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Move, Inc. and Leo Jay
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FILED
Superior Court of California
County of Los Angeles

OCT 09 2018

Sherri R. Carter, Executive Officer/Clerk of Court
By Paul A. Sanchez, Deputy
Paul Sanchez

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT

11 BRIAN BOBIK, an Individual,
12 Plaintiff,

13 v.

14 MOVE, INC.; LEO JAY, an individual; and
15 DOES 1-25, Inclusive,
16 Defendants.

CASE NO. BC678768

Assigned To Judge Monica Bachner
Dept. 71

**NOTICE OF RULING ON
DEFENDANTS' DEMURRER TO
SECOND AMENDED COMPLAINT AND
NOTICE OF CONTINUANCE OF
HEARINGS**

File Date: October 6, 2017
Trial Date: None Set

17 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
18

19 PLEASE TAKE NOTICE that at the hearing on October 1, 2018, the Court granted
20 Defendants Move, Inc. and Leo Jay's Demurrer to Second Amended Complaint without leave to
21 amend. The Court issued a final order, a copy of which is attached hereto as Exhibit A.
22

23 Additionally, the Court continued the Trial, Final Status Conference, and Post-Mediation
24 Status Conference, as follows:

- 25 1. Trial, previously scheduled to begin June 10, 2018, is continued to **August 19,**
26 **2019**, at 10:00 a.m., in Dept. 71.
27 2. Final Status Conference, previously scheduled for May 31, 2018, is continued to
28 **August 2, 2019**, at 9:00 a.m., in Dept. 71.

**NOTICE OF RULING ON DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT AND
NOTICE OF CONTINUANCE OF HEARINGS**

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9 FOR THE COUNTY OF LOS ANGELES
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NOTICE OF CONTINUANCE OF HEARINGS**

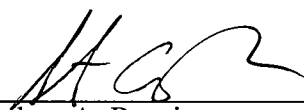
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3. Post-Mediation Status Conference, previously scheduled for February 27, 2018, is continued to **March 8, 2019**, at 8:30 a.m., in Dept. 71.

DATED: October 9, 2018

Respectfully submitted,
MITCHELL SILBERBERG & KNUPP LLP
ANTHONY J. AMENDOLA
STEPHEN A. ROSSI

By: 

Stephen A. Rossi
Attorneys for Defendants
Move, Inc. and Leo Jay

01/31/19



10/18/18

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DEPARTMENT 71

TENTATIVE RULING

FILED
Superior Court of California
County of Los Angeles
OCT -1 2018 TF
Sherri R. Carter, Executive Officer/Clerk
By: T Freeman Deputy
Twyla Freeman

BRIAN BOBIK, an individual,

Case No.: BC678768

vs.

MOVE, INC., et al..

Hearing Date: October 1, 2018

Defendants Move, Inc. and Leo Jay's demurrer to the 5th (harassment in violation of the FEHA) cause of action in the second amended complaint is sustained *in that leave to amend.*

Defendants Move, Inc. and Leo Jay (collectively "Defendants") demur to the 5th (harassment in violation of the FEHA) cause of action in the second amended complaint of Plaintiff Brian Bobik ("Plaintiff"). Defendants argue Plaintiff failed to allege sufficient facts to constitute a cause of action and/or the cause of action is time-barred.

Defendants' request for judicial notice is granted. However, the Court will not take judicial notice of the truth of the matters asserted within the Right to Sue Notice and DFEH Complaint. (RJN, Exhibit A.)

A prima facie case for harassment requires the following elements: (1) plaintiff belongs to a protected group; (2) plaintiff was subjected to unwelcome harassment; (3) the harassment complained of was based on protected status; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.)¹

¹ "Under FEHA, an employer is 'strictly liable for the harassing conduct of its agents and supervisors.' [Citation.] The standard for coworker liability is that an employer is liable where it, its agents or supervisors 'knows or should have known of this conduct and fails to take immediate and appropriate corrective action.' [Citation.]" (*Id.* at 608, fn. 6.)

