2d Civ. No. B174456

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

DAYSI RIVAS-SMITH,

Plaintiff and Appellant,

vs.

LOS ANGELES COUNTY, et al.,

Defendants and Respondents.

Appeal from the Los Angeles County Superior Court
Honorable Richard Hubbell, Presiding
Case No. BC263388

RESPONDENTS' BRIEF

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INTRODUCTION

Plaintiff and appellant Daysi Rivas-Smith was discharged from the Los Angeles County Sheriff's Department (the "Department") for poor performance. She appealed to the County Civil Service Commission (the "Commission"), and the Commission found that the discharge was appropriate.

Despite this finding – and without waiting for the Commission's decision to become final or seeking a writ of administrative mandamus – Rivas-Smith filed the present action against the County of Los Angeles, the Department, and Deputy John Fernandez, claiming that the Department terminated her for improper reasons – specifically, based on her race and in retaliation for complaining of discrimination and harassment by her supervisor, Deputy Fernandez, in violation of the Fair Employment and Housing Act ("FEHA"). The trial court granted summary judgment for the defendants, reasoning that the Commission's decision, which Rivas-Smith failed to challenge judicially, barred her FEHA claims. Rivas-Smith appealed.

Summary judgment was properly granted. The California Supreme Court has held that a public employee who pursues her employer's internal administrative remedies and receives an adverse decision must exhaust those remedies and challenge the decision by a writ of administrative mandamus – or else be bound by the adverse decision in a later FEHA action. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1088.) Because Rivas-Smith failed to challenge in the superior court the Commission's finding that her discharge was appropriate, she was bound by that decision. And because that finding was inconsistent with her FEHA claims, which

alleged that she was discharged for improper reasons, those claims were barred.

Rivas-Smith asserts that her FEHA claims were viable because she did not litigate those claims before the Commission – in other words, because she did not contend that the Department's reasons for her termination were pretextual and that the true reasons for termination were racial discrimination and retaliation for complaining of discrimination and harassment. This assertion will not save her action. Under the doctrines of res judicata and collateral estoppel, the Commission's decision precluded Rivas-Smith from litigating her pretext theory in the guise of her FEHA claims because she *could* have raised that theory before the Commission. She was aware of the theory at the time of the Commission proceeding and had ample opportunity to argue it. Her tactical decision to withhold that contention does not give her the right to assert it in her FEHA action. Rather, this kind of repetitive litigation is exactly what the doctrines of exhaustion of remedies, res judicata, and collateral estoppel were designed to prevent. (See *Johnson, supra,* 24 Cal.4th at p. 72; *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1481-1482, 1485.)

For all these reasons, the judgment should be affirmed.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Rivas-Smith's Discharge and Appeal to the County Civil Service Commission.

Rivas-Smith was employed by the Los Angeles County Sheriff's Department as a Court Services Specialist. (1 CT 132, 174.) Her employment was terminated effective in January 2001. (2 CT 252-256.)

Rivas-Smith appealed her discharge to the County Civil Service Commission in January 2001. (1 CT 134, 169; 2 CT 250.) At a three-day hearing between February 2002 and July 2002 (1 CT 170), the Department contended that the discharge was appropriate following several unsatisfactory performance evaluations. (1 CT 169; 2 CT 216-222.) The Department introduced the following evidence in support of its position:

1. Rivas-Smith's supervisors documented a number of problems with her work: Her field logs were inaccurate, she failed to serve papers in a timely manner, she failed to meet expectations as to the quantity of her work, and she was late. (1 CT 171, 175; 2 CT 216; see 2 CT 277-280, 311-314, 316-343.) As a result of these problems, Rivas-Smith received a performance evaluation in July 2000 that rated her as "Improvement Needed" and included an improvement plan specifying how her performance needed to improve. (1 CT 171-172, 175; 2 CT 216-217, 345-352.) Among other things, the plan stated that her logs and other documentation must accurately reflect her field activities. (1 CT 171-172; 2 CT 350-351.)

