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Court of Appeal, First District, Division 1, California.

Harry K. VERNON, Plaintiff and Appellant,
v.
CITY OF BERKELEY, Defendant and Respondent.

No. A109680
.
|
(Alameda County Super. Ct. No. C-842999-1).
|
May 30, 2006.

Attorneys and Law Firms

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Opinion

SWAGER, J.

***1** The trial court granted the motion of respondent City of Berkeley (hereafter respondent or the City) for summary judgment and dismissed appellant's action for employment discrimination (Gov.Code, § 12940), violation of civil rights (42 U.S.C. §§ 1981, 1983), and declaratory relief. We conclude that the City has established a complete defense to appellant's action, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The evidence before us is familiar to this court and is for the most part not in material dispute. Appellant is "an African-American male" who began his employment as a firefighter with the City of Berkeley (hereafter the City or Berkeley) Fire Department on February 14, 1978. During his many years as an "active firefighter," appellant suffered from a chronic, hereditary "skin condition called Pseudo Folliculitis Barbae," or "PFB," which causes skin irritation and even infection upon shaving. PFB "afflicts African-American men" disproportionately, and is a "fairly widespread," although the severity of the condition varies. Appellant suffers from a severe enough case of PFB that he is required to "refrain from shaving" to avoid the effects of the condition.

While engaged in "structural fire fighting activity," appellant and other firefighters employed by the City are mandated by California law to wear a respirator classified as "self-contained breathing apparatus (SCBA)," that have "tight-fitting face pieces." (Cal.Code Regs., tit. 8, §§ 3409(a)(2)(A), 5144.)[1] Beginning in 1984, with the approval of the City, appellant wore a very closely cropped beard and continued to engage in active fire suppression duties in the course of his employment. Thereafter, neither appellant nor any other of the City's firefighters with short facial hair failed the "FIT test" administered regularly to "firefighters active in fire suppression" to determine if "a close and adequate seal about the SCBA" was maintained. Appellant also did not experience any leaking or other adverse consequences related to his use of the SCBA with his facial hair while he was actively engaged in fire suppression duties between 1984 and 1999.

In 1997 and 1998, the State of California (the State) adopted regulations-to conform to existing federal OSHA rules-that prohibited the use or testing of SCBA devices by firefighters with "[f]acial hair that comes between the sealing surface of the facepiece and the face" (Cal.Code Regs., tit. 8, § 5144(g)),[2] and required the City to "develop and implement comprehensive written standard operating procedures for the use, care, maintenance, and training relating to respiratory protective equipment in

accordance with Section 5144" (Cal.Code Regs., tit. 8, § 3409(b)(1)).[3] The City was informed by "Cal-OSHA" that "allowing an employee with facial hair to work wearing an SCBA respirator would constitute a violation of 8 C.C.R. § 5144(g)(1)(A)," even if the employee was otherwise able to pass the fit test. As a result, in June of 1999, the City implemented a new "Respiratory Protection Policy" that prohibited any person "who had visible facial hair" from taking a SCBA mask fit test.[4] The effect of the policy was that in October of 1999 appellant was prevented from taking the fit test by the City for the stated reason that his "visible facial hair" violated California Code of Regulations, title 8, section 5144(g)(1)(a). He was thus precluded from working "as a firefighter in fire suppression." He was promptly removed from active fire suppression duty, briefly placed on paid administrative leave, then "placed in a position performing fire inspections" pending further analysis of his status. Appellant was the only firefighter in the City who was impacted by the new Cal-OSHA regulations.

***2** The City subsequently attempted to obtain a variance, waiver, or some form of "accommodation" from Cal-OSHA to exclude appellant from the strict prohibitions against performance of fire suppression duties by employees with facial hair, on the basis that the SCBA rules were discriminatory in effect upon African-American employees. The City also unsuccessfully sought assistance from the California State Assembly and the Attorney General with the effort to return appellant to fire suppression duties. The City did not undertake a constitutional challenge to the OSHA regulations.