Plaintiff's harassment in violation of the FEHA cause of action is time-barred on the face of the second amended complaint and judicially noticed documents. Government Code §12960(d) provides, in pertinent part, as follows: "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred..." Plaintiff filed a DFEH Complaint on March 28, 2017. (RJN, Exhibit A.) The allegations in Plaintiff's second amended complaint suggest the harassing conduct occurred more than a year *before* Plaintiff filed the DFEH complaint. (SAC ¶¶7-24.) Plaintiff alleged Jay knew he suffered from ADD because he previously informed Jay (his Manager) of his condition and requested accommodations, including that Plaintiff be allowed to sit on an exercise ball (instead of a chair) at his desk, to use an earpiece, and to sit in the back of the office. (SAC ¶14.) Plaintiff alleged Jay, in or about 2015, started a campaign of harassment, discrimination, and retaliation toward Plaintiff based on his disability. (SAC ¶13.) Plaintiff alleged that sometime in 2015, Jay violently yelled at Plaintiff (for speaking to a complaining and frustrated client and expressing his understanding of the client's frustrations), reprimanded Plaintiff for having an earpiece in his ear, ordered Plaintiff to get rid of the exercise ball, and did not allow Plaintiff to sit in the back of the office. (SAC ¶¶15-16.) Plaintiff alleged he explained to Jay again that he was suffering from ADD and required the earpiece, exercise ball, and sitting in back of the office as accommodations so he could focus at work by drowning out noise and distractions, but Jay did not care and refused to accommodate Plaintiff's disability and barred Plaintiff from using his exercise ball or earpiece at work. (SAC ¶¶17-18.) Plaintiff alleged he, thereafter, on multiple occasions, asked if he could change the location of where he was sitting so as to minimize the amount of noise caused from people walking by to accommodate his ADD and Jay denied this accommodation. (SAC ¶19.) Plaintiff alleged Jay relocated him to the front corner of the office, a location with even more foot traffic, knowing it would be more difficult for Plaintiff to work, generate sales, and make an income. (SAC ¶20.) Plaintiff alleged he complained to his supervisor, Adrian Mathew, but nothing was done. (SAC ¶21.) Plaintiff alleged Jay, to make matters worse, started to further harass Plaintiff by giving him old leads to contact, which Jay knew would result in lesser sales for Plaintiff. (SAC ¶¶22-23.) Plaintiff alleged that, as a direct result of the stress from work caused by Defendants' illegal and unethical business practices and failure to accommodate, he was diagnosed with depression and placed on temporary disability leave on March 9, 2016. (SAC ¶24.) Plaintiff was released to return to work without restrictions starting March 13, 2017, *more than a year later*. (SAC ¶26.) Plaintiff alleged Defendant Move, Inc. terminated his employment on March 15, 2017. (SAC ¶¶33-34.)

Plaintiff did not allege facts in the second amended complaint to suggest the continuing violations doctrine applies. “[A]n employer’s persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer’s unlawful actions are (1) sufficiently similar in kind--recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [Citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence.’ [Citation]” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)² Plaintiff alleged that, upon his return to the office on March 13, 2017, Jay had Plaintiff sit in a location that was closer to the front of the office, did not allow Plaintiff to use an earpiece, and did not allow Plaintiff to sit on an exercise ball, knowing it would make it more difficult for Plaintiff to work, generate sales, and make an income due to his disability. (SAC ¶¶28-31.) Plaintiff also alleged he approached Jay on March 14, 2017, to discuss the harassing acts of denial of his requests to be seated in the back, sit on an exercise ball, and use an earpiece, and Jay avoided discussing these issues with Plaintiff and walked away. (SAC ¶32.) Plaintiff’s allegations suggest the alleged harassment was sufficient in kind. However, the allegations do not establish the harassment occurred with reasonable frequency. The allegations in the second amended complaint suggest there were no harassing acts between March 9, 2016 and March 12, 2017, while Plaintiff was out on disability. Additionally, the allegations in the second amended complaint show the alleged harassing conduct – barring Plaintiff from using his exercise ball, refusing to allow Plaintiff to change the location of where he was sitting, and not allowing Plaintiff to use an earpiece – acquired a degree of permanence *before* Plaintiff was placed on disability. Plaintiff alleged Jay, prior to his medical leave, reprimanded him for having an earpiece in his ear, ordered Plaintiff to get rid of his exercise ball, and did not allow for Plaintiff to sit in the back of the office. (SAC ¶16.) Plaintiff alleged Jay “simply did not care, refused to accommodate Plaintiff’s disability, and barred Plaintiff from using his exercise ball while at work,” denied Plaintiff’s multiple requests to change location, and relocated Plaintiff to the front of the office. (SAC ¶¶18-20.) Plaintiff also alleged he complained to his supervisor, Adrian Matthew, but nothing was done. (SAC ¶21.) The allegations in the second amended complaint show Plaintiff was on notice, before his medical leave, that “further efforts to end the unlawful conduct