2. While Rivas-Smith was on the improvement plan, the Department placed her under surveillance, which demonstrated that Rivas-Smith in fact falsified her work logs and court documents. (1 CT 172, 173; 2 CT 218-221; see 3 CT 417-567; 4 CT 568-590 [surveillance logs], 596-597.)

3. In January 2001, Rivas-Smith received an unsatisfactory performance evaluation. (1 CT 172, 175; 2 CT 215, 252-256.) The evaluation explained that, since she had been on the six-month improvement plan, her work had continued to deteriorate. (2 CT 252-256.)

Based on that unsatisfactory evaluation, Rivas-Smith was discharged. (2 CT 252.)

Rivas-Smith, who was represented by counsel (see 2 CT 211, 225, 227, 232), contended that her performance problems "were due to a lack of training," that she was treated differently from other employees, and that "the penalty of discharge [was] inappropriate in relation to the alleged offense" because it was "too harsh and not consistent with a progressive discipline scheme." (1 CT 169, 174; 2 CT 212-213.)

The hearing officer issued a recommended decision concluding that "[t]he record . . . contains overwhelming evidence that the unsatisfactory evaluation, which formed the basis of the decision to discharge Rivas-Smith, was appropriate." (1 CT 172.) The hearing officer made findings of fact consistent with the Department's contentions. (1 CT 175.)

The hearing officer also specifically rejected Rivas-Smith's contentions, finding that she intentionally falsified her logs (1 CT 173), that she was given specific instructions on what she needed to do to improve (1 CT 174), and that discharge was an appropriate penalty for falsifying records (*Ibid*). Accordingly, the hearing officer concluded that "[t]he discharge was appropriate." (1 CT 175.)

After giving the parties an opportunity to file objections – an opportunity of which Rivas-Smith did not take advantage – the Commission adopted the hearing officer's findings and recommendations in a final decision in September 2002. (1 CT 134, 176-177; 2 CT 199.)

B. The FEHA Lawsuit.

In September 2001 – nine months after her termination and five months before the Commission hearing on her termination began – Rivas-

Smith filed discrimination charges with the Department of Fair Employment and Housing ("DFEH") against the County of Los Angeles, the Department, and Deputy John Fernandez, alleging that she was, among other things, terminated because of her race and because she "complained of harassment, discrimination, and retaliation." (1 CT 28-30.)

Rivas-Smith then filed a complaint in superior court in December 2001. (1 CT 4.) Her complaint alleged causes of action titled (1) "Discrimination, Harassment and Retaliation based on Perceived Race" and (2) "Association Discrimination, Harassment, and Retaliation," both in violation of FEHA.[1] (1 CT 4, 5-15, 17-26.) These causes of action, both based on identical facts, essentially alleged that Rivas-Smith was wrongfully terminated because of her race and in retaliation for complaining of harassment and discrimination by her supervisor, Deputy Fernandez. (1 CT 12 ["Plaintiff believes she was terminated not for legitimate business reasons, but in retaliation for complaining of harassment and discrimination"; "Plaintiff believes all adverse employment actions taken against her were not for legitimate business reasons but because of her perceived race"], 23 [same].)

Defendants moved for summary judgment, arguing that under res judicata and collateral estoppel, the Commission's finding that Rivas-Smith's termination was appropriate barred her FEHA claims, which were

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[1] Rivas-Smith's complaint also alleged a cause of action for violation of her civil rights under the Unruh Act, Civil Code section 52.1(b). (1 CT 4.) In response to defendants' summary judgment motion, Rivas-Smith conceded that the Unruh Act has no application to employment discrimination. (4 CT 672-673.) The trial court granted summary judgment, thus disposing of this cause of action. (4 CT 734.) Rivas-Smith has again conceded on appeal that this ruling was proper. (AOB 11, fn. 1.)

based on the allegation that the termination was wrongful. (1 CT 155-164; 4 CT 687-691.)

In opposition, Rivas-Smith argued, among other things, that "none of her complaints regarding harassment, discrimination, [or] retaliation . . . were ever litigated or decided" by the Commission. (4 CT 677, 681-682.) Though she admitted that defendants would prevail on a claim for wrongful termination, she asserted – without further explanation – that she had not brought a cause of action for wrongful termination in her lawsuit. [2] (4 CT 682.)