Meanwhile, appellant continued to perform employment duties for the City "in roles other than fire suppression." He complained that his placement on administrative leave and subsequent assignment to duties "outside of fire suppression" resulted in "significant negative financial impact" on him from his use of accrued vacation or leave time and inability to earn overtime pay. Appellant also declared that he was subjected to retaliation, hostility, excessive scrutiny and harassment by the City after he demanded an accommodation from the regulations, which caused him to take leave due to the anxiety he suffered.

Following briefings and hearings before the Division of Occupational Safety and Health (DOSH) Board, the City's application for a permanent variance was denied on December 14, 2000. However, the City's request for a "temporary experimental variance" on behalf of appellant was granted by DOSH, effective August 22, 2002. Appellant was then returned to active fire suppression duties until his voluntary retirement from service with the City in December of 2003.

The present action was filed by appellant against the City, the State of California, and the United States for racial and disability discrimination (Gov.Code, § 12940), retaliation and harassment (Gov.Code, § 12940), failure to prevent discrimination (Gov.Code, § 12940), violation of civil rights (42 U.S.C. § 1981 et seq.), and injunctive and declaratory relief. The case was removed to the federal district court, then remanded to the superior court after no federal claims or parties remained in the case. The trial court sustained the State's demurrer to appellant's first amended complaint without leave to amend on grounds that the State was neither an employer of appellant nor an aider and abettor in any discriminatory employment practices. We affirmed the judgment that dismissed the State as a defendant in an opinion filed on February 25, 2004. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114.)[5]

After appellant filed a fourth amended and supplemental complaint, the City as the sole remaining defendant filed a motion for summary judgment. The motion was granted as to all causes of action, and judgment was entered in favor of the City. This appeal followed.

DISCUSSION

Appellant argues that the City's implementation of CAL-OSHA regulations through its Respiratory Protection Policy, which "prohibited the use or testing of SCBA respirators by anyone with visible facial hair," violates the provisions of the Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.).[6] Appellant does not assert that the City intentionally discriminated against him, but rather that the Respiratory Protection Policy had a "disparate impact" upon him and other "African-American PFB sufferers." Appellant acknowledges the City's position that Respiratory Protection Policy was "mandated by the State," but claims the City

did not satisfy its burden to prove the availability of "less discriminatory alternatives" to "avoid the discriminatory impact of the regulations," as the "business necessity" defense under the FEHA requires. He also maintains that even if the City established a business necessity for the Respiratory Protection Policy, the "justification was insubstantial, or that it was a mere pretext because there were less discriminatory alternatives."

***3** Our inquiry in the appeal before us thus focuses upon the City's liability under the anti-discrimination provisions of the FEHA for enforcement of mandatory State employment regulations that govern use of respirators by employees with facial hair. "FEHA, among other prohibitions on discrimination, makes it unlawful for 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 discriminate against the person ... in terms, conditions, or privileges of employment.' (Gov.Code, § 12940, subd. (a).)" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 373; see also *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 227.) "Discrimination on the specified grounds is against public policy (§ 12920) and an unlawful employment practice (§ 12940)." (*Fiol v.. Doellstedt* (1996) 50 Cal.App.4th 1318, 1324; see also *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

" 'Because the FEHA is remedial legislation, which declares "[t]he opportunity to seek, obtain and hold employment without discrimination" to be a civil right (§ 12921), and expresses a legislative policy that it is necessary to protect and safeguard that right (§ 12920), the court must construe the FEHA broadly, not ... restrictively. Section 12993, subdivision (a) directs: "The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof." If there is ambiguity that is not resolved by the legislative history of the FEHA or other extrinsic sources, we are required to construe the FEHA so as to facilitate the exercise of jurisdiction by the [Fair Employment and Housing Commission]. [Citation.]' [Citation.]" (*Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1114; see also *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 819.)

Appellant has proceeded on a theory of disparate impact rather than disparate treatment.[7] "Disparate impact discrimination has been recognized as actionable under both title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.), and the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.)." (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1321.) "To prevail on a theory of disparate *impact,* the employee must show that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on certain employees because of their membership in a protected group." (*Knight v. Hayward Unified School Dist., supra,* 132 Cal.App.4th 121, 129; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1171.) "[D]isparate impact is not proved merely because all members of a disadvantaged subgroup are also members of a protected group." (*Carter v. CB Richard Ellis, Inc., supra,* at p. 1326.) Proof must be offered, "usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are 'in operation ... functionally equivalent to intentional discrimination.' [Citation.]" (*Harris v. Civil Service Com.* (1998) 65 Cal.App.4th 1356, 1365, italics omitted.)

