 1985, *Swartzendruber* has merely presented a new legal theory upon which she seeks recovery." (*Swartzendruber v. City of San Diego, supra*, 3 Cal.App.4th at p. 908.)

Plaintiff is similarly situated to *Swartzendruber*. Plaintiff's right is the right to continued employment, i.e., her right to hold employment, and the harm suffered was the loss of employment. This right and harm [*25] were litigated before the Commission. Plaintiff, like *Swartzendruber*, has merely presented a new legal theory upon which she seeks recovery. Plaintiff argues that res judicata cannot apply to her FEHA claims because those claims were not litigated before the Commission. In response to a similar argument made by *Swartzendruber*, the court said: "*Swartzendruber* could have raised these issues had she so desired in her testimony." (*Swartzendruber v. City of San Diego, supra*, 3 Cal.App.4th at p. 909.) As noted above, I agree.

Consequently, the conclusion I reach is the conclusion the *Takahashi* court reached on analogous facts: "Simply put, plaintiff cannot prevail against defendants on the basis that their conduct towards her that caused her termination was wrongful in the face of a final state court determination in the first action that the district had the right to terminate her for incompetency. That plaintiff elected not to litigate at the hearing before the Commission her claims that she was discriminated against in violation of her constitutional and civil rights does not detract from the finding by the Commission, and independently by the superior court, that [*26] the district had cause to dismiss her." (*Takahashi v. Board of Education, supra*, 202 Cal. App. 3d at p. 1482.)

I would affirm the judgment.

ARMSTRONG, J.