The trial court agreed with defendants and granted summary judgment, finding that there was no triable issue of material fact and defendants were entitled to judgment as a matter of law because "[Rivas-Smith's] failure to judicially challenge the Commission's Findings that the Department's decision to discharge [her] was appropriate is fatal to the civil complaint." (4 CT 733-734; see also CT 738.)

Judgment was entered on February 4, 2004. (4 CT 746.) Rivas-Smith filed a timely notice of appeal on April 1, 2004. (4 CT 751.)

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[2] As we explain in the legal discussion below, this statement is untrue. In fact, on its face her complaint is one for wrongful termination. (See Legal Discussion, section C, *infra*.)

STANDARD AND SCOPE OF REVIEW

A judgment of the trial court is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) An appellant seeking to reverse the judgment has the burden of demonstrating reversible error in the trial court. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) This burden requires the appellant to (1) identify the issues for review, (2) provide reasoned analysis and legal authority to support her position on the issues; and (3) identify specific facts and provide citations to the record to support her position. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301 [generalized assertion without citation to the record is waived]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [general assertion without legal argument or authority is waived].)

The appellant's burden on appeal is not lessened by the fact that the judgment was a summary judgment, which is reviewed de novo by the appellate court. The de novo standard describes the manner in which the evidence is reviewed, not the scope of review. De novo review means that the appellate court makes its own decision on the evidence before it, without giving deference to the trial court's decision. (*Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1646.) The *scope* of that de novo review, however, is determined by the issues properly raised and supported by citation to the record and legal authority. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 ; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 373; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [plaintiff's brief failed to present a triable issue of fact concerning summary judgment where it cited

only general legal principles without relating them to specific facts or evidence].) "[D]e novo review does not obligate [the appellate court] to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues" of material fact to defeat summary judgment. (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 116; see also *Guthrey v. State of California, supra*, 63 Cal.App.4th at p. 1115 ["'The reviewing court is not required to make an independent, unassisted study of the record in search of error'"].)

Like any judgment, a summary judgment should be affirmed if it can be upheld on any grounds supported by the record. (*Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 538, fn. 4.)

LEGAL DISCUSSION

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE COMMISSION'S ADVERSE DECISION PRECLUDED RIVAS-SMITH'S FEHA CLAIMS.

The trial court granted summary judgment because it found that Rivas-Smith's "failure to judicially challenge the Commission's findings that the Department's decision to discharge [her] was appropriate is fatal to the civil complaint." (4 CT 733-734; see also 4 CT 738.)

Rivas-Smith raises only two issues on appeal. First, she asserts that she was not required to exhaust her administrative and judicial remedies before pursuing her FEHA lawsuit. (AOB 14-20.) Second, she contends her FEHA action raised issues not litigated before the Commission. (AOB 21-23.) As we now explain, both contentions are meritless.

A. Rivas-Smith Was Required To Exhaust Her Administrative And Judicial Remedies Before Filing Her FEHA Lawsuit.

The California Supreme Court has held that a public employee who claims a civil rights violation may choose either to pursue her administrative civil service remedies, or to skip those remedies altogether and proceed directly to the remedies provided by FEHA. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at pp. 1087-1088, 1092.) However, "having chosen a forum . . . , [the] employee must exhaust 'the chosen administrative forum's procedural requirements.'" (*Page v. Los Angeles*

County Probation Dept. (2004) 123 Cal.App.4th 1135, 1142; *Schifando, supra,* 31 Cal.4th at p. 1088.)