***4** " 'Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.... [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation.' [Citation]" (*Carter v. CB Richard Ellis, Inc., supra,* 122 Cal.App.4th 1313, 1323-1324, quoting from *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 994-995.) As in any racial discrimination case, appellant bears the burden of proving that his "race was a substantial factor in the adverse employment decision." (*Horsford v.*

Board of Trustees of California State University, supra, 132 Cal.App.4th 359, 375.)

In discrimination cases, "the burdens of proof and persuasion shift. *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir.1994)." (*Beale v. GTE California* (C.D.Cal.1996) 999 F.Supp. 1312, 1320.) "In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court" for resolution of claims of discrimination. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354; see also *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730; *Ewing v. Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, 610-611, 614.) Under both federal and state law, "discrimination claims proceed through three stages. First, the plaintiff has the burden of establishing a prima facie case of discrimination. Second, if the plaintiff meets this burden, the employer must offer a legitimate nondiscriminatory reason for the adverse employment decision. Third, and finally, the plaintiff bears the burden of proving the employer's proffered reason pretextual." (*Knight v. Hayward Unified School Dist., supra,* 132 Cal.App.4th 121, 129; see also *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 624.) "However, the burden of persuasion never shifts to the employer; it remains at all times with the employee. [Citation.] 'If the plaintiff establishes a prima facie case, the defendant bears only a burden of going forward with additional evidence of legitimate nondiscriminatory reasons. The defendant does not take on a burden of persuasion.' [Citation.]" (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 663.)

" '[W]hether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury.' [Citation.]" (*Quinn v.. City of Los Angeles* (2000) 84 Cal.App.4th 472, 481, quoting from *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201.) Thus, "the issues raised by the shifting burdens of proof are amenable to pretrial proceedings." (*Caldwell v. Paramount Unified School Dist., supra,* at p. 202.)

***5** In a summary judgment motion in a case brought under the FEHA, the defendant " 'has the burden to show that the plaintiff cannot establish at least one element of his cause of action, "or that there is a complete defense to that cause of action." [Citations.] Once the defendant meets this burden, the burden shifts to the plaintiff to show "that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." [Citation.] [¶] ... The burden, however, does not shift to plaintiff until defendant carries its initial burden to show that an essential element of the cause of action "cannot be established...." [Citation.] [¶] If the moving defendant argues that it has a complete defense to the plaintiff's cause of action, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense....' [Citations.]" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App .4th 215, 223-224; see also *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150-151.) "Once the employer makes a '... sufficient showing of a legitimate reason for discharge, ...' [citation], i.e., that it had a lawful, nondiscriminatory reason for the termination [citation], then the discharged employee seeking to avert summary judgment must '... demonstrate either (by additional facts or legal argument) that the defendant's showing was in fact insufficient or (by competent evidentiary materials) that there was a triable issue of fact material to the defendant's showing. [Citations.]' [Citation.] With respect to the latter choice, the employee '... must produce "substantial responsive evidence" that the employer's showing was untrue or pretextual. [Citation.] For this purpose, speculation cannot be regarded as substantial responsive evidence. [Citation.]' [Citation.]" (*Hanson v. Lucky Stores, Inc., supra,* at p. 225.)

"Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of

that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

I. The City's Evidence of a Legitimate, Nondiscriminatory Reason for the Policy.

As the parties have done, we assume appellant proved a prima facie case of disparate impact from the City's enforcement of regulations that prohibited him from passing the SCBA respirator fit test, and proceed to resolve this appeal by examining the issue of respondent's proof of a legitimate, nondiscriminatory reason for its employment decision. (See *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792, 802; *Beale v. GTE California, supra,* 999 F.Supp. 1312, 1320; *Caldwell v. Paramount Unified School Dist., supra,* 41 Cal.App.4th 189, 197.) Under title 2, section 7286.7 of the California Code of Regulations, "If employment discrimination is established, this employment discrimination is nonetheless lawful where a proper, relevant affirmative defense is proved and less discriminatory alternatives are not shown to be available." Respondent's burden as the employer is to show that the adverse action taken against appellant "was 'validly and fairly devised and administered to serve a legitimate business purpose.' " (*Hanson v. Lucky Stores, Inc., supra,* 74 Cal.App.4th 215, 224, quoting *Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th 1718, 1733.)