² “[P]ermanence’ in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.” (*Id.*)

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will be in vain.”³ Plaintiff’s denied requests for the same accommodations, after return from his medical leave, do not support application of the continuing violations doctrine. (SAC ¶¶28-32.)⁴

Plaintiff also failed to allege sufficient facts to constitute a cause of action for harassment in violation of the FEHA. Specifically, Plaintiff did not allege facts suggesting Defendants committed actionable harassment (i.e. harassment sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment). As discussed above, Plaintiff alleged facts suggesting the only unlawful acts that occurred within one year of filing his DFEH complaint are the denied requests for accommodation, which were previously denied before his medical leave, and termination of his employment, which does not constitute harassment.

Based on the foregoing, Defendants’ demurrer to the 5th COA is sustained.

Dated: October 1, 2018


Hon. Monica Bachner
Judge of the Superior Court

³ (See *Richards* at 823 (“Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end, as by the employer’s cessation of such conduct or by the employee’s resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee’s requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations.”).)

⁴ The only other alleged unlawful act to have occurred within one year of Plaintiff filing his DFEH Complaint is termination of his employment. (SAC ¶¶33-34.) However, termination of employment is a common personnel management action, which does not constitute harassment. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62-65.) (See also *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1407-1408.)

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California, I am over the age of
4 eighteen years and am not a party to this action; my business address is Mitchell Silberberg &
5 Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business
6 email address is als@msk.com.

7 On October 9, 2018, I served a copy of the foregoing document(s) described as **NOTICE
8 OF RULING ON DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT
9 AND NOTICE OF CONTINUANCE OF HEARINGS** on the interested parties in this action at
10 their last known address as set forth below by taking the action described below:

11 Jasmine A. Duel, Esq.
12 Kousha Berokim, Esq.
13 BEROKIM & DUEL, P.C.
14 270 N. Canon Drive, 3rd Floor
15 Beverly Hills, CA 90210
16 E: jasmine@berokimduel.com
17 E: berokim@berokimduel.com
18 T: (310) 846-8553
19 F: (310) 300-1233

Counsel for Plaintiff
BRIAN BOBIK

- 20 **BY OVERNIGHT DELIVERY:** I placed the above-mentioned document(s) in sealed
21 envelope(s) designated by the carrier, with delivery fees provided for, and addressed as set
22 forth above, and deposited the above-described document(s) with **FEDEX** in the ordinary
23 course of business, by depositing the document(s) in a facility regularly maintained by the
24 carrier or delivering the document(s) to an authorized driver for the carrier.
- 25 **BY PLACING FOR COLLECTION AND MAILING:** I placed the above-mentioned
26 document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s)
27 for collection and mailing following ordinary business practices. I am readily familiar
28 with the firm's practice for collection and processing of correspondence for mailing with
the United States Postal Service. Under that practice it would be deposited with the U.S.
Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic
Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.
- BY ELECTRONIC MAIL:** Upon agreement of all interested parties, I served the above-
mentioned document electronically on October 9, 2018 on the parties listed at the email
addresses above and, to the best of my knowledge, the transmission was complete and
without error in that I did not receive an electronic notification to the contrary.

29 I declare under penalty of perjury under the laws of the State of California that the above is
30 true and correct.

31 Executed on October 9, 2018, at Los Angeles, California.

32 

33 Alma L. Silva

From: Silva, Alma
To: "jasmine@berokimduel.com"; "Kousha Berokim"
Cc: Amendola, Anthony; Rossi, Stephen; Hering, Joyce; Shawver, Yvonne
Subject: Bobik v. Move, Inc., et al. - LASC Case No. BC678768 - Notice of Ruling
Date: Tuesday, October 9, 2018 11:20:53 AM
Attachments: MOVE and JAY Notice of Ruling on Demurrer to SAC (B427916).pdf

Dear Counsel:

Attached please find the Notice of Ruling on Defendants' Demurrer to Second Amended Complaint and Notice of Continuance of Hearings with regard to the above-entitled matter.

Should you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,



Alma Silva | Secretary

T: 310.312.3271 | a1s@msk.com

Mitchell Silberberg & Knupp LLP | www.msk.com

11377 W. Olympic Blvd., Los Angeles, CA 90064

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