Thus, if the employee elects the civil service process and pursues it through the hearing stage, she must finish that process: She must await a final decision and, if the decision is adverse, challenge it judicially by petitioning for a writ of administrative mandamus before filing a lawsuit. (*Page, supra,* 123 Cal.App.4th 1135 at pp. 1142-1144; *Johnson v. City of Loma Linda, supra*, 24 Cal.4th at pp. 69-71.) If she fails to obtain a final decision before filing a FEHA lawsuit, the suit is barred by her failure to exhaust administrative remedies. (*Johnson v. City of Loma Linda, supra*, 24 Cal.4th at p. 70; *Page, supra,* 123 Cal.App.4th at pp. 1142-1143.) If she receives an adverse decision but fails to challenge it through a petition for writ of administrative mandamus, she has failed to exhaust her *judicial* remedies and therefore is bound by the administrative decision in any later lawsuit. (*Page, supra*, 123 Cal.App.4th at pp. 1142-1144; *Johnson v. City of Loma Linda, supra*, 24 Cal.4th at pp. 70-71, 76; *Schifando, supra,* 31 Cal.4th at p. 1090.) And if the adverse civil service decision is inconsistent with her FEHA claims, those claims are barred. (*Johnson v. City of Loma Linda, supra*, 24 Cal.4th at p. 71 [unreviewed administrative determination that plaintiff was terminated for economic reasons was inconsistent with, and therefore barred, FEHA claim asserting that the termination was for discriminatory reasons].)

Rivas-Smith contends she was not required to pursue her administrative remedies because she "abandoned" them by failing to file objections to the hearing officer's proposed decision. (AOB 15, 17, 19.) This makes no sense. Her "abandonment" of her administrative remedies *is* the failure to exhaust them, not an *excuse* for failing to do so.

In support of her contention, Rivas-Smith relies on *Williams v. Housing Authority of the City of Los Angeles* (2004) 121 Cal.App.4th 708, *Ruiz v. Department of Corrections* (2000) 77 Cal.App.4th 891, and *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271. (AOB 17.) But none of these cases supports the proposition that a party can abandon administrative remedies on a whim. In *Williams* and *Ruiz*, the plaintiff abandoned the administrative civil service process *before* any hearing was held or proposed decision rendered. (*Williams*, *supra*, 121 Cal.App.4th at pp. 716, 735; *Ruiz*, *supra*, 77 Cal.App.4th at pp. 895-896.) And in *Watson,* the plaintiff did not pursue internal administrative remedies at all, but proceeded directly to her FEHA claims – something a party is always free to do. (*Watson*, *supra*, 212 Cal.App.3d at p. 1277.) However, once a party opts to pursue her administrative remedies and takes it to hearing and a proposed decision, she is no longer free to abandon that road for another and will be bound by the administrative decision in any later litigation.

Page illustrates this point. There, a county employee filed a grievance with the county civil service commission after she was disabled and the county failed to offer her a new position. The hearing officer issued a proposed decision that included findings adverse to the employee. Before the decision was final, the employee filed a discrimination complaint with the DFEH and brought a lawsuit alleging FEHA violations. (*Page, supra,* 123 Cal.App.4th at pp. 1138-1141.) The court of appeal held that the complaint was barred, reasoning that, while the employee originally had the option to pursue either her civil service remedies or FEHA remedies, having chosen the civil service forum she was obligated to exhaust its requirements. (*Id.* at p. 1142-1144.) The court explained:

> [Plaintiff] chose the civil service commission process and proceeded through three days of hearings . . . , resulting in a comprehensive decision by the hearing officer. [She] *was*

> *not then free to ignore and abandon the administrative process and proceed to a FEHA action for damages.* [She] had to await a final Commission decision and, if it was adverse, then file a petition for writ of mandate in the trial court to overturn the Commission decision.

(*Id.* at p. 1142.)

Here, Rivas-Smith could have chosen to bypass the administrative civil service process altogether – but she did not do so. Instead, she appealed her discharge to the Commission, which held a hearing and issued a proposed decision. (1 CT 169-175.) Having pursued the Commission proceeding to that point, Rivas-Smith was obligated to complete it, including pursuit of her judicial remedies (by filing a petition for writ of administrative mandamus). (*Page, supra*, 123 Cal.App.4th at pp. 1142-1144; *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at pp. 70-71, 76.) Having failed to do so, Rivas-Smith is bound by the Commission's adverse decision. (*Ibid.*) And because the Commission's finding that her termination was appropriate is inconsistent with her FEHA claims, those claims are barred. (1 CT 174-175; 4 CT 672-673, 733-734; *Johnson v. City of Loma Linda, supra*, 24 Cal.4th at p. 71.)