***6** A business necessity is recognized as a legitimate, nondiscriminatory reason that operates as a defense in disparate impact cases under the FEHA (Cal.Code Regs., tit. 2, § 7286.7(b)). [8] Under the business necessity defense, " 'the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.' [Citations.]" (*City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 989-990; see also *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 983.)

"While the objective soundness of an employer's proffered reasons supports their credibility (see discussion, *post*), the ultimate issue is simply whether the employer acted with a motive to discriminate illegally. Thus, 'legitimate' reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th 317, 358, italics omitted.) If the employer presents admissible evidence " 'that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing.' [Citations.]" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951; see also *Knight v. Hayward Unified School Dist., supra,* 132 Cal.App.4th 121, 129.)

The City claims that its actions were "required by California law," and therefore were "permissible as a matter of law." While we do not agree with the City that compliance with Cal-OSHA regulations establishes per se a defense to any disparate impact case under the FEHA as a matter of law without further inquiry (*Fitzpatrick v. City of Atlanta* (11th Cir.1993) 2 F.3d 1112, 1121 (*Fitzpatrick*)), we find upon examination of the record that a legitimate, nondiscriminatory reason for the City's practice has been established in the case before us. We know from the evidence presented that respondent did not take any adverse action against appellant until after DOSH adopted regulations in 1997 that prohibited the use or testing of SCBA respirators upon employees with visible hair. Thus, the City did not evince any inclination to subject appellant to any disparate impact before the State regulations were enacted. Once the SCBA respirator regulations became effective, they were binding upon the City as governing standards for maintaining and enforcing employee safety. (Lab.Code, § 6304.5; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927-928.) The City had neither control over the formulation or enactment of the safety regulations, nor the authority to cancel or disregard them. (See *Harris v. Civil Service Com., supra,* 65 Cal.App.4th 1356, 1363.)

***7** The City's subsequent implementation of the "Respiratory Protection Policy" to conform to State requirements demonstrates a legitimate, nondiscriminatory

reason for the prohibition against any person "who had visible facial hair" from taking a SCBA mask fit test. Not only did the **City** act to comply with State standards, but also to safeguard the safety of its employees as specified in the **Cal**-OSHA regulations. Employment tests or requirements " 'that are discriminatory in effect' " are nonetheless valid if " 'the employer meets "the burden of showing that any given requirement [has] ... a manifest relationship to the employment in question." [Citation.] ...' [Citation.]" (*Harris v. Civil Service Com., supra,* 65 Cal.App.4th 1356, 1366.) Imposition of standards of employment by the employer to promote employee safety is recognized as a legitimate basis for job discrimination. (*McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 130; *Hollon v. Pierce* (1967) 257 Cal.App.2d 468, 477.) "Nothing in the **California** Fair Employment and Housing Act prohibits an employer from 'the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her duties, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others.' (Gov.Code, § 12940, subd. (a)(2).) It is self-evident that a public employer may require an employee to meet physical or mental standards reasonably related to the duties required by the job and the health and safety of the employee or others." (*Sienkiewicz v. County of Santa Cruz* (1987) 195 Cal.App.3d 134, 142.) Further, "a requirement that employees not pose a significant safety threat in the workplace would obviously be consistent with business necessity: a safe workplace is a paradigmatic necessity of operating a business. *See* *Fitzpatrick v. **City** of Atlanta,* 2 F.3d 1112, 1119 (11th Cir.1993) (holding that protecting employees from workplace hazards is a 'business necessity' under Title VII)." (*United States EEOC v. AIC Security Investigations, Ltd.* (7th Cir.1995) 55 F.3d 1276, 1283.)