B. Res Judicata And Collateral Estoppel Bar Relitigation Of Any Matters That Were, Or *Could Have Been*, Litigated In The Prior Proceeding.

The requirement that an employee exhaust judicial remedies has its "underpinnings" in the doctrine of res judicata and its subsidiary doctrine, collateral estoppel. (*Risam v. County of Los Angeles* (2002) 99 Cal.App.4th 412, 419.)

Under res judicata, a final judgment on the merits in favor of a defendant bars further litigation on the same cause of action. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795; *Takahashi v. Board of Education, supra*, 202 Cal.App.3d at p. 1473.) The scope of a cause of action is defined by the "primary right" theory, under which "the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant" – in other words, "one injury gives rise to only one claim for relief." (*Slater v. Blackwood, supra*, 15 Cal.3d at p. 795, citation omitted; see also *Friedman Professional Management Co., Inc. v. Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 28 ["the core concept is harm suffered"].)

Collateral estoppel precludes a party from relitigating issues of fact or law litigated and decided in a prior proceeding, regardless of whether the later lawsuit involves the same cause of action. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 848; *Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1229.) Courts have applied both res judicata and collateral estoppel to determine the preclusive effect of administrative decisions that have not been reviewed by administrative mandamus. (See, e.g., *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904, 908-909 disapproved on another ground in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72 [res judicata]; *Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1034-1035 [res judicata and collateral estoppel]; *Risam v. County of Los Angeles, supra*, 99 Cal.App.4th at p. 420 [collateral estoppel]; see also *Page v. Los Angeles County Probation Department, supra* , 123 Cal.App.4th at p. 1142 [administrative agency's "decision has issue and claim preclusive [i.e., collateral estoppel and res judicata] effect"].)

Under either doctrine, a party is prohibited not only from litigating matters that were actually litigated in the prior proceeding, but also matters

that were within the scope of the prior matter and could have been raised there. (See, e.g., *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202-203 [applying res judicata; "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged"]; *Takahashi, supra*, 202 Cal.App.3d at p. 1481 [applying res judicata; "any available defense should be asserted at the earliest opportunity and certainly at an administrative hearing"]; *Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181-182 ["a former judgment . . . is a collateral estoppel on issues which were raised, *even though some factual matters or legal arguments which could have been presented were not* "; original emphasis]; *Kingsburry v. Tevco, Inc.* (1978) 79 Cal.App.3d 314, 317-318 [same]; *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1301 [finding most of complaint barred by collateral estoppel; prior determination of an issue is conclusive in a later lawsuit "with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination"]; *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 724-725 [same].)

Swartzendruber v. City of San Diego, supra, 3 Cal.App.4th 896, is instructive. There, plaintiff was fired from a city's police department for insubordination, and the civil service commission upheld the termination. Without petitioning for a writ of administrative mandamus, plaintiff filed a civil lawsuit alleging claims for intentional infliction of emotional distress, violation of public policy, sex discrimination and federal civil rights violations. (*Id.* at pp. 902-903.) The court of appeal held that, under res judicata and collateral estoppel, all of the claims were barred because they "were predicated on the impropriety of [plaintiff's] termination" and thus

involved the same cause of action, and the same issue, litigated before the commission. (*Id.* at pp. 904-906, 907-908.) The court further reasoned that plaintiff's civil rights claims were barred even though she never actually litigated them before the commission, because she "*could* have raised these issues had she so desired" – specifically, she could have defended herself against the city's charge of insubordination by arguing that the city's actions violated her civil rights. (*Id.* at p. 909, emphasis added; see also *Takahashi v. Board of Education, supra*, 202 Cal.App.3d at pp. 1476-1477, 1481-1482, 1484-1485 [under res judicata and collateral estoppel, administrative finding that there was good cause for plaintiff's termination barred a later lawsuit alleging discriminatory termination, even though plaintiff had not argued discrimination at the administrative hearing, because she *could* have raised discrimination as a defense].)[3]

Here, the Commission proceeding determined that Rivas-Smith's termination was appropriate. (1 CT 174-175.) In her subsequent lawsuit, which is the subject of this appeal, Rivas-Smith contended that her termination was *not* appropriate and that the reasons given by the Department for the termination were pretextual. (1 CT 12 ["Plaintiff believes she was terminated not for legitimate business reasons, but in retaliation for complaining of harassment and discrimination"; "Plaintiff believes all adverse employment actions taken against her were not for legitimate business reasons but because of her perceived race"], 23 [same].) This would have been an appropriate defense to raise before the

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[3] See also *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 482 [under collateral estoppel, administrative finding that plaintiff's termination was proper barred later FEHA claims alleging discriminatory termination, even though plaintiff did not raise discrimination in the administrative proceeding, because he "had ample opportunity to raise issues and present evidence" of discrimination in that proceeding].

Commission.[4] Rivas-Smith contends only that she did not raise the issue before, not that she *could not* have done so. And, in fact, the record shows that all the facts underlying her defense were available to her before the Commission hearing: Her DFEH complaint and her FEHA lawsuit asserting the pretext defense were filed months before the Commission hearing began. (1 CT 4, 28-30, 170.) Rivas-Smith's failure to raise the defense at the hearing – whether by design (tactical decision) or mere omission – does not prevent application of either res judicata or collateral estoppel to bar her from raising the defense at this late date. Because she did litigate the propriety of her termination, and *could* have litigated the particular defense she now seeks to raise, before the Commission, she is prohibited from relitigating that issue – including the omitted defense – now. (Cf. *Takahashi, supra,* 202 Cal.App.3d at pp. 1476-1477,1482, 1484-1485; *Swartzendruber, supra,* 3 Cal.App.4th at p. 909; *Castillo v. City of Los Angeles, supra,* 92 Cal.App.4th at p. 482; *Interinsurance Exchange of the Auto. Club v. Superior Court, supra,* 209 Cal.App.3d at pp. 181-182 [collateral estoppel barred legal theories that were not, but could have been, raised in earlier proceeding]; *Kingsburry v. Tevco, Inc., supra,* 79 Cal.App.3d at pp. 317-318 [same].)

In fact, Rivas-Smith *did* litigate the pretext defense before the Commission, even though she did not explicitly refer to FEHA or label the Department's alleged conduct retaliation or discrimination. Rivas-Smith argued before the Commission that she was unfairly evaluated and was treated more harshly than other employees. Specifically, she argued that

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[4] Cf. *Takahashi, supra,* 202 Cal.App.3d at pp. 1476-1477 ["[i]f violation of . . . civil rights had been alleged and proved in proceedings before the Commission to determine whether the district had cause to terminate plaintiff for incompetency, such violation would have made the termination wrongful"]; *Swartzendruber, supra,* 3 Cal.App.4th at p. 909.

her performance problems were due to a lack of training, that the improvement plan on which she was placed was ambiguous and could not be complied with, and that the standard discipline for falsifying records was not discharge, but progressive discipline. (1 CT 169, 173-174; 2 CT 211-213.) She said:

> The truth of the matter, is that [Rivas-Smith] was under selective and intense security . . . [she] was held to a much different standard which led to unreasonable productivity goals – which were not applied to other employees – as well as the "rush to judgment" mentality by her supervisors for any perceived transgression.

(2 CT 213.) In short, Rivas-Smith contended that the Department's stated reasons for terminating her were untrue and that she was treated differently from other employees. The hearing officer rejected these contentions. (1 CT 173-175.) Rivas-Smith is precluded from raising them again now. (Cf. *Castillo, supra,* 92 Cal.App.4th at p. 482 [prior administrative decision barred plaintiff from relitigating discrimination issue where, in the administrative proceeding, plaintiff "presented evidence in his defense . . . showing disparate treatment by his supervisor . . . and others" but "did not attribute the disparity to discrimination based on age, race, or national origin"].)