In *Fitzpatrick, supra,* 2 F.3d 1112, 1113, the **City** of Atlanta moved for summary judgment in a Title VII disparate impact case brought by African-American firefighters afflicted with PFB, who challenged the Fire Department's "no-beard" rule on grounds that it discriminated against African-Americans in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., and "the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)." The defendant asserted that an "affirmative 'business necessity' defense" justified the "ban on shadow beards" to protect firefighter employees "from health and safety risks." (*Fitzpatrick, supra,* at pp. 1118-1119.) The court recognized that "protecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal for Title VII purposes," but also observed that "merely asserting a safety rationale does not suffice to prove the defense." (*Fitzpatrick, supra,* at p. 1119, fn. 6.) The court then proceeded to examine the supporting evidence presented by the defendant to support the "contention that the ban on shadow beards is necessitated by safety concerns," (*id.* at p. 1118) in the form of: (1) an expert opinion " 'that the SCBA should not be worn with any amount of facial hair that contacts the sealing surface of the face piece,' " (*id.* at p. 1119) due to the lack of a "proper seal between the SCBA mask and the wearer's face" (*id.* at p. 1120) that permits air and contaminants from the "outside environment to leak into the mask;" and (2) the recommendations of "three national organizations that set occupational safety and health standards," including OSHA, "that SCBA's should not be worn with facial hair which contacts the sealing surface of the face piece." (*Ibid.*) The defendant's evidence was found credible and sufficient to carry "its movant's initial summary judgment burden on the business necessity issue." (*Ibid.*) The court concluded: "We believe that this evidence affirmatively demonstrates, not only that being clean-shaven is a business necessity for firefighters, but also that any proposed less discriminatory alternatives to the no-beard rule that would not require firefighters to be clean-shaven would not be adequately safe. Thus the evidence is sufficient to satisfy the **City's** initial burden as the summary judgment movant on the less discriminatory alternative issue." (*Id.,* at p. 1122.)

***8** The court further concluded that the firefighters failed to come forward in response with evidence sufficient to create a "genuine issue as to the reality of the **City's** safety claims" or "the availability of a comparably safe, less discriminatory alternative." (*Fitzpatrick, supra,* 2 F.3d 1112, 1120, 1122.) Evidence "that for the six years between 1982 and 1988 the **City** permitted firefighters with PFB to wear their SCBA's over shadow beards" (*id.* at p. 1120) without mishap or reported difficulty obtaining adequate seals was found inadequate to create a genuine issue of fact without any "showing how carefully the firefighters' seals were monitored over this period, or whether examinations

were made that would have uncovered any resulting safety or health problems. The mere absence of unfortunate incidents is not sufficient to establish the safety of shadow beards; otherwise, safety measures could be instituted only once accidents had occurred rather than in order to avert accidents. Although the six-year history is not irrelevant to the question of whether it is unsafe to wear SCBA's over shadow beards, we hold that when considered in the context of the totality of the evidence, it would not be sufficient to prevent the City from obtaining a directed verdict at trial." (*Id.,* at pp. 1120-1121.) In addition, the firefighters failed to offer proof of a less discriminatory alternative to the "no-beard rule" or evidence that the "proffered safety justification is, in fact, a pretext for discrimination." (*Id.,* at pp. 1121, 1124.) The court in *Fitzpatrick* thus concluded: "In light of the substantial evidence adduced by the City in support of its safety justification, we hold that no reasonable finder of fact could find the justification pretextual solely on the basis of the underinclusiveness of the City's SCBA safety rule. Accordingly, the City is entitled to summary judgment on the Title VII disparate treatment claim." (*Id.,* at p. 1125.)