C. Rivas-Smith Has Not Alleged Claims for Discrimination, Harassment, or Retaliation Separate from Her Termination.

Taking another tack, Rivas-Smith contends that her lawsuit is *not* for wrongful termination, but for "harassment, discrimination, and

retaliation." (AOB 23; see also 4 CT 681-682.) This contention must be rejected for several reasons.

First, Rivas-Smith's contention is belied by the allegations of the complaint, which state that her termination was wrongful and that the reasons given by the Department for the termination were pretextual. (1 CT 12 ["Plaintiff believes she was terminated not for legitimate business reasons, but in retaliation for complaining of harassment and discrimination"; "Plaintiff believes all adverse employment actions taken against her were not for legitimate business reasons but because of her perceived race"], 23 [same].)

Second, to the extent Rivas-Smith's position is that she has alleged *other* causes of action in the complaint, she fails to identify what, exactly, they are, calling them only claims for "harassment, discrimination, and retaliation." (AOB 23.) But she doesn't even distinguish between the three types of claims, let alone explain what *facts* might support each one.

For example, a claim for discrimination may only be made against an employer, while claims of harassment may be made against coworkers. (*Plute v. Roadway Package System, Inc.* (N.D. Cal. 2001) 141 F.Supp.2d 1005, 1010-1011.) Rivas-Smith has not separated her claims as between the defendants.

In addition, a claim for discrimination or retaliation requires a showing that the plaintiff suffered an "adverse employment action" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355) – i.e., a "substantial adverse change in the terms and conditions of the plaintiff's employment" (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453). Similarly, a claim for harassment requires harassing conduct "'sufficiently severe or pervasive' to alter the terms and conditions of the victim's employment." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463.)

Furthermore, both discrimination and harassment require evidence of racial or other animus motivating the defendant's behavior. (See Gov. Code, §12940 (a), (j)(1).)

Rivas-Smith has not come close to demonstrating that any of these criteria has been met, or could be met, in this case. Her only "evidence" that defendants' conduct was the product of racial animus is her repeated assertion that she *believed* that was so.[5] But her subjective belief is no substitute for hard evidence on the subject. (*Jenkins v. MCI Telecommunications Corp.* (C.D. Cal. 1997) 973 F.Supp. 1133, 1137 ["bare speculation" that defendants' conduct was motivated by racial prejudice "cannot support a prima facie case of discrimination" or harassment].)

The only "adverse employment action" mentioned in the complaint or the opening brief is Rivas-Smith's termination. (AOB 10; 1 CT 12, 23.) Her contention that her termination is not involved leaves wide open the question of what other adverse employment action could support a claim

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[5] See AOB 4 [speculating that Deputy Fernandez was unreasonably critical of Rivas-Smith because of her race; citing 4 CT 620, 644, 631], AOB 6 [Rivas-Smith's son asked if he could not stay at work because of his race; citing 4 CT 629-631]; AOB 7 [Rivas-Smith told supervisor that she believed Deputy Fernandez treated her unfairly because of her race; citing 4 CT 618].

for discrimination or retaliation,[6] or what conduct could support a claim for harassment.[7]

Rivas-Smith's failure to elaborate on what "other" claims are purportedly covered by her complaint that would prevent the entry of summary judgment in this case operates as a waiver of the issue on appeal. (*Guthrey v. State of California, supra,* 63 Cal.App.4th at p. 1115 [appellant's opening brief failed to present a triable issue of fact concerning

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[6] See *Volovsek v. Wisconsin Department of Agriculture* (7th Cir. 2003) 344 F.3d 680, 688 [supervisors' negative comments, negative performance evaluations, inadequate training, denial of support, and administration of math test, while of "possible evidentiary relevance" to denial of promotion, "do not, themselves, amount to the kind of adverse employment action that constitutes discrimination or retaliation"]; *Grube v. Lau Industries, Inc.* (7th Cir. 2001) 257 F.3d 723, 728 [employer's decision to change employee's working hours did not rise to the level of an adverse employment action], 729; *Akers v. County of San Diego, supra*, 95 Cal.App.4th at p. 1457 ["a mere oral or written criticism of an employee" is not an adverse employment action"]; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511-512 ["one time events" and assigning plaintiff more duties than other employees were not adverse employment actions].