Although the City in the present case did not produce any expert opinion testimony, we have in the record before us comparable evidence that furnishes proof of a legitimate, nondiscriminatory reason or business necessity for the rule that an employee must have "no facial hair" to take and pass a respirator fit test required to engage in active firefighting duties. As in *Fitzpatrick,* the City adhered to Cal-OSHA regulations, but here, unlike *Fitzpatrick,* the safety policies were mandated, not merely recommended, by the State. (*Fitzpatrick, supra,* 2 F.3d 1112, 1121.) The safety regulations are persuasive and trustworthy evidence of a business necessity for the policy implemented by the City. (*Id.,* at pp. 1120-1121.) The record also includes reasons articulated for the "no facial hair" requirement which we think justify the implementation of the policy to promote employee safety: firefighters are routinely exposed to potentially lethal environmental conditions during structural firefighting scenarios that may also cause long-term dysfunction or illness and increased morbidity or mortality despite the use of protective respirators; studies show that facial hair, including "stubble," interferes with tight-fitting facepiece seals on respirators; the prohibition against facial hair is essentially universal, and recommended by the National Fire Protection Association; tests conducted on SCBA respirators in emergency situations suggest that the equipment may not operate as safely and efficiently as when tested in quantitative fit test chambers. Based upon the evidence presented, we find that the City has established a complete defense to appellant's disparate impact action with definitive proof that its action was taken for a legitimate, nondiscriminatory reason.

II. Appellant's Proof of Pretext.

***9** We turn to appellant's burden to produce competent evidence that the legitimate reasons offered by the City " 'were not its true reasons, but were a pretext for discrimination.' [Citation.]" (*Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 676 .) "[W]here the defendant has made a strong showing that its personnel decisions were not based on an impermissible discriminatory factor, the plaintiff cannot prevail merely by showing the personnel decisions negatively impacted a protected group." (*Horsford v. Board of Trustees of California State University, supra,* 132 Cal.App.4th 359, 376-377.) " 'If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. In short, by applying *McDonnell Douglas' s* shifting burdens of production in the context of a motion for summary judgment, "the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury." ' [Citation.]" (*Sada v. Robert F. Kennedy Medical Center, supra,* 56 Cal.App.4th 138, 150, italics omitted.) The plaintiff's evidence that the employer's showing was untrue or pretextual must rise above the level of speculation. (*Hanson v. Lucky Stores, Inc., supra,* 74 Cal.App.4th 215, 225.) "The employee 'must produce "substantial responsive evidence" ' on this last point. [Citation.] ... Pretext may be demonstrated by showing '... that the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge. [Citation.]' [Citation.]" (*Id.,* at p. 224, fn. omitted.)

Appellant seeks to demonstrate pretext and negate the City's business necessity defense by relying on evidence that many if not all other fire departments in the State have "permitted a medical accommodation for firefighters with PFB" by authorizing "short cropped facial hair" with use of SCBA respirators rather than the "no facial hair policy" implemented by the City. Appellant also points out that he used a respirator for many years without incident before the no facial hair policy, and has passed fit tests both before and after the change in policy.

The different policies of other fire departments does not suggest to us that the City's policy was a pretext for discrimination, particularly where the City engaged in comprehensive efforts to accommodate appellant. The City was not required to flout state law to avoid a finding of pretext. (See *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590, 603-604.) Moreover, not only was appellant permitted to wear short facial hair for years before the state law was changed, but the City vigorously attempted to obtain a variance for him after the change in the law. The City also sought input from the California State Assembly and the Attorney General's office to alleviate the impact of the Cal-OSHA regulations upon appellant. Ultimately, the City was granted an experimental variance for appellant, which resulted in his return to active fire suppression duties until his retirement. Nothing in the record demonstrates that the City's policy was a pretext to engage in discriminatory treatment of appellant.

III. Appellant's Proof of a Less Discriminatory Alternative.

***10** Nor do we find that the City had available to it a comparably safe, less discriminatory alternative to the no facial hair policy. (Cal.Code Regs., tit. 2, § 7286.7.) Appellant has not suggested an alternative other than an exemption or accommodation for "African-American PFB sufferers" that authorizes use of SCBA respirators with visible facial hair. His burden is to create a genuine issue of fact that "shadow beards must adequately serve the Fire Department's acknowledged business need, namely, safety." (*Fitzpatrick, supra,* 2 F.3d 1112, 1122.) Evidence that appellant regularly passed SCBA fit tests and previously engaged in fire suppression duties without adverse consequences does not persuade us that the City was thereby presented with a reasonable, less restrictive alternative to compliance with state law. The City offered evidence in response that appellant's successful fit tests do not establish the safety of the use of SCBA respirators in actual emergency or firefighting situations. Testing may produce varied results depending upon the nature of the tests conducted-that is, quantitative tests in fit test chambers, as opposed to a workplace factor study with simulated contaminant concentrations measured against "in-mask concentrations." The results of appellant's testing under controlled conditions may be of questionable value when assessing the safety of use of SCBA respirators in a structural firefighting environment. As specified in the preamble to the federal regulation, 29 Code of Federal Regulations part 1910.134, studies indicate that fit factors in quantitative or laboratory tests do not correlate to "actual protection provided on the job." The record also refers to various studies, the recommendation of the National Fire Protection Association, and the opinions of "three national respirator experts," all of which suggest that the prohibition upon facial hair is a critical factor to the efficient and safe operation of SCBA respirators in emergency or hazardous situations. We conclude that appellant has failed to offer adequate proof that either an exemption or failure to follow state law is a comparably effective alternative to the proscription against visible facial hair. (*Fitzpatrick, supra,* at pp. 1122-1124.) And finally, a permanent exemption is not an available alternative where it was requested but denied to the City; an experimental exemption was an available alternative, but that the City obtained for appellant. Upon the City's proof of legitimate, nondiscriminatory reasons for the no visible facial hair policy, and appellant's failure to raise a rational inference of pretext or a less discriminatory alternative, summary judgment in favor of the City was proper. (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th 317, 362; *Knight v. Hayward Unified School Dist., supra,* 132 Cal .App.4th 121, 129.)

Accordingly, the judgment is affirmed.

We concur: MARCHIANO, P.J., and MARGULIES, J.

All Citations

Not Reported in Cal.Rptr.3d, 2006 WL 1467790, 98 Fair Empl.Prac.Cas. (BNA) 1175

Footnotes

1 **California** Code of Regulations, title 8, section 3409(a) reads: "(a) Approved Equipment. [¶] (1) Approvals. Fire fighters exposed to harmful exposure in the course of their assigned activities shall be provided with, and shall use respiratory protective devices that are approved and certified in accordance with Section 5144, and the methods and requirements specified by the National Institute of Occupational Safety and Health (NIOSH) under 42 CFR part 84.[¶] (2) Permissible Devices. [¶] (A) Respiratory protective devices provided for and used by fire fighters in structural fire fighting activity shall be limited to those types classified as self-contained breathing apparatus (SCBA), and combination breathing apparatus of the supplied-air positive-pressure type. [¶] (B) Closed-circuit self-contained breathing apparatus shall not be used by fire fighters except where it has been demonstrated that long duration breathing apparatus is necessary. If such breathing devices are used, quantitative fit tests providing a minimum protection factor of 5,000 shall be performed on each individual using the long duration breathing apparatus. The quantitative fit test procedures shall be available for inspection by the Division." (Italics added.)

2 **California** Code of Regulations, title 8, section 5144, provides in pertinent part: "(g) Use of respirators. This subsection requires employers to establish and implement procedures for the proper use of respirators. These requirements include prohibiting conditions that may result in facepiece seal leakage, preventing employees from removing respirators in hazardous environments, taking actions to ensure continued effective respirator operation throughout the work shift, and establishing procedures for the use of respirators in IDLH atmospheres or in interior structural firefighting situations. [¶] (1) Facepiece seal protection. [¶] *(A) The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have:* [¶] 1. *Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function;* or [¶] 2. Any condition that interferes with the face-to-facepiece seal or valve function." (Italics added.)

3 The State regulations are identical to and based upon the "federal OSHA" regulations (29 C.F.R. § 1910.134), and the State had no discretion to alter the federal standards.

4 Facial hair is defined as more than one day's growth of beard.

5 We observed in our opinion in ***Vernon*** that appellant may still effectively challenge the application of the State's **CAL**-OSHA regulations to him in his action for discriminatory employment practices and declaratory relief against his direct employer, the **City**. That challenge is before us now.

6 All further **California** statutory references are to the Government Code unless otherwise indicated.

7 "In general, there are two types of illegal employment discrimination under the ADA and the FEHA: disparate treatment and disparate impact. [Citations.] In order to prevail under a disparate *treatment* employment discrimination theory, a member of a protected class must show the employer harbored discriminatory intent." (*Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128-129.)

8 Title 2, section 7286.7(b) of the **California** Code of Regulations provides: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact."

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