[7] Offhand comments, simple teasing, racial epithets, and other isolated incidents do not qualify as actionable harassing conduct. (*Etter v. Veriflo Corp., supra,* 67 Cal.App.4th at p. 463; see, e.g., *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 643 [allegations that supervisor said deputy probation officer had "a typical Hispanic macho attitude" and should consider transferring to the field because "Hispanics do good in the field," yelled at him in front of youth at detention center, and made false complaints about him to a superior were not severe or pervasive enough to constitute actionable harassment]; *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1031, 1036-1037 [no hostile work environment as a matter of law despite allegations that the employer posted a racially offensive cartoon, made racially offensive slurs, targeted Latinos when enforcing rules, provided unsafe vehicles to Latinos, did not provide adequate police backup to Latino officers, and kept illegal personnel files on plaintiffs because they were Latino].

summary judgment where it cited only general legal principles without relating them to specific facts or evidence]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [general assertion without legal argument or authority, which "merely refers [the court] to the statement of facts contained in his opening brief, apparently assuming this court will construct a theory supportive of his position," is waived]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [points not argued, argued in conclusionary form, or unsupported by citation to authorities or the record are waived].) Even though the standard of review for a summary judgment is de novo, this court is not required to scour the record to salvage her case for her. (*Lewis v. County of Sacramento, supra,* 93 Cal.App.4th at p. 116 ["de novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues"]; *Guthrey v. State of California, supra,* 63 Cal.App.4th at p. 1115 [""The reviewing court is not required to make an independent, unassisted study of the record in search of error""].)

Rivas-Smith's contention is also barred by her failure to raise the issue adequately in the trial court. Rivas-Smith's opposition to summary judgment, like her opening brief, failed to identify any conduct that would support a claim for discrimination, retaliation, or harassment separate from her termination. (See 4 CT 677, 681-682.)

Since the Commission's decision that Rivas-Smith's discharge was appropriate satisfied defendants' burden of showing that Rivas-Smith's FEHA claims had no merit, it was Rivas-Smith's burden to identify specific facts demonstrating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (c), (p)(2); *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 780-781, emphasis added [once a defendant meets its burden of showing that there is no triable issue as to any material fact and that the

defendant is entitled to judgment as a matter of law, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists . . . [and] set forth the *specific facts* showing that a triable issue of material fact exists"]; see also *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at pp. 357, 360, 362 [when a plaintiff alleges she was terminated for discriminatory or retaliatory reasons in violation of FEHA, an employer meets its burden of establishing that the plaintiff's cause of action has no merit if it presents evidence of legitimate, nondiscriminatory reasons for its actions].) She failed to do so. Summary judgment was proper.

CONCLUSION

Rivas-Smith raises only two issues on appeal. Neither one presents grounds for reversal.

First, contrary to Rivas-Smith's contention, she was required to exhaust administrative and judicial remedies before pursuing her FEHA lawsuit. Her failure to do so renders the Commission's decision binding. Because that decision established that her termination was appropriate, it barred her FEHA claims, which alleged that she was terminated for improper reasons.

Second, Rivas-Smith contends that her FEHA action raised issues not litigated before the Commission – specifically, whether the Department's stated reasons for her termination were pretextual. But Rivas-Smith *could* have raised pretext before the Commission as a defense to her termination. Because she could have raised the issue, res judicata and collateral estoppel bar her from raising it now in the form of her FEHA action. Furthermore, Rivas-Smith has not alleged any other causes of action, outside of the termination, that require further proceedings.

The summary judgment in favor of defendants should be affirmed.

Dated: January 11, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 14 (c)(1), the attached Respondents' Brief is proportionately spaced, has a typeface of 13 points and contains 5,865 words.

Dated: January 11, 2005

GREINES, MARTIN, STEIN & RICHLAND LLP

By_